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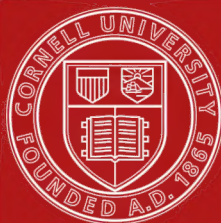
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A TREATISE
ON THE
LAW OF TORTS

BY
C. G. ADDISON
Author of "A Treatise on the Law of Contracts"

REPRINTED FROM THE LAST LONDON EDITION WITH FULL
AMERICAN NOTES

BY
H. G. WOOD
Author of "A Treatise on the Law of Nuisances"

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CONTENTS.

CHAPTER XII.

OF ASSAULT AND BATTERY, AND WRONGFUL IMPRISONMENT.

SECTION I.—*Of assault and battery, and mayhem.*

- 787. What constitutes an assault.
- 788. Assaults resulting from acts of negligence.
- 789. Assaults by constable — Hand-cuffing unconvicted prisoners.
- 790. Assault and battery.
- 791. Mayhem and wounding.
- 792. Assault and battery in self-defense.
- 793. Assault in defense of the possession of a house, or close, or of property.
- 794. Assault in resistance of a forcible entry, or to prevent a seizure of chattels.
- 795. Resistance of a forcible entry by a landlord.
- 796. Assaults in preservation of the public peace.
- 797. Battery and wounding in self-defense, or in defense of the possession of tenements or chattels.

SECTION II.—*Of false imprisonment.*

- 798. Definition of false imprisonment.
- 799. Constructive imprisonment.
- 800. Imprisonment by order of a judge or judicial officer.
- 801. Arrest in execution of warrants of justices.

802. Arrest by constables without warrant.

803. Arrest by private persons without warrant.

804. Arrest for a misdemeanor.

805. Arrest of the wrong party.

806. Arrest for malicious injuries to property.

807. Willful and malicious trespass.

808. Arrest of persons committing indictable offenses in the night.

809. Arrest for an assault and breach of the peace.

810. Arrest during the continuance of the affray.

811. What amounts to a breach of the peace.

812. Arrest of persons disturbing divine service.

813. Arrest of vagrants and persons found committing acts of public indecency.

814. Arrest under the merchant shipping act.

815. Arrest of principal by his bail.

816. Arrest for offenses committed within the limits of the metropolitan police district.

817. Arrest by servants of railway companies.

818. Detention of recruits and deserters.

819. Imprisonment of dangerous lunatics.

SECTION III.—*Of actions for an assault and battery, and for false imprisonment.*

820. Statutory protection to constables and their assistants from vexatious actions.
821. Protective clauses in favor of parties acting in the execution of acts of parliament.
822. Limitation of actions and notice of action.
823. Notice of action to persons acting in execution of the larceny act.
824. Notice of action to persons acting in execution of the metropolitan police act.
825. Persons entitled to the benefit of the protection.
826. Length of notice of action.
827. Statement of the cause of action.
828. Tender of amends.
829. Payment of money into court.
830. Parties to be made plaintiffs—Master and servant.
831. Of the parties to be made defendants.
832. Liability of a corporation to an action for an assault.
833. Subsequent ratification of wrongful imprisonment rendering the ratifying party responsible for the wrong.
834. Declarations for an assault and false imprisonment.
835. What may be given in evidence under the plea of not guilty.
836. Not guilty by statute.
837. Pleas setting forth a previous hearing and dismissal by magistrates.
838. Pleas of justification.
839. Defense of neighbors and friends.
840. Moderate correction by parents, schoolmasters, masters of ships, &c.
841. Pleas of justification of imprisonment.
842. Evidence at the trial. Proof of an assault.
843. Proof of an arrest and imprisonment.
844. Evidence for the defense.
845. Damages recoverable.
846. Damages where there are several co-trespassers.
847. Prospective damages.
848. Special damages in actions for false imprisonment.
849. Evidence in mitigation of damages.

CHAPTER XIII.

OF MALICIOUS CONSPIRACY, MALICIOUS PROSECUTION, AND ARREST—MALICIOUS ABUSE OF LEGAL PROCESS.

SECTION I.—*Of malicious conspiracy, malicious prosecution and arrest—Malicious abuse of legal process.*

850. Malicious conspiracy.
851. Malicious exhibition of articles of the peace against another.
852. Malicious prosecution.
853. What is evidence of a want of reasonable and of probable cause, and of malice.
854. Prosecution by persons who manifest a consciousness of the innocence of the accused.
855. Prosecutions under the advice of counsel.
856. Malicious complaints before magistrates—Maliciously causing a justice's warrant to be issued against the plaintiff.
857. Continuance by defendant of proceedings commenced without his knowledge.
858. Effect of the complaint or information before the magistrate being followed up by a conviction of the plaintiff.
859. Maliciously causing a search warrant to issue.
860. Malicious indictment.
861. Malicious prosecution by court martial.

862. Malicious assertion of a legal right.

863. Malicious and unfounded actions.

864. Maliciously putting the process of the law in motion in the name of a pauper or insolvent.

865. Maliciously issuing execution for a larger sum than is due upon judgment.

866. Maliciously causing an extent to issue.

867. Malicious proceedings in bankruptcy.

868. Malicious abuse of legal process.

869. Malicious detention of judgment debtors after tender of the debt and costs.

870. Malicious arrest.

871. What amounts to a malicious arrest—Proof of actual custody.

SECTION II.—*Of actions for malicious arrest and malicious prosecution.*

872. Parties to be made defendants.

873. Pendency of a rule for a criminal information against the defendant.

874. Declarations for a malicious prosecution.

875. Of the plea of not guilty in actions for a malicious arrest and malicious prosecution.

876. Pleas of justification.

877. Evidence at the trial—Proof on the part of the plaintiff—Malicious arrest or prosecution.

878. Proof of malicious informations and complaints before magistrates.

879. Proof of certified copy of the record of the prosecution and acquittal.

880. Proof of malice and of want of reasonable and probable cause.

881. Proof on the part of the defendant.

882. Of the damages recoverable in actions for a malicious prosecution.

CHAPTER XIV.

OF TRESPASS IN EXECUTION OF VOID OR IRREGULAR PROCESS—RESPONSIBILITY OF JUDGES AND MINISTERIAL OFFICERS OF JUSTICE, AND PERSONS SETTING THEM IN MOTION.

SECTION I.—*Of trespass in execution of void or irregular process—Responsibility of judges and ministerial officers of courts of justice, and persons setting them in motion.*

883. Exemption of judges from actions in respect of things done in the exercise of their judicial functions.

884. Conditions precedent to the existence of jurisdiction on the part of a judge.

885. Disqualification of judges on account of interest.

886. Exemption of judges from actions where they have a *prima facie* jurisdiction, and no objection is taken to their jurisdiction.

887. Orders of commitment by county court judges.

888. Commitments for contempt.

889. Statutory forms of commitment by county court judges.

890. Who are judges and judicial officers.

891. Delegation of judicial functions.

892. Removal of the proceedings of inferior courts for revision by a superior tribunal.

893. Proceedings against county court judges to compel them to act in particular cases.

894. Proceedings of courts-martial.

SECTION II.—*Of the duties and responsibilities of ministerial officers of courts of justice.*

895. Illegal assumption of the jud'

CONTENTS.

- cial office by ministerial officers.
896. Neglect of duty by ministerial officers of courts of justice.
897. Duties and responsibilities of the sheriff and his officers—Execution of writs.
898. Priority of writs of execution.
899. Trespasses by the sheriff and his officers.
900. Execution of writs by special bailiffs.
901. Trespasses in dwelling-houses by sheriffs and their officers under color of the execution of legal process.
902. Of the breaking open the outer door of a dwelling-house in the execution of legal process.
903. What amounts to a breaking of the outer door.
904. Of the breaking open of inner doors in the execution of a writ.
905. Illegality of an arrest or seizure of goods effected through the medium of an act of trespass.
906. When the sheriff becomes a trespasser by remaining on premises an unreasonable time.
907. Seizure of the goods of the wrong person.
908. Seizure by sheriffs and their officers of privileged or protected goods.
909. Power of the sheriff to compel rival claimants to interplead and establish their title.
910. Claims of landlords on sheriffs for rent in arrear.
911. Sale by sheriffs of goods taken in execution.
912. Capture of the wrong person.
913. Arrest of the right person under a wrong name.
914. Illegal arrest on Sundays.
915. Incurability of a wrongful imprisonment—Arrest under one of several writs.
916. Arrest of privileged persons.
917. Countermand of writs and warrants.
918. Liability of the sheriff for an escape.
919. Recapture upon fresh pursuit.
920. Discharge of debtors taken in execution.
921. Arrest of the person and seizure of goods under void or irregular process.
922. Exemption of sheriffs and others from responsibility when the injury has been brought about by the misrepresentation of the plaintiff.
923. False returns to writs of execution.
924. Extortion by sheriffs and their officers.
925. Duties and responsibilities of the high bailiff, bailiffs, and registrars, of the county court.
926. Liability of ministerial officers where the court has no jurisdiction and no authority to issue process.
927. Duty of bailiffs of the county court to satisfy the landlord's claim for rent.
928. Liabilities of jailers.
929. Liability of the messenger of the Court of Bankruptcy.
- SECTION III.—*Of actions against judges, sheriffs, and ministerial officers, and their assistants, and parties setting them in motion.*
930. Actions against county court judges—Notice of action.
931. Remedies against sheriffs and officers for an escape.
932. Actions to recover money in the hands of the sheriff.
933. Actions against high bailiffs of county courts and their assistants.
934. Statutory protection to high bailiffs, and persons acting by their order, or in their aid, in the execution of county court warrants.

- 935. Of the staying of proceedings in actions against high bailiffs and officers of the county court.
- 936. Plaintiffs in actions against sheriffs.
- 937. Of the defendants in actions for wrongs done under color of legal process.
- 938. Declaration against a sheriff for not executing the Queen's writ, or for an escape.
- 939. Declarations against sheriffs for removing goods taken in execution without paying rent due to the landlord.
- 940. Declarations against sheriffs for treble damages for extortion.
- 941. The plea of not guilty.
- 942. Pleas of justification.
- 943. Justification in the execution of legal process.
- 944. Replications.
- 945. Evidence at the trial—Proof on the part of the plaintiff.
- 946. Proof of judgments, writs, and process from the superior courts.
- 947. Delivery of the writ to the sheriff, to be executed.
- 948. Proof of the sheriff's having directed or authorized the commission of the wrongful act.
- 949. Proof of false return to a writ.
- 950. When admissions by an under-sheriff and bailiffs are evidence against the sheriff.
- 951. Proof of the removal of goods taken in execution without paying the landlord's rent.
- 952. Evidence of the process under which the sheriff acted.
- 953. Evidence for the defense—Proof of rent being in arrear at the time of the levy.
- 954. Proof of proceedings in the county court.
- 955. Damages recoverable in actions against sheriffs and officers—Negligence and breach of duty.
- 956. Assessment of damages in actions for an escape.

- 957. Special damages.
- 958. Exemplary damages.
- 959. Recovery of treble damages for extortion.

CHAPTER XV.

OF TRESPASSES AND INJURIES COMMITTED IN EXECUTION OF WARRANTS AND ORDERS OF JUSTICES—RESPONSIBILITY OF MAGISTRATES, CONSTABLES, THEIR ASSISTANTS, AND PERSONS SETTING THEM IN MOTION—REMEDIES FOR WRONGS DONE UNDER COLOR OF CONVICTIONS AND WARRANTS OF JUSTICES.

SECTION I.—*Of trespasses and injuries committed in the execution of warrants and orders of justices.*

- 960. Of the jurisdiction of justices of the peace.
- 961. Jurisdiction of justices residing or being out of the county of which they are justices.
- 962. Jurisdiction of borough justices under the municipal corporation act.
- 963. The power of summary conviction of offenders by justices without the intervention of a jury.
- 964. Liability of justices for misconduct in the exercise of their judicial functions.
- 965. Of the granting of search-warrants by magistrates.
- 966. Liability of justices for acts done by them without jurisdiction or in excess of their jurisdiction.
- 967. Exemption of justices from actions in cases where they had a *prima facie* jurisdiction, and no objection was taken to their jurisdiction until after they had adjudicated.
- 968. Wrongful proceedings by justices

- interested in the matter before them.
969. Wrongful commitment and imprisonment by justices.
970. Acts of a justice of the peace who has not duly qualified.
971. Of the form of commitment.
972. Commitment by justices of accused persons for trial—Examination of the witnesses.
973. Effect of the depositions being taken in the absence of the magistrate who acts upon them.
974. Convictions by magistrates on their own view.
975. Summary convictions founded upon informations.
976. Statutory provisions respecting summary convictions and orders of justices.
977. Requisites of the information or complaint.
978. Of the time within which the information or complaint must be laid.
979. Proceedings upon information or complaint.
980. Unlawful proceedings of justices when there is no information or complaint before them.
981. When a complaint once made can not be settled and withdrawn.
982. Convictions by justices in excess of their jurisdiction.
983. Ouster of the jurisdiction of justices by setting up a claim of title.
984. To what extent a justice of the peace is protected in the exercise of a discretionary power.
985. Wrongful ministerial acts by magistrates.
986. Convictions upon by-laws.
987. Of the drawing-up of convictions and orders.
988. Disclosure of the authority and jurisdiction of justices on the face of their proceedings.
989. Description of the offense or subject-matter of complaint.
990. Of singling out the offender.
991. Description of the locality of the offense.
992. Orders and adjudications by justices.
993. Statutory forms of convictions and orders.
994. Immateriality of mere surplusage.
995. Effect of the conviction.
996. Warrants of distress and commitment.
997. Exemption of justices from actions in respect of warrants of distress for poor-rate.
998. Warrants of distress and commitment in case of non-payment of costs by an informer or complainant.
999. Service of a copy of the minute of the order before the issue of a warrant of commitment or distress.
1000. The power of appeal to the court of quarter sessions against summary convictions and orders of justices.
1001. Excess of jurisdiction may be made a ground of appeal.
1002. Of the execution of convictions and orders after notice of appeal.
1003. Exemption of justices from liability where a defective conviction or order has been confirmed upon appeal.
1004. Statement of a case to the superior courts by way of appeal from decisions of justices.
1005. Of the quashing of convictions and orders — Removal of orders and convictions by certiorari.
1006. Decisions which are final, and can not be reviewed by certiorari or mandamus.
1007. Commitment for contempt.
1008. When the writ of certiorari is not taken away by express statutory prohibition.

- 1009. Proof by affidavit of the facts and circumstances calling for the interference of the superior court.
- 1010. Amendment of orders or judgments of justices on return to a certiorari.
- 1011. Of testing the legality of a commitment by writ of habeas corpus.
- 1012. Proceedings against justices to compel them to act in particular cases.
- 1013. Right of county justices to order the expense of county litigation to be defrayed out of the county funds.
- 1014. Of the power of justices to give costs.
- SECTION II.—*Exemption of constables and their assistants from liability when acting in the execution of warrants and orders of magistrates.*
- 1015. Exemption of constables, officers, and their assistants from liability for acts done by them in obedience to warrants of justices.
- 1016. Excess of authority on the part of constables and officers—Handcuffing unconvicted prisoners.
- 1017. Abuse of a search-warrant.
- SECTION III.—*Remedies for wrongs done under color of convictions and warrants of justices.*
- 1018. Replevin of chattels distrained under warrant of justices.
- 1019. Of actions against justices.
- 1020. When the action is brought in respect of things done without jurisdiction, or in excess of jurisdiction.
- 1021. When the action is brought for a malicious conviction, commitment or distress, or a malicious abuse by a magistrate of the functions of his office.
- 1022. Effect of the existence of a power of appeal on the right to bring an action.
- 1023. Objections by justices to actions against them in the county court.
- 1024. Of setting aside certain actions brought against justices of the peace.
- 1025. Limitation of actions against justices of the peace.
- 1026. Of notice of action against justices.
- 1027. Statement of the cause of action on the face of the notice.
- 1028. Tender of amends before action.
- 1029. Of the computation of the month's notice, and of the time for tendering amends.
- 1030. Of the statutory protection to constables, officers, and their assistants from vexatious actions.
- 1031. Parties to be made defendants—Wrongful convictions and orders by one justice acted upon by another justice.
- 1032. Liability of persons who set justices and constables in motion.
- 1033. Evidence at the trial of actions against justices.
- 1034. Proof of malice and of the want of reasonable and probable cause.
- 1035. Evidence at the trial of actions against constables and officers—Proof of the injury having been done in execution of a warrant of justices.
- 1036. Proof of warrant of justices—Secondary evidence of the contents of a warrant.
- 1037. Proof by the plaintiff of his demand of the perusal and copy of the warrant.
- 1038. Proof by the defendant of the production of the warrant—Production and perusal of a copy of the warrant.
- 1039. Damages recoverable in ac-

tions against justices of the peace.

CHAPTER XVI.

OF INJURIES FROM THE EXERCISE OF STATUTORY POWERS — STATUTORY COMPENSATIONS FOR INJURIES AUTHORIZED BY STATUTE.

SECTION I. *Of injuries from the exercise of statutory powers.*

- 1040. Exemption of persons from personal liability in respect of things done under statutory authority.
- 1041. Injuries from the negligent execution of statutory powers.
- 1042. Nuisances from the negligent working of railways.
- 1043. Duties and responsibilities of boards of public works, trustees and commissioners—Contractors and workmen acting in the exercise of statutory powers.
- 1044. Surveyors of highways and county bridges.
- 1045. Effect of clauses in particular statutes exonerating persons from all personal liability in respect of things done in the bona fide execution of the statute.
- 1046. Right of commissioners, trustees and public officers to indemnify themselves in respect to the costs and expenses they incur out of the public funds they are authorized to administer.
- 1047. When expenses incurred through blunders or negligence may be charged upon a public or trust fund.
- 1048. Creation of nuisances in the bona fide exercise of statutory powers.
- 1049. Pollution of streams and inju-

ries to docks, wharfs, towing-paths, &c., in the exercise of statutory powers.

- 1050. Creation of nuisances in the exercise of the statutory powers contained in the Towns Improvement Clauses Act.
- 1051. The Metropolis Local Management Act.
- 1052. Of the power to take lands and streams for public purposes.
- 1053. Licenses to enter upon land authorized to be taken for public works.
- 1054. Seizure and detention of goods by custom-house officers acting in the execution of statutory powers.

SECTION II.—*Of statutory remedies for the recovery of compensation for injuries authorized by statute.*

- 1055. Injuries establishing a right to statutory compensation.
- 1056. Of ascertaining the amount of statutory damage by arbitration.
- 1057. Jurisdiction of the arbitrator.
- 1058. Damages recoverable before justices of the peace and not by action.
- 1059. Of the statutory remedy for the recovery of compensation under the provisions of the Lands Clauses and Railway Clauses Consolidation Acts.
- 1060. Of statutory compensation to tenants and occupiers of lands taken for public works.
- 1061. Notices by claimants of the nature and extent of the injury sustained, and of the amount of compensation required.
- 1062. Assessment of damages.
- 1063. Future damages.
- 1064. Assessment of damages to which the claimant is not legally entitled—Removal of the inquisition by certiorari.
- 1065. Recovery of the amount of

- compensation assessed by a jury.
1066. Declaration in actions for railway compensations.
1067. Pleadings—Defenses—Traverse of the injury to the land.
1068. Remedy for subsequent unforeseen damages.
1069. Remedy in cases of severance.
1070. Compulsory purchase of house by railway company.
- SECTION III.—*Remedies by action and by injunction in respect of injuries from the negligent doing of things authorized to be done by statute.*
1071. Limitation of actions in respect of things done under local and personal statutes.
1072. Accrual of the cause of action and commencement of the period of litigation.
1073. Of notice of action.
1074. Notice of action to gas companies and trading corporations and their officers.
1075. Notice of action to toll and tax collectors and revenue officers.
1076. Notice of action against contractors, &c., under local boards of health.
1077. Notice of action against surveyors and persons acting in execution of the highway acts.
1078. Tender of amends before action.
1079. Parties to be made defendants.
1080. Pleadings—Plea of not guilty.
1081. Plea of tender of amends before action.
1082. Pleas of justification under the authority of an act of parliament.
1083. Evidence at the trial—Proof of notice of action.
1084. Power of the court of chancery to grant an injunction to prevent unnecessary injury from the execution of statutory powers.

1085. Injunction to restrain nuisances created by public bodies acting in the exercise of statutory powers.
1086. Injunction to prevent misuse by companies and public bodies of land acquired by them under statutory authority.

CHAPTER XVII.

OF LIBEL AND SLANDER.

- SECTION I.—*Of libel and written slander.*
1087. Of the distinction between slander by word of mouth and slander in a published writing.
1088. Oral slander rendered actionable by being printed and published—Exemption of the author, and liability of the publisher.
1089. What writings are libellous and actionable.
1090. Of malice.
1091. Privileged writings and communications.
1092. Defamatory writings in courts of justice.
1093. Defamatory petitions to the Queen, to Parliament, or to ministers or officers of state respecting the conduct of magistrates and officers.
1094. Criminatory communications by public officers acting in discharge of a public duty.
1095. Criminatory pastoral letters, and printed communications from clergymen to their parishioners.
1096. Defamatory letters respecting clergymen.
1097. Privileged confidential communications between relations respecting the character of a person proposing marriage.

1098. Privileged confidential communications between friends to prevent an injury.
1099. Privileged communications by persons having a pecuniary interest involved in the matter of the communication.
1100. Reckless and inconsiderate communications.
1101. Disclosures made *bonâ fide* in the course of an investigation set on foot by the plaintiff himself.
1102. Communications between subscribers to charities.
1103. Privileged communications respecting the character of servants.
1104. Comments in excess of the privilege.
1105. Of the effect of addressing privileged communications to a wrong party by mistake.
1106. Reports of trials containing defamatory matter.
1107. Publications of *ex parte* statements and of proceedings preliminary to a trial.
1108. Publication of speeches and proceedings in Parliament.
1109. Defamatory reports of proceedings at public meetings, vestry meetings, &c.
1110. Reviews and criticisms in public papers.
1111. Criticisms by one public journalist upon another.
1112. Criticisms upon handbills and advertisements.
1113. Criticisms upon sermons and clergymen.
1114. Comments upon the public character of public men.
1115. Disparaging criticism by one tradesman upon the goods of a rival tradesman.
- SECTION II.—Of verbal slander.**
1116. When defamatory words are actionable.
1117. Defamatory words not actionable without special damage.
1118. Defamatory words actionable *per se* without proof of any special damage.
1119. In what cases actionable words are rendered not actionable by precedent or subsequent words.
1120. Defamatory words imputing to the plaintiff that he is afflicted with a contagious disorder.
1121. Defamatory words concerning tradesmen and professional men.
1122. Words imputing misconduct, or gross ignorance or incapacity, to professional men.
1123. Words imputing official misconduct to a person in an office of profit or trust.
1124. Words rendered actionable by reason of special damage.
1125. Slandorous denunciations from the pulpit causing loss of custom, situation, or employment.
1126. Effect of a dismissal of a slandered servant, being a wrongful dismissal on the part of the master.
1127. Effect of the slander being disbelieved by the master.
1128. Special damage not being the immediate and natural consequence of the words spoken—Unauthorized repetition of verbal slander.
1129. Special damage directly resulting from the repetition of oral slander.
1130. Circumstances rebutting the presumption of malice.
1131. Privileged communications—Proof of malice.
1132. Privileged charges of felony made *bona fide*, with reasonable grounds for suspicion.
1133. Privileged statements and com-

- ments by advocates in the course of judicial proceedings, or in the conduct of a cause.
1134. Defamatory statements by a party in open court conducting his own cause.
1135. Privileged comments and charges by judges and magistrates in the exercise of the duties of their office.
1136. Of the interpretation and application of the words used.
1137. Slander of title.
- SECTION III.—*Of actions for libel and slander.*
1138. Consolidation of actions for the same slander.
1139. Parties to be made plaintiffs.
1140. Parties to be made defendants.
1141. Declarations for libel and slander.
1142. Of the innuendo or defamatory sense attributed to the writing or words on the face of the declaration.
1143. Statement of special damage in actions for verbal slander.
1144. What may be given in evidence under the plea of not guilty.
1145. Plea that the libel was inserted without malice or gross negligence, and that an apology was published—Payment of money into court.
1146. Pleas of justification.
1147. Evidence for the plaintiff—
—Printed placards—Proof of publication.
1148. Publication in newspapers.
1149. Proprietorship of newspapers containing libels.
1150. Proof of the utterance of the words charged in actions for verbal slander.
1151. Proof of the singing of libellous songs.
1152. Application of the libel to the plaintiff.
1153. Proof of the defamatory sense of the words used.
1154. Admissibility of evidence of surrounding circumstances to explain and point the libel—
Interpretation of the words used.
1155. Proof of subsequent libels to explain and point the libel charged in the declaration.
1156. Proof of successive libels to show malice.
1157. Evidence of malice.
1158. Proof of injury to the plaintiff.
1159. Evidence of special damage.
1160. Proof of the trade, or profession, or official character of the plaintiff.
1161. Proof that the words were spoken concerning a tradesman or professional man in the way of his trade or profession.
1162. Evidence on the part of the defendant—
Traverse of material allegations.
1163. Proof of the truth of the charge or accusation.
1164. The damages recoverable in actions for defamation.
1165. Evidence in aggravation of damages.
1166. Mitigation of damages.
1167. Proof of libels by the plaintiff on the defendant.
1168. Evidence of offers of apology in mitigation of damages.
1169. Of the judge's direction to the jury.
1170. Setting aside verdict—
Arrest of judgment.
1171. Indictments for libel and slander.
1172. When the truth of the matter may be given in evidence.
1173. Evidence for the defense.
-

CHAPTER XVIII.

OF FRAUDULENT MISREPRESENTATION,
AND DECEIT, FRAUDULENT CON-
CEALMENT, BREACH OF WAR-
RANTY, AND FALSE PRE-
TENSES.SECTION I.—*Of fraudulent misrepresenta-
tion and deceit ; fraud-
ulent concealment and
breach of warranty.*

- 1174. Of willful deceit.
- 1175. Unintentional deception.
- 1176. False representations under
pretense of a claim of right
—False claim of lien.
- 1177.—Representations by a person of
his knowledge of a particular
fact, when he knows that he
has no knowledge at all about
it.
- 1178. Statements and representations
which must be authenticated
by a signed writing—False re-
presentations concerning the
conduct, credit, ability, trade,
or dealings of third persons.
- 1179. Representations concerning the
character, credit, trade, or
dealings of co-partnerships
and joint-stock companies—
Authentication thereof by a
signed writing.
- 1180. Misrepresentation by directors
and officers of public com-
panies — Publication of de-
ceitful prospectuses and re-
ports.
- 1181. Fraudulent breach of war-
ranty.
- 1182. Warranties made pending a ne-
gotiation for the sale of prop-
erty.
- 1183. Private representations made
prior to a sale by auction
forming no part of the pub-
lic contract of sale.
- 1184. False representations amounting
to a warranty by a person of
his knowledge of a particular
fact, where the means of
knowledge lie peculiarly
or exclusively within his
reach.
- 1185. Representations concerning mat-
ters which are obvious to
ordinary intelligence, and
which lie as much within the
knowledge of one party as
the other.
- 1186. Representations amounting
merely to expressions of
opinion and belief.
- 1187. Statements in answer to in-
quiries—Information to sher-
iffs and public officers.
- 1188. Warranties by vendors on sales
of real property.
- 1189. False representations of title by
vendors of corporeal and in-
corporeal hereditaments—
Representations not amount-
ing to a warranty.
- 1190. Representation of title on sales
of chattels amounting to a
warranty.
- 1191. False representations by manu-
facturers of the character and
quality of the articles they
manufacture and sell.
- 1192. Representations by a vendor
who is told that the purchaser
wants the article he proposes
to buy for a particular
purpose.
- 1193. False representations by vendors
made to absent purchasers
amounting to a warranty.
- 1194. False representations by vendors
where the purchaser has
means of examination and
judgment—Sale of goods by
sample.
- 1195. False representations by rail-
way companies amounting to
a warranty.
- 1196. False representation of authority
— Pretended agency — De-
ceit by agents.
- 1197. When a principal is responsible
for the fraud of his agent.

- 1198. False assumption of authority, as between master and servant, employer and employed.
 - 1199. Counterfeiting trade-marks—Fraudulent use by one person of the trade-mark of another with intent to deceive.
 - 1200. Warranty of the genuineness of articles with trade-marks.
 - 1201. Warranty of description as to quantity or country.
 - 1202. Fraudulent assumption of the name of a bank.
 - 1203. Deceit by provision-dealers in selling unwholesome food.
 - 1204. False and fraudulent representations by married women and infants.
 - 1205. Fraudulent concealment.
 - 1206. Fraudulent concealment of the dangerous nature of articles delivered to a bailee to be warehoused or carried.
 - 1207. Fraudulent sales with all faults.
 - SECTION II.—*Of actions for fraud and deceit, and the remedy by injunction.*
 - 1208. Actions for deceit—Parties to be made plaintiffs.
 - 1209. Parties to be made defendants—Principal and agent.
 - 1210. Joint-stock companies.
 - 1211. Of declarations for deceit.
 - 1212. Declarations for a breach of warranty on the sale of a horse.
 - 1213. Declaration by an agent against a principal for a false representation.
 - 1214. Declarations for fraudulently inducing an architect.
 - 1215. Of the plea of not guilty.
 - 1216. Proof of fraudulent misrepresentation and deceit.
 - 1217. Proof of the representation having been made to the plaintiff.
 - 1218. Proof that the plaintiff relied upon the representation, and not upon his own examination and judgment.
 - 1219. Proof of warranties.
 - 1220. Proof of the terms and conditions of warranty by proof of public notices stuck up in an auction-room or repository where the thing warranted was sold.
 - 1221. Evidence of the breach of warranty of a horse—What constitutes unsoundness.
 - 1222. Proof of manifest defects not covered by the warranty.
 - 1223. Proof of vice.
 - 1224. Proof of the use of counterfeit trade-marks.
 - 1225. Remedies in equity for a false representation.
 - 1226. Of the damages recoverable in actions for fraudulent misrepresentation and deceit.
 - 1227. Special damages—Breach of warranty.
 - 1228. Special damages—False assumption of agency.
 - 1229. Prevention of fraud by indictment.
 - 1230. Indictments for obtaining, or endeavoring to obtain, money or goods by false pretenses.
 - 1231. Injunction to prevent fraud.
 - 1232. Injunction to prevent the fraudulent use of trade-marks, names, &c.
-
- CHAPTER XIX.
- OF MATRIMONIAL AND PARENTAL INJURIES, ADULTERY, AND SEDUCTION.
- SECTION I.—*Of the infringement of matrimonial and parental rights.*
- 1233. Rights of wives deserted by their husbands.
 - 1234. Right of action of married women after they have obtained an order for protection.
 - 1235. What amounts to desertion.

1236. Of the restitution of conjugal rights.
1237. Of judicial separation on the ground of adultery, cruelty, or desertion.
1238. What amounts to cruelty.
1239. Revival of condoned cruelty.
1240. What amounts to desertion without cause.
1241. Rights of married women after a decree for a judicial separation.
1242. Alimony in cases of judicial separation.
1243. Of adultery and the dissolution of the marriage contract.
1244. Adultery and desertion on the part of the husband.
1245. Willful neglect or misconduct on the part of the husband conducing to adultery on the part of the wife.
1246. Connivance or toleration of adultery.
1247. Connivance on the part of the wife.
1248. Condonation of adultery.
1249. Alimony in cases of dissolution of marriage.
1250. Orders for the settlement of property for the benefit of the innocent party and children.
1251. Power of the divorce court over marriage-settlements.
1252. Orders respecting the custody of children.
1253. Of the common law right of fathers to the custody of their infant children.
1254. Right of guardians for nurture to the custody of infant children.
1255. Inability of courts of common law to interfere with the right of the father to the custody of his children.
1256. Of the controlling power of the court of chancery over the father's right to the custody of his infant children.
1257. Jurisdiction of the court of chancery over the custody of the children of British subjects born abroad.
1258. Jurisdiction of the court of chancery over the children of foreigners in this country.
1259. Right of access of mothers to their infant children and to the custody of children under seven years of age.
1260. Of the right of the mother to the custody of her children on the death or transportation of the father.
1261. Of the obligation of parents to provide for their children.
1262. Evidence on the hearing of petitions—Competency of the husband and wife to give evidence.
1263. Trial of questions of fact before a jury.
1264. Petitions for damages from adulterers.
1265. Evidence at the trial of a claim for damages for adultery—Proof of the marriage.
1266. Proof of marriage by certified extracts from parochial registers of marriages.
1267. Proof of marriage through the medium of examined copies and certified extracts from non-parochial registers.
1268. Of the damages recoverable in cases of adultery.
1269. Evidence of the defendant's circumstances or property.
1270. Application of the damages recovered—Payment of costs.
- SECTION II.—*Of seduction.*
- 1271.—Of the harboring of married women and inducing them to live apart from their husbands.
1272. Of the seduction and loss of service of servants.
1273. Of injuries to parents in being deprived of the services of their children through the tortious act of another.

1274. Of injuries to parents from the seduction of their daughters.
1275. Effect of the absence of the daughter from the parent's roof at the time of the seduction.
1276. Pretended hiring of girls for purposes of seduction.
1277. Seduction of married daughters.
1278. Effect of proof that the defendant, though he seduced the girl, was not the father of the child of which she was delivered.
1279. Effect of the seduction and loss of service having been occasioned by the plaintiff's own misconduct and neglect of his parental duties.
1280. Of the parties entitled to maintain an action for seduction.
1281. Of the pleadings in actions for seduction.
1282. Evidence at the trial in actions for seduction—Proof of the relationship of master and servant.
1283. Of the damages recoverable in actions for seduction.
1284. Evidence in aggravation of damages—Proof that the defendant made his advances to the daughter under the guise of matrimony.
1285. Evidence in mitigation of damages.
1286. Damages recoverable in actions for inducing or persuading wives, servants, or workmen, to abandon their duties or neglect the fulfillment of a contract.
1287. Indictment for the abduction of unmarried girls.

CHAPTER XX.

OF ACTIONS EX DELICTO—PARTIE
THERETO—NON-JOINDER AND MIS-
JOINDER OF PARTIES.

SECTION I.—*Of actions ex delicto and the parties to be made plaintiffs in such action.*

1288. Parties to be made plaintiffs in actions of tort founded on contract.
1289. Of the remedies which tenants in common and joint tenants have against each other.
1290. Rights of the survivor of two joint tenants or tenants in common.
1291. Trustee and cestui que trust.
1292. Bailees of goods.
1293. Master and servant
1294. Husband and wife.
1295. Actions by married women after a judicial separation, or an order for protection.
1296. Infants.
1297. Heir-at-law, devisee, and personal representatives.
1298. Administrators.
1299. Trustees of bankrupts.
1300. Transfer of rights and liabilities ex delicto to trustees of bankrupts.
1301. Right of the trustees to the bankrupt's wife's choses in action.
1302. Of the number of the plaintiffs in actions ex delicto—Joint and separate rights of action.

SECTION II.—*Of actions ex delicto and the parties to be made defendants in such actions*

1303. Tenants in common.
1304. Corporations.
1305. When a joint-stock company is responsible for the tortious acts of the directors and managers.
1306. Trustees and commissioners of public works.
1307. Military and naval officers.
1308. Master and servant.
1309. Principal and agent.

1310. Subsequent ratification and adoption of a wrongful act by parties for whose use and benefit the act was done.
1311. What amounts to evidence of ratification of a wrongful act.
1312. Servants and agents.
1313. Husband and wife.
1314. Infants.
1315. Executors and administrators.
1316. Wrongs committed by a deceased person within six months before death.
1317. Actions against the executor of a prebendary, vicar, or incumbent of a benefice.
1318. Liabilities of executors and administrators for their own wrongful acts.
1319. Trustees in bankruptcy.
1320. Of the continued liability of a bankrupt to actions *ex delicto* and to arrest.
1321. Of the number of the defendants in actions *ex delicto*—Parties jointly and severally liable.
- SECTION III.—*Of non-joinder and mis-joinder of parties—Amendment before and at the trial.*
1322. Amendment of non-joinder and mis-joinder before trial.
1323. Amendment at the trial.
1324. Amendment after notice or plea in abatement of non-joinder of parties.
1325. Mis-joinder of defendants.
1326. The effect of marriage, death, and bankruptcy upon the proceedings in an action.
1327. Of actions in the county court.
1328. The general jurisdiction of the county court.
1329. Copyright of design.
1330. Friendly societies.
1331. Ouster of jurisdiction of county court in cases where the title to land, &c., is in question.
1332. Recovery of possession of small tenements in the county court.
1333. Equitable jurisdiction.
1334. Admiralty jurisdiction.
1335. Jurisdiction by consent.
1336. Waiver of objection to jurisdiction.
1337. Of actions in the superior courts—Joinder of different causes of action in the same suit.
1338. Requisites of the declaration.
1339. Statement of special damage.
1340. Several counts in declaration in respect of the same cause of action.
1341. Pleas.
1342. Pleas to the jurisdiction—Privileges of ambassadors.
1343. Plea of not guilty.
1344. Not guilty by statute.
1345. Of pleading several matters of defense.
1346. Traverses by the defendant.
1347. Traverses by the plaintiff.
1348. Requisites of special pleas.
1349. Fictitious and needless averments in pleading.
1350. Defenses arising after the commencement of the action.
1351. Payment of money into court by way of compensation or amends.
1352. Plea of judgment in actions *ex delicto*.
1353. Plea of accord and satisfaction.
1354. Plea of the pendency of another action for the same wrong.
1355. Plea of judgment recovered.
1356. Continuing injuries—Judgment recovered.
1357. Effect of the recovery of judgment in actions for the conversion of property.

CHAPTER XXI.

OF ACTIONS EX DELICTO, PLEADINGS, DEFENSES, AND EVIDENCE.

SECTION I.—*Of pleadings, defenses, and evidence in actions ex delicto.*

- 1358. Recovery of judgment in rem.
- 1359. Plea of the bankruptcy of the plaintiff.
- 1360. Pleas of the statute of limitations.
- 1361. Commencement of the period of limitation.
- 1362. Extension of the period of limitation in certain cases.
- 1363. Equitable pleas and defenses.
- 1364. Joinder of issue.
- 1365. Pleadings construed distributively
- 1366. New assignments.

SECTION II — *Proceedings and evidence at the trial.*

- 1367. Right to begin.
- 1368. Proof on the part of the plaintiff.
- 1369. Effect of payment of money into court.
- 1370. Primary and secondary evidence.
- 1371. Notice to produce a written document to let in secondary evidence of its contents.
- 1372. Proof of facts resting on hearsay and reputation.
- 1373. Entries of deceased persons against their interest.
- 1374. Entries made by deceased persons in the exercise of their duties.
- 1375. Statements and declarations accompanying an act.
- 1376. When the adverse party in a suit is estopped from giving evidence to contradict his own statements and representations to the plaintiff.
- 1377. Evidence of manorial customs.
- 1378. Evidence of title and seizin.
- 1379. Amendment of variances between the declaration of the cause of action and the proof adduced in support of it.
- 1380. Admissions of liability.
- 1381. Illness of witness.

CHAPTER XXII.

OF THE DAMAGES AND COSTS RECOVERABLE IN ACTIONS EX DELICTO.

SECTION I.—*Of damages recoverable in actions ex delicto.*

- 1382. Of the assessment of damages in actions *ex delicto*.
- 1383. Damages recoverable in particular actions.
- 1384. Special and extraordinary damages.
- 1385. Damages too remote, and not naturally resulting from the wrong done.
- 1386. Damages in actions of tort founded on contract.
- 1387. Expense of obtaining legal advice.
- 1388. Costs of previous legal proceedings.
- 1389. Recovery of damages which the plaintiff has become liable to pay through the default of the defendant.
- 1390. Medical expenses — Physician's fees.
- 1391. Prospective damages.
- 1392. Exemplary and vindictive damages.
- 1393. Evidence in mitigation of damages.
- 1394. Joint-trespasses — Recovery of damages from one of several co-trespassers.
- 1395. Damages when the plaintiff has insured against loss, or has received full indemnity under a contract of insurance.
- 1396. Double and treble damages.
- 1397. New trial on the ground of excessive and outrageous damages.
- 1398. New trial on account of the smallness of the damages.
- 1399. Arrest of judgment where the plaintiff has a verdict for greater damages than he is legally entitled to.

1400. Inquisition of damages before the sheriff.

SECTION II.—Of the recovery of costs in actions *ex delicto*.

1401. Award of costs to a successful plaintiff in the superior courts.

1402. Costs to a successful defendant.

1403. Costs on pleas setting up matters of defense which have arisen since the last pleading.

1404. Costs on a stay of proceedings.

1405. Costs on arrest of judgment, or judgment *non obstante veredicto*.

1406. Where the court has no jurisdiction it has no power to give costs.

1407. Effect on costs of withdrawing a juror.

1408. Costs in actions of slander and libel.

1409. When the certificate of a judge or presiding officer is necessary to enable the plaintiff to recover costs.

1410. Certificate that the action was brought to try a right.

1411. Within what time the certificate must be granted.

1412. County Court Acts depriving the plaintiff of costs in the superior courts.

1413. When the foundation of the action is a contract.

1414. When money has been paid into court.

1415. The certificate that it appeared to the judge that there was sufficient reason for bringing the action in the superior court.

1416. Costs on references.

1417. Costs of reference.

1418. Certificate for full costs in actions for willful and malicious grievances.

1419. Full costs in actions for willful and malicious trespass, or after notice not to trespass.

1420. Costs in the superior courts in actions against justices.

1421. In actions against constables and officers, and parties acting or intending to act in the execution of statutory powers.

1422. Certificate for costs in actions for things done in supposed pursuance of the Act for the protection of property from malicious injuries.

1423. Costs in actions against executors.

1424. Costs in actions for duties and penalties at the suit of the Crown.

1425. In actions upon judgments.

1426. Costs on new trials.

1427. In cases of appeals from the decision of a county-court judge, or judge of an inferior tribunal.

1428. In the case of an appeal from a superior court to the Court of Exchequer Chamber.

1429. Costs on removal of actions by writ of certiorari.

1430. In cases of prohibition.

1431. On indictments for libel and slander.

1432. Costs of writs of mandamus and injunction.

1433. On an application for an injunction under the Railway and Canal Traffic Act.

1434. Repeal of divers statutes enabling plaintiffs in certain actions to recover double costs.

1435. Costs in compensation cases.

1436. Taxation of costs.

1437. Costs of particular issues.

1438. Where costs are to be taxed by the court in which the action is brought.

1439. Security for costs.

1440. Award of costs in the county court.

CHAPTER XXIII.

OF DAMAGES IN CHANCERY, AND THE
REMEDY BY INJUNCTION, PROHIBITION,
AND CERTIORARI.

SECTION I.—*Of damages in chancery
and the remedy by injunction.*

- 1441. Award of damages in the court of chancery.
- 1442. The writ of injunction issuing out of chancery.
- 1443. Injunction to restrain a public company from exceeding its statutory powers.
- 1444. Injunction to restrain disturbance of grave-yards, and obstructions to rights of burial.
- 1445. Injunction to restrain the infringement of patent-rights and copyright.
- 1446. Injunction to restrain the sale or detention of chattels.
- 1447. Effect of laches and delay in applying for an injunction.
- 1448. Acquiescence precluding a plaintiff from relief.
- 1449. Of the statutory obligation upon the court of chancery to decide all questions of law and fact on the determination of which the title to relief in equity depends.
- 1450. Of the remedy by injunction at common law.
- 1451. Injunction at common law to restrain infringements of patent-right and copyright.
- 1452. Injunctions and orders to stay proceedings.

SECTION II.—*Of the remedy by prohibition for the prevention of judicial wrongs.*

- 1453. The writ of prohibition.
- 1454. Prohibition before judgment.
- 1455. Prohibition after judgment and execution.
- 1456. Prohibition where appeal lies.
- 1457. Prohibition to the ecclesiastical courts.

- 1458. Notwithstanding an appeal entered.
- 1459. The writ of prohibition to restrain a county court judge.
- 1460. Prohibition to the Lord Mayor's court.
- 1461. Proceedings in prohibition.
- 1462. The application for a prohibition.
- 1463. The rule or summons to show cause why a writ of prohibition should not issue to a county court.
- 1464. Notice of the issue of the writ.
- 1465. Refusal of writ, when final.
- 1466. Of the setting aside writs of prohibition issuing out of chancery.

SECTION III.—*Of the remedy by certiorari.*

- 1467. The writ of certiorari.
- 1468. Where the inferior court has jurisdiction.
- 1469. Where the inferior court has no jurisdiction.
- 1470. Limitation of time for issuing the writ.
- 1471. Grounds for the issue of the writ.
- 1472. Certiorari to remove causes from the county court.
- 1473. Of the concurrent remedy by appeal and by certiorari—County court appeals.
- 1474. The application for the writ.
- 1475. Affidavits, when necessary.
- 1476. Notice of the issue of the writ.
- 1477. The effect of the issue of the writ.
- 1478. The effect of the refusal of a writ of certiorari.
- 1479. Proceedings after removal.
- 1480. Quashing of the writ — *Procedendo*.

CHAPTER XXIV.

OF THE REMEDY BY MANDAMUS.

SECTION I.—*Of the remedy by mandamus for the vindication of rights, and the enforce-*

*ment of the performance
of public duties.*

- 1451.** The prerogative writ of mandamus.
- 1452.** Mandamus to enforce statutory, corporate, and public duties and obligations.
- 1483.** Mandamus to judges, magistrates, and judicial officers, commanding them to hear and adjudicate.
- 1484.** Mandamus to ministerial officers.
- 1485.** Mandamus to overseers or clergymen to bury the dead body of a pauper.
- 1486.** Of the granting of the writ where there is another remedy.
- 1487.** Mandamus to compel the surrender of public documents.
- 1488.** A mandamus to restore a public officer to a freehold office from which he has been wrongfully dismissed.
- 1489.** How a freehold office may be forfeited and vacated.
- 1490.** Offices held at will.
- 1491.** Visitatorial power excluding the proceeding by mandamus.
- 1492.** Mandamus to restore the name of a medical practitioner to the Medical Register.
- 1493.** Mandamus to test the validity of an election.
- 1494.** Mandamus to elect corporate and public officers.
- 1495.** Mandamus to enforce an appointment to a public or corporate office.
- 1496.** Mandamus to chartered companies and corporations.
- 1497.** Mandamus to make calls.
- 1498.** Mandamus to local boards, commissioners, trustees, and public officers to levy rates and satisfy and discharge a judgment-debt, or a pecuniary obligation.
- 1499.** Mandamus to railway companies, corporate bodies, and local boards to make compensation

for lands taken, or injuries inflicted upon private persons.

- 1500.** Mandamus to boards of health to make compensation.
 - 1501.** Effects of laches or delay in applying for the writ.
 - 1502.** The proceedings upon a mandamus.
 - 1503.** Proceedings by mandamus in respect of corporate offices in boroughs.
 - 1504.** Conditions precedent to the issue of the writ.
 - 1505.** Requisites of the writ.
 - 1506.** Parties to whom the writ is to be directed
 - 1507.** Service of the writ.
 - 1508.** Return to the writ.
 - 1509.** The return to a mandamus to restore a dismissed public officer to his office.
 - 1510.** Return setting up inability or impossibility of performance—Expiration of statutory power.
 - 1511.** Pleas to the return—Traverse of material allegations.
 - 1512.** Statutory protection to certain public officers.
 - 1513.** Time for taking objections to the writ.
 - 1514.** Review of proceedings in mandamus by writ of error.
 - 1515.** Damages and costs.
 - 1516.** Judgment non obstante verdicto.
 - 1517.** Action or information for a false return.
 - 1518.** Attachment for disobedience of peremptory writ of mandamus.
- SECTION II.**—*Of the claim to a writ of mandamus in an action at common law.*
- 1519.** Of the union of an action in respect of a private injury with an application for a mandamus.
 - 1520.** Actions in which a claim for a mandamus may be sustained,

CONTENTS.

xxiii

1521. Actions in which a claim for a mandamus can not be sustained.

1522. Declaration in an action for a mandamus.

1523. The pleadings in the action.

1524. Orders for the rectification of the register of ~~share~~ holders in joint-stock companies.

THE LAW OF TORTS.

CHAPTER XII.

OF ASSAULT AND BATTERY, AND WRONGFUL IMPRISONMENT.

SECTION I.—*Of assault and battery, and mayhem.*

- 787. What constitutes an assault.
- 788. Assaults resulting from acts of negligence.
- 789. Assaults by constable — Hand-cuffing unconvicted prisoners.
- 790. Assault and battery.
- 791. Mayhem and wounding.
- 792. Assault and battery in self-defense.
- 793. Assault in defense of the possession of a house, or close, or of property.
- 794. Assault in resistance of a forcible entry, or to prevent a seizure of chattels.
- 795. Resistance of a forcible entry by a landlord.
- 796. Assaults in preservation of the public peace.
- 797. Battery and wounding in self-defense, or in defense of the possession of tenements or chattels.

SECTION II.—*Of false imprisonment.*

- 798. Definition of false imprisonment.
- 799. Constructive imprisonment.
- 800. Imprisonment by order of a judge or judicial officer.
- 801. Arrest in execution of warrants of justices.

- 802. Arrest by constables without warrant.
- 803. Arrest by private persons without warrant.
- 804. Arrest for a misdemeanor.
- 805. Arrest of the wrong party.
- 806. Arrest for malicious injuries to property.
- 807. Willful and malicious trespass.
- 808. Arrest of persons committing indictable offenses in the night.
- 809. Arrest for an assault and breach of the peace.
- 810. Arrest during the continuance of the affray.
- 811. What amounts to a breach of the peace.
- 812. Arrest of persons disturbing divine service.
- 813. Arrest of vagrants and persons found committing acts of public indecency.
- 814. Arrest under the merchant shipping act.
- 815. Arrest of principal by his bail.
- 816. Arrest for offenses committed within the limits of the metropolitan police district.
- 817. Arrest by servants of railway companies.
- 818. Detention of recruits and deserters.

819. Imprisonment of dangerous lunatics.
- SECTION III.—*Of actions for an assault and battery, and for false imprisonment.*
820. Statutory protection to constables and their assistants from vexatious actions.
821. Protective clauses in favor of parties acting in the execution of acts of parliament.
822. Limitation of actions and notice of action.
823. Notice of action to persons acting in execution of the larceny act.
824. Notice of action to persons acting in execution of the metropolitan police act.
825. Persons entitled to the benefit of the protection.
826. Length of notice of action.
827. Statement of the cause of action.
828. Tender of amends.
829. Payment of money into court.
830. Parties to be made plaintiffs—Master and servant.
831. Of the parties to be made defendants.
832. Liability of a corporation to an action for an assault.
833. Subsequent ratification of wrongful imprisonment rendering the ratifying party responsible for the wrong.
834. Declarations for an assault and false imprisonment.
835. What may be given in evidence under the plea of not guilty.
836. Not guilty by statute.
837. Pleas setting forth a previous hearing and dismissal by magistrates.
838. Pleas of justification.
839. Defense of neighbors and friends.
840. Moderate correction by parents, schoolmasters, masters of ships, &c.
841. Pleas of justification of imprisonment.
842. Evidence at the trial. Proof of an assault.
843. Proof of an arrest and imprisonment.
844. Evidence for the defense.
845. Damages recoverable.
846. Damages where there are several co-trespassers.
847. Prospective damages.
848. Special damages in actions for false imprisonment.
849. Evidence in mitigation of damages.

SECTION I.

OF ASSAULT AND BATTERY, AND MAYHEM.

787. *What constitutes an assault.*—Every laying of hands on the person of another, and every blow or push, constitutes an assault and trespass, in respect of which an action for damages is maintainable, unless the act can be justified or excused on the ground that it was done in self-defense, or in defense of one's property, or in obedience to some legal warrant or authority, or was the result of inevitable accident. Every attempt, also, to offer with force and violence

to do hurt to another, constitutes an assault, such as striking at a person with or without a weapon; holding up a fist in a threatening attitude, sufficiently near to be able to strike; presenting a gun or pistol, whether loaded or unloaded, in a hostile and threatening manner, within gun-shot or pistol-shot range, and near enough to create terror and alarm; riding after a man with a whip threatening to beat him, or shaking a whip in a man's face; advancing with hand uplifted in a threatening manner with intent to strike, although the person is stopped before he gets near enough to carry the intention into effect; (*a*) hitting at one man and unintentionally striking another; (*b*) cutting off the hair of a pauper in a poor-house; (*c*) throwing water upon the person of another; (*d*) and any gesture or threat of violence exhibiting an intention to assault, with the means of carrying that threat into effect. (*e*) But, as regards threatening gestures, if the parties at the time the gestures are used are so far distant from each other that immediate contact is impossible, there is no assault. (*f*)

Words accompanying a threatening gesture may deprive that gesture of the character of an assault. Thus, where a man laid his hand on his sword in a threatening manner, but accompanied the gesture with the words, "If it were not assize-time I would not take such language from you," it was held that the words showed that the party did not then intend to use his sword, and that there was no assault. (*g*) And Lord ABINGER is reported to have held, that if a man presents an unloaded pistol at another, and at the same time says that he does not intend to shoot him, this is no assault. (*h*)

The mere touching of a person, without force or violence, for the purpose of drawing his attention to some matter or another, is not an assault, unless it is done in a hostile or insulting manner; (*i*) nor is it an assault to push gently

(*a*) Bac. Abr. ASSAULT. Martin v. Shopper, 3 C. & P. 373. Stephens v. Myers, 4 C. & P. 350. Rex v. St. George, 9 C. & P. 493.

(*b*) James v. Campbell, 5 C. & P. 372.

(*c*) Forde v. Skinner, 4 C. & P. 239.

(*d*) Pursell v. Horne, 3 N. & P. 564.

(*e*) Read v. Coker, 13 C. B. 860.

(*f*) Pollock, C. B., Cobbett v. Grey, 4 Exch. 744.

(*g*) Tuberville v. Savage, 1 Mod. 3.

(*h*) Blake v. Barnard, 9 C. & P. 628.

(*i*) Coward v. Baddeley, 4 H. & N. 481; 28 Law J., Exch. 261.

against the person of another in endeavoring to make a way through a crowd; but if it is done in a rude and violent manner, or there is any struggling or pushing calculated to do harm, there will be both an assault and a battery. (*j*)

An assault must be an act done against the will of the person assaulted, and therefore it can not be said that a person has been assaulted by his own permission. If the act is done in the course of sport between persons taking liberties with each other by mutual consent, there is no assault. (*k*)

788. *Assaults resulting from acts of negligence.*—An assault may be committed without any design or intention to commit an assault, for if the person of one man is violently struck through the carelessness and negligence of another, this is an assault, and it is no answer, as we have seen, to say that it was done unintentionally. Thus, if a man drives against and violently upsets the plaintiff in his carriage, and knocks him down, or overturns the chair in which he is seated, the person thus striking the plaintiff or knocking him down, is guilty of an assault, although he had no intention to commit an assault. (*l*)¹

(*j*) *Gole v. Turner*, 6 Mod. 149.

R. v. Johnson, 34 Law J., M. C. 192.

(*k*) *Christopherson v. Bare*, 11 Q. B.

(*l*) *Hopper v. Reeve*, 7 Taunt. 698.

477. *Reg. v. Martin*, 9 C. & P. 214.

¹ The distinction between an assault and a battery is, that the one is an offer to strike or commit violence to another against his will, while a battery is an actual violence done to the person of another without his assent; *United States v. Hand*, 2 Wash. (U. S.) 435; *Johnson v. Tompkins*, 1 Baldwin (U. S.) 571; *Smith v. State*, 12 Ohio St. 466; *Duncan v. Com.*, 6 Dana (Ky.) 295; but in all cases in order to constitute an assault there must be an *intent* to injure, and the person making it must be in a position that, if not prevented, he can carry his intent into effect; *Richels v. State*, 1 Sneed. (Tenn.) 606; *State v. Malcolm*, 8 Iowa, 413; *People v. Yslas*, 27 Cal. 630; see note, *ante*; *United States v. Orteza*, 4 Wash. (U. S.) 534. So it has been held that one may commit an assault by merely stopping a person on the street, and by threats or menaces preventing him from passing; *Johnson v. State*, 17 Tex. 515; or doubling one's fist and approaching another with a threat to strike, if certain things are done; *United States v. Myers*, 1 Cranch C. C. (U. S.) 310; *United States v. Richardson*, 5 Id. 348; or riding a horse so near another as to endanger his person and engender a fear that it is the rider's intention to ride over him; *State v. Sims*, 3 Strob. (S. C.) 137; or approaching another threateningly brandishing a knife or other weapon; *Barnes v. Martin*, 15 Wis. 240; or pointing a loaded gun or pistol at another and threatening to shoot, although there is no actual attempt to shoot, if the circumstances are such as to indicate an *intention* to do so, or the *means* of carrying the threat into execution; *United States v. Kierman*.

789. *Assaults by constables—Handcuffing unconvicted prisoners.*—If a constable orders an unconvicted prisoner to be handcuffed when there is no attempt to escape, nor any rea-

6 Cranch C. C. (U. S.) 435 ; Kiefe v. State, 19 Ark. 190 ; Richels v. State, *ante* ; Com. v. McLaughlin, 5 Allen (Mass.) 507 ; so it has been held an assault for one to point a pistol at a person, which is not loaded, if the person at whom it is pointed does not know but that it is loaded, or has no reason to believe that it is not ; State v. Cherry, 11 Ired. (N. C.) 475 ; State v. Shepherd, 10 Iowa, 126 ; Beach v. Hancock, 27 N. H. 223 ; but the doctrine of these cases, except in special instances, is not consistent either with principle or authority. It is a matter of no consequence in determining the character of the offense in the first instance, whether the pistol which was pointed was loaded or not. It is not the *fear* excited in the person assaulted that constitutes an assault, but the actual *intention* of the person making it. If *he* did not know whether the pistol was loaded or not, his pointing it at a person and threatening to shoot, might well be said to be an assault, because his *intention* is evident, and that is the *gist* of the offense. In order to constitute an assault there must "*in all cases be the means of carrying the threat into execution,*" or the person making it must suppose that such is the case ; Blake v. Barnard, 9 C. & P. 620 ; Stephens v. Myers, 3 C. & P. 374 ; State v. Richels, *ante*.

If I raise a feather at another person, and threaten to knock his brains out with it, this can not be said to be an assault, for the very nature of the weapon defeats the intention, and shows the absurdity of my threat. So if I point a pistol at another, *knowing* that it is not loaded, and threaten to *shoot* him with it, the very fact that the pistol is not loaded, deprives the act of the elements essential to constitute it an offense,—"*intention* and the means of executing it." But if A points a pistol at B, *knowing* that it is not loaded, and B, supposing that it is, or not knowing but that it is, shoots A, he would under proper circumstances be justified, for he would have a right to believe his life in danger or that he was in danger of receiving bodily harm from A.

As to the necessity of showing an actual *intention* to carry a threat into execution, and the *means* of doing it, see State v. Bryson, 1 Wins. (N. C.) 86 ; Lawson v. State, 30 Ala. 14 ; Osborn v. Veitch, 1 F. & F. 317 ; Stephens v. Myers, *ante* ; State v. Davis, 1 Ired. (N. C.) 125 ; Woodruff v. Woodruff, 22 Ga. 237 ; Blake v. Barnard, 9 C. & P. 626 ; Smith v. State, 39 Miss. 521 ; State v. Blackwell, 9 Ala. 79 ; State v. Morgan, 3 Ired. (N. C.) 186 ; Com. v. Eyre, 1 S. & R. (Penn.) 347 ; State v. Crow, 1 Ired. (N. C.) 375 ; State v. Benedict, 11 Vt. 236 ; People v. Bransby, 32 N. Y. 525.

Any actual violence inflicted upon one person by another is both an assault *and* battery, *if it is done intentionally* ; Johnson v. State, 11 Tex. 515 ; State v. Davis, 1 Hill (N. Y.) 46 ; thus, the mere touching of a person, willfully and in anger, or anything about his person, as his coat ; Republica v. De Longchamps, 1 Dall. (U. S.) 114 ; United States v. Ortega, 4 Wash. (U. S.) 434 ; or a cane in his hand ; State v. Davis, *ante* ; but in order to constitute a battery, something *attached to the person* must be touched, and against the will of the person touched, and with a malicious intent ; State v. Breck, 1 Hill (N. Y.) 363 ; Mills v. Carpenter, 10 Ired. (N. C.) 298 ; Smith v. State, 10 Ohio St. 466 ; Duncan v. Com., 6 Dana (Ky.) 295 ; thus, if A raises a club and approaches B with an *intent* to strike B, who is in a carriage, and actually strikes at him, but only hits the carriage or horse, this is not a battery upon B, but an assault merely.

sonable ground to fear a rescue, the constable will be responsible in damages for an assault. (*m*)

790. *Assault and battery*.—A battery as distinguished from

(*m*) *Post*, ch. 18, s. 2, *Griffin v. Coleman*, 265. *Wright v. Court*, 4 B. & C. 596. *man*, 28 Law J., Exch. 134; 4 H. & N.

An assault and battery committed upon one with his consent, and at his request, and for some purpose which the person supposes will be beneficial to him if within the limits of the license, is not actionable, for there is an absence of malice or wrongful intent. But if the battery is for an unlawful purpose, or is excessive, the assent will not operate as a defense; *Pillow v. Bushnell*, 5 Barb. (N. Y.) 156; *State v. Breck*, 1 Hill (N. Y.) 363. For instances where assent was held not a defense, see *Stout v. Wren*, 1 Hawks (N. C.) 420; *Logan v. Austin*, 1 Stew. (Ala.) 476.

In order to constitute an assault and battery actionable, or indictable, it must have been done unlawfully, for a mere *accidental* injury inflicted upon another, is not a battery, nor is it actionable unless it is shown to result from negligence. Thus in *Morris v. Platt*, 32 Conn. 75, it was held that, where one was assaulted by another under such circumstances as warranted a reasonable apprehension that his life was about to be taken, fired a pistol at his assailant, and missing him accidentally hit the plaintiff, unless he could be held chargeable for negligence, no action would lie against him, for the act which produced the injury was lawful. Therefore, a battery inflicted by one in the reasonable defense of his person; *Com. v. Ellenger*, 1 Brewster (Penn.) 352; *State v. Davis*, 7 Jones (N. C.) 52; *Murray v. Boyne*, 42 Mo. 472; *Morris v. Platt*, 32 Conn. 75; or his property, real or personal, but the force used must not be in excess of that necessary for protection of person or property, is not actionable. *Baldwin v. Hagan*, 6 Conn. 453; *Scribner v. Beach*, 4 Den. (N. Y.) 448; *Hill v. Rogers*, 2 Iowa, 67; *Thompson v. Berry*, 1 Cranch C. C. (U. S.) 45; *Davis v. Whitridge*, 2 Strob. (S. C.) 232; *Robinson v. Hawkins*, 4 T. B. Mon. (Ky.) 274; *Elliott v. Brown*, 2 Wend. (N. Y.) 497. But in order to justify an assault and battery in defense of either person or property, the danger must be such as to create an apprehension of danger in the mind of a reasonable man, and *must not be in excess of the force reasonably necessary to prevent the consummation of the injury*, and as to whether or not more force was used than was necessary, is purely a question of fact for the jury. *Gallagher v. State*, 3 Minn. 270. And the force used to repel the assault, is to be measured by the nature and character of the assault itself. The mere raising of the hand or fist in a threatening manner is an assault which a person will be justified in repelling, but common sense dictates that such an assault would not justify the person assaulted in stabbing his assailant with a knife, or shooting him with a pistol or gun, or striking him with a club. It would merely warrant the assailed person in using that degree and form of force, reasonably necessary to prevent injury to himself from his assailant, and must be measured by the assault itself and by the attendant circumstances, and a person judges and acts at his peril. *Com. v. Ellenger*, 1 Brews. (Penn.) 352; *Floyd v. State*, 36 Ga. 91. But, on the other hand, if a person raises an axe, knife, pistol, heavy club, or other dangerous or deadly weapon in a threatening manner, and approaches another *with an evident intention to do him bodily harm, and there is no ready or reasonable avenue for retreat*, the person assailed would be justified in meeting the assault with similar weapons, or with any weapons necessary to protect his own life and,

an assault, is where the person of a man is actually struck or touched in a violent, angry, rude, or insolent manner. (*n*) If a man is violently jostled out of the way or spat upon, (*o*) or has water, stones, or dirt rudely thrown upon him, (*p*) or has his hat insolently knocked off, or his hair forcibly cut, (*q*)

(*n*) Rawlings v. Till, 3 M. & W. 28.

4 N. & P. 564.

(*o*) Reg. v. Cottesworth, 6 Mod. 172.

(*q*) Forde v. Skinner, 4 C. & P. 239.

(*p*) Pursell v. Horn, 8 Ad. & E. 604;

if the circumstances are such as *to raise an apprehension of danger of great bodily harm, in the mind of a reasonable person*, if the assailant is permitted to carry out his purpose, and the person assailed *can not reasonably retreat, he will be justified in taking the life even* of his assailant. Floyd v. State, *ante*; Scribner v. Beach, 4 Den. (N. Y.) 448.

The mere fact that a person *believed himself* in danger of bodily harm is not enough; he must show that the circumstances were such as to occasion an apprehension of danger in the mind of a reasonable person. State v. Bryan, 1 Wins. (N. C.) 86. Nor can the act be justified, if the person assaulted *provoked* the assault, and as to whether he did provoke it, and as to whether he was justified in using the degree of force employed in repelling it is a question for the jury from all the circumstances. State v. Bryson, *ante*.

In order to justify a battery, there must be an actual assault, or an attempt to infringe upon one's rights of property. The use of *abusive, insulting, or opprobrious language*, however aggravating or humiliating, *will never justify*, although it may sometimes serve to mitigate, an assault. The right of assaulting another, is only given by the law, in cases where it is rendered *necessary* for the protection of one's person or property, real or personal, or of his wife and children or members of his family; Hill v. Rogers, 2 Iowa, 67. Opprobrious or insulting words must be borne without physical resistance, however provoking, and if one so far forgets himself as to allow his passions, thus excited, to involve him in an assault upon the person, the law will not protect him against liability for, although it may mitigate the offense; Thompson v. Munnua, 21 Iowa, 65; Cushman v. Ryan, 1 Story (U. S.) 91; State v. Wood, 1 Bay. (S. C.) 351; and in order to allow evidence of such provocation to be given in mitigation, it must be shown to be immediate, and so recent as to warrant a presumption that the assault was committed under the *immediate* influence of it. If the provocation arose some time before the assault, it is not admissible in evidence even; Barry v. Inglis, 1 Tayl. (N. C.) 121; Matthews v. Terry, 10 Conn. 455; Ellsworth v. Thompson, 13 Wend. (N. Y.) 651; Lee v. Wolsey, 19 Johns. (N. Y.) 319; Cox v. Whitney, 9 Me. 531; Jakeway v. Dula, 7 Yerg. (Tenn.) 82.

Any person present, *aiding or abetting* an assault, may be held chargeable therewith civilly or criminally, and as there are no accessories in trespass, but all are regarded as principals, in a civil action the assault may be charged to have been made by any person who aided or abetted it, even though he did not strike a blow, and evidence that an assault was committed which the defendant upheld or aided or abetted, will be sufficient to support an allegation of an actual striking and wounding by him; Gaetz v. Ambs, 27 Mo. 28; and the fact that the defendant has been criminally proceeded against, is no bar to a civil action, nor to the recovery of exemplary damages; Hoadley v. Watrous, 45 Vt. 287; 12 Am. Rep. 197.

or his horse has been struck so that it ran away and threw him to the ground, (*r*) the person guilty of the violence is liable to an action for an assault and battery. "But every laying on of hands is not a battery. The party's intention must be considered, for people will sometimes, by way of joke or in friendship, clap a man on the back, and it would be ridiculous to say that every such case constitutes a battery." (*s*) A touch given by a constable's staff in order to engage the attention of a person is not a battery. (*t*)

791. *Mayhem and wounding*.—When the assault has been carried to the extent of maiming or crippling, or of wounding a person, it of course becomes of a much more serious character than a common assault, and the person injured will recover heavy damages, unless the maiming or wounding amounts to a felony, or can be justified or excused in the manner presently mentioned. The old word "mayme" or "meyhem," derived from the French word *meyhemer*, or *mehaigner*, was used to signify any hurt done to a man's body, whereby he was rendered less able in fighting either to defend himself or annoy his adversary; such as the cutting off, disabling, or weakening a hand or finger, striking out an eye or foretooth, breaking a bone, or injuring the head, or wounding a sinew, &c. (*u*)

792. *Assault and battery in self-defense*.—If the assault is in self-defense, and it can be shown that the plaintiff was the aggressor, and assaulted the defendant in the first instance, the action will be answered by a plea of son assault demesne, which is a plea alleging that the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defense. (*v*) If one man strikes another, and the person struck, in the heat of anger, and on the impulse of the moment, returns the blow with a stick or bludgeon, the battery is excusable; (*w*) but he has no right to revenge himself, and if, when all the danger is past, he strikes a blow not necessary for his defense, he commits an assault and battery. (*x*)

(*r*) *Dodwell v. Burford*, 1 Mod. 24; 1 Sid. 433.

(*s*) *Ld. Hardwicke, Williams v. Jones*, Hard. 301.

(*t*) *Wiffin v. Kincard*, 2 B. & P. N. R. 472. *Coward v. Baddeley*, *ante*.

(*u*) *Bac. Abr. MAIHEM* Beames's *Glanv.* p. 350. *Bract. lib.* 3, tr. 2.

(*v*) See 15 & 16 Vict. c. 76, sched. B.

(*w*) *Oakes v. Wood*, 3 M. & W. 150.

(*x*) *Coleridge J., Reg. v. Driscoll*, Car & M. 214.

If a man strike another who does not immediately after resent it, but takes his opportunity, and then some time after falls upon him and beats him, in this case son assault is no good plea, and the second assault can not be justified. (y)¹

793. *Assault in defense of the possession of a house, or close, or of property.* (z)—An assault and battery may be justified in defense of the possession of a house or a close, or a vestry-room, or pulpit, (a) or in defense of the possession of goods and chattels by the person entitled to the possession and use of them. (b)² If one man enters the house of another with force and violence, the owner of the house may justify turning him out, without a previous request to depart; (c)³ but if he enters quietly, he must be requested to retire before hands can be lawfully laid upon him to turn him out. If he will not depart after having been requested so to do, the owner may use as much force as is necessary; and if the intruder resists the attempts of the owner of the house to turn him out, he is guilty of an assault upon the latter; and if a policeman standing by sees the resistance and witnesses the assault, he is justified in taking the intruder into custody. A policeman may also, with the authority and at the request of the master of the house, himself proceed to turn out the intruder; but he is not bound to do so unless he pleases, as it is no part of a policeman's duty to do so. (d)⁴ If a shopkeeper puts goods into his shop window, ticketed at a certain price, he is not bound to sell them at the price marked; and if a customer insists upon having the goods, and refuses

(y) Holt, C. J., *Cockcroft v. Smith*, 11 Mod. 43.

(z) As to equitable defense in such a case, see *Allen v. Walker*, L. R. 5 Exch. 187.

(a) *Jackson v. Courtenay*, 8 Ell. & Bl.

8; 27 Law J., Q. B. 37; Bro. Abr TRESPASS, pl. 128.

(b) *Roberts v. Taylor*, 1 C. B. 149.

(c) *Weaver v. Bush*, 8 T. R. 78.

(d) *Wheeler v. Whiting*, 9 C. & P. 265.

¹ *Schlosser v. Fox*, 14 Ind. 365; *Halliday v. Noble*, 1 Barb. (N. Y.) 137.

² *Ford v. Logan*, 2 A. K. Mar. (Ky.) 325; *McAuley v. State*, 3 Iowa, 435; *Com. v. Lakeman*, 4 Cush. (Mass.) 597; *U. S. v. Bartle*, 1 Cr. C. C. (U. S.) 236; *Causee v. Anders*, 4 Dev. & B. (N. C.) 246.

³ *Sampson v. Henry*, 11 Pick. (Mass.) 379; *McDermott v. Kennedy*, 1 Harr. (Del.) 143; *McIlroy v. Cochran*, 2 A. K. Mar. (Ky.) 276.

⁴ *Baldwin v. Hayden*, 6 Conn. 453; *Gyne v. Culver*, 47 Barb. (N. Y.) 592; *Davis v. Whitridge*, 2 Strob. (S. C.) 232; *Com. v. Goodwin*, 3 Cush. (Mass.) 154; *Dale v. Erskine*, 35 N. H. 503; *Robinson v. Hawkins*, 4 T. B. Mon. (Ky.) 136.

to leave the shop after having been requested so to do by the shopkeeper or his servants, he may be turned out. (*e*) If a man comes into a public-house, and conducts himself in a disorderly manner, and the landlord requests him to go out, and he will not, the landlord may turn him out, though the disturbance does not amount to a breach of the peace. To do this, the landlord may lay hands on him, using no more violence than is necessary to turn him out. If the person resists, and lays hands on the landlord, that is an unjustifiable assault upon the landlord. (*f*)¹

794. *Assault in resistance of a forcible entry, or to prevent a seizure of chattels.*—If one person enters another's house or ground with force and violence, the possessor or occupier of the house may oppose force by force, and turn the person out without a previous request to him to depart, (*g*) unless the person making the forcible entry is a constable or officer acting under competent legal authority; for there is a manifest distinction between endeavoring to turn a man out of a house or close into which he has previously entered quietly, and resisting a forcible attempt to enter. (*h*) The same rule prevails with regard to a forcible seizure of goods and chattels, for wherever force is used to gain possession of a thing, "the force may be opposed by force without more ado," (*i*) although the person using the force has a right to the possession he seeks to acquire.²

(*e*) *Timothy v. Simpson*, 6 C. & P. 500.

(*f*) *Howell v. Jackson*, 6 C. & P. 725.

Webster v. Watts, 11 Q. B. 311; 17 Law J., Q. B. 73.

(*g*) *Tulley v. Reed*, 1 C. & P. 6.

(*h*) *Polkinghorn v. Wright*, 8 Q. B. 206.

(*i*) *Green v. Goddard*, 2 Salk. 641; *Owen*, 150.

¹ In *Howell v. Jackson*, 6 C. & P. 725, PARKE, B. said, "There is no doubt that a landlord may turn out a person who is making a disturbance in a public house, though such disturbance does not amount to a breach of the peace. To do this the landlord may lay hands on him, and in doing so, is not guilty of a breach of the peace." The only distinction between a putting out by the landlord of one who is actually committing a breach of the peace, and one who is creating a disturbance or misbehaving himself, is, that in the former case there need be no request to depart, before violence is used, whereas in the latter case there must be, and a reasonable time given for him to do so before actual force is resorted to.

² *McIlroy v. Cochran*, 2 A. K. Mar. (Ky.) 276; *Hyatt v. Woods*, 3 Johns. (N. Y.) 239; *Sampson v. Henry*, 11 Pick. (Mass.) 379.

795. *Resistance to a forcible entry by a landlord.*—A forcible entry is expressly prohibited by the 5 Rich. 2, c. 7, even where entry is given by law. And it is laid down, that if a man enters peaceably into a house but turns the occupant out of possession by force, or by threats frightens him out of possession, this is a forcible entry. (*j*) If a tenant who holds over after the expiration of his lease is de facto in possession of the house; if he is sitting in his drawing-room, or sleeping in his bed, and the landlord walks in at the front door, the latter can not be said to be in possession of the house any more than the visitor who comes to make a morning call; and if he lays hands on the tenant and turns him out, he can not truly say that this was done in defense of his (the landlord's) possession of the house, such possession not having been gained until after the exercise of the act of force constituting the assault. But if the tenant, or any other person, who has originally lawfully come into possession, voluntarily leaves the premises vacant, the landlord or lawful owner may at once enter, and take and keep possession. The previous possessor is then lawfully dispossessed, and if he re-enters he commits a trespass, and he may be turned out of the house or off the land. (*k*)¹

796. *Assaults in preservation of the public peace.*—Any person who witnesses an affray, may, during the continuance of the affray, and for the purpose of putting a stop to it, lay hands on the affrayers. (*l*) If he comes up in the midst of the affray, and forcibly interferes as a peacemaker for the purpose of separating the combatants and preventing further violence, he is not guilty of a trespass, unless he uses more violence than is reasonably necessary for the purpose. (*m*)

797. *Battery and wounding in self-defense, or in defense of the possession of tenements or chattels.*—When a person has

(*j*) Bosanquet, J., *Newton v. Harland*, 1 Sc. N. R. 474; 1 M. & Gr. 660; *Bac. Butcher v. Costar*, 7 T. R. 431. *Butcher v. Butcher*, 7 B. & C. 402.

ABR. FORCIBLE ENTRY.

(*l*) *Noden v. Johnson*, 16 Q. B. 218.

(*k*) *Browne v. Dawson*, 12 Ad. & E. 629. *Taylor v. Cole*, 3 T. R. 295. *Taunton v. Timothy v. Simpson*, 6 C. & P. 500.

¹ *Carey v. People*, 45 Barb. (N. Y.) 262; *Sampson v. Henry*, ante; *Higgins v. State*, 7 Ind. 549; *Com. v. Lakeman*, 4 Cush. (Mass.) 597; *Causee v. Anders*, 4 Dev. & Bat. (N. C.) 246, *McAuley v. State*, 3 Iowa, 435, *Bush v. State*, Tread. (S. C.) 489.

been assaulted in such a way as to endanger his life, he is of course justified in maiming and wounding the attacking party; and if he has been violently assaulted, or assaulted in such a way as to put him into bodily fear, the mayhem or wounding, if inflicted in self-defense, is held excusable. "A man can not justify a maim for every assault, as, if A strikes B, B can not justify the drawing his sword and cutting off his hand." (n) "If A strike B, and B strike again, and they close immediately, and in the scuffle B maihems A, this maihem is excusable; but if, upon a little blow given by A to B, B gives him a blow that maihems him, this maihem is not excusable." (o)¹

"Cockcroft in a scuffle ran his finger towards Smith's eye, who bit a joint off from the plaintiff's finger: the question was, whether this was a proper defense for the defendant to justify in an action of mayhem; and HOLT, C. J., said that a man ought not, in the case of a small assault, to give a violent or unsuitable return, but in such case plead what is necessary for a man's defense, and not who struck first, for hitting a man a little blow with a little stick on the shoulder is not a reason for him to draw a sword, and cut and hew the other." (p) To justify a battery, the defendant must show that there was an unlawful resistance on the part of the plaintiff to the lawful acts of the defendant. If the plaintiff complains of repeated blows, of his having been knocked down and wounded, or of his having had his leg broken, it is no answer to say that the plaintiff intruded himself into the defendant's dwelling-house, and made a disturbance, and would not go out, and therefore the defendant knocked him down, or cut his head open with a truncheon, or broke his leg, as no man is justified in resorting to such severe measures to expel an intruder, unless resistance has been offered; in which case the plea of justification must allege the fact of the resistance, and it must be shown that the force used was no more than was reasonably necessary to overcome such resistance. (q)

(n) Pur. Cur. Cook v. Beal, 1 *Ld. Raym.* 177; 3 *Salk.* 115.

(o) Cockcroft v. Smith, 2 *Salk.* 642.

(p) Cockcroft v. Smith, 11 *Mod.* 43.

(q) Gregory v. Hill, 8 *T. R.* 299.

Oakes v. Wood, 2 *M. & W.* 291.

¹ See note 1, page 4.

In an action of trespass it was alleged that the defendant overturned a ladder upon which the plaintiff was standing, and threw the plaintiff from it upon the ground, and the defendant pleaded that he was possessed of a house and garden, and that the plaintiff erected a ladder in the garden, and went up the ladder in order to nail a board to the house of the plaintiff; that the defendant forbade the plaintiff so to do, and desired him to come down; and that, upon the plaintiff's persisting in nailing the board, he gently shook the ladder, and gently overturned it, and gently threw the plaintiff from it upon the ground, doing as little damage as possible to the plaintiff, and on demurrer to the plea it was held that the overturning and throwing down of the ladder, however gently, with the plaintiff upon it, was unjustifiable, and the plea bad. (r)

SECTION II.

OF FALSE IMPRISONMENT.

798. *False imprisonment* is a trespass committed by one man against the person of another, by unlawfully arresting him, and detaining him without any legal authority. Every confinement of the person is an imprisonment, whether it be in a common prison, or a private house, or in the stocks, or by forcibly detaining any one in the public streets. False imprisonment may also arise from the arrest or detention of the person by an officer without a warrant, or by an illegal warrant executed at an unlawful time.

799. *Constructive imprisonment*.—Actual contact is not necessary to constitute an imprisonment. Any restraint put upon the freedom of another by show of authority or force, is sufficient to constitute an imprisonment; so that, if a person is restrained from leaving a room, or going out of a house, without the presence of a constable, this infringement of his personal liberty will constitute an imprisonment. (s) If a bailiff who has a process against any one says to him, "You

(r) Collins v. Renison, Say. 138.

(s) Warner v. Riddiford, 4 C. B. N. S. 206.

are my prisoner, I have a writ against you," upon which the person addressed submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process. (t) If a person is commanded by a constable to go with him, and the order is obeyed, and they walk together in the direction pointed out by the constable, that is constructively an imprisonment, though no actual force be used; for the party addressed feels that he has no option, no more power of going in any but the one direction prescribed to him, than if the constable or bailiff had actual hold of him; and it is that entire restraint upon the will which constitutes the imprisonment. (u) "If you put your hand upon a man, or tell him he must go with you, and he goes, supposing you have the right and the power to compel him, that is an arrest." (x) But a partial restraint of the will of a person is not sufficient to constitute an imprisonment. Thus, where a part of a public footway on a bridge was taken and appropriated for seats to view a regatta, and separated for that purpose from the adjoining carriage-road by a temporary fence, and the plaintiff insisted upon a right of way across the part so appropriated, and climbed over the fence, but was stopped by two policemen, who prevented him from proceeding onwards, but at the same time told him he might go back if he pleased, which the plaintiff refused to do, and remained where he was for half-an-hour, it was held that this was no imprisonment. (y)¹

(t) *Grainger v. Hill*, 4 B. N. C. 212.

(x) *Tindal, C. S., Wood v. Lane*, 6 C.

(u) *Williams, J., Bird v. Jones*, 7 Q. B.

& P. 774.

743; 2 Inst. 589; Bull, N. P. 62.

(y) *Bird v. Jones*, 7 Q. B. 742.

¹ It is enough to uphold an action for a false imprisonment if the plaintiff is prevented from going where he pleases, even though he is not assaulted, provided he is so deterred from exercising his will by a reasonable apprehension of personal danger; *Smith v. State*, 7 Humph (Tenn.) 43; *Johnson v. Tompkins*, 1 Bald. (U. S.) 571; *Pike v. Hanson*, 9 N. H. 491; *Floyd v. State*, 7 Eng. (Ark.) 43. It is not necessary that a person should be confined in a prison or house; it is enough if he is forcibly detained in the public streets; *Floyd v. State, ante*. A false imprisonment is *any unlawful detention of a person against his will*, whether under a void process or without any process at all. It is placing a person against his will in a position where he can not exercise his will, in going where he lawfully may go, and holding him subject to the will of another, without lawful authority; *Crowell v. Gleason*, 10 Me. 325.

800. Imprisonment by order of a judge or judicial officer.—All judges of a court of record have power to commit to the custody of their officer *sedente curia*, by oral command, without any warrant made at the time. This proceeds upon the ground that there is, in contemplation of law, a record of such commitment, which record may be drawn up when necessary. A prisoner is in lawful custody although committed to prison for the purpose of being brought up again for rehearing, without any warrant or commitment in writing. (z) ¹

801. Arrest in execution of warrants of justices.—Constables making an arrest in execution of a warrant of justices ought to have their warrant with them, ready to be produced in case it should be required. Not having it, they are not justified in making an arrest, unless the arrest be made for felony, or suspicion of felony. (a)

802. Arrest by constables without warrant.—A constable has no power at common law to arrest a person without warrant on suspicion of his having committed a misdemeanor; (b) but if he has reasonable cause to suspect that a person has committed a felony, he may detain such person, not being an infant under the age of seven years, incapable of committing a felony, (c) until he can be brought before a justice of the peace to have his conduct investigated. (d) ² There is no

(z) *Kemp v. Neville*, 31 Law J., C. P. 165. *Throgmorton v. Allen*, 14 M. & W. 70.

(a) *Galliard v. Laxton*, 31 Law J., M. C. 123.

(b) *Bowditch v. Balchin*, 5 Exch. 380. *Griffin v. Coleman*, 28 Law J., Exch.

134; 4 H. & N. 265.

(c) *Marsh v. Loader*, 14 C. B., N. S. 535.

(d) *Beckwith v. Philby*, 6 B. & C. 635; 9 D. & R. 487. *Lawrence v. Hedger*, 3 Taunt. 14. *Buckley v. Gross*, 32 Law J., Q. B. 129.

¹ But if a justice of the peace commits a person to prison because of his refusal to comply with an order for bail, when there is no written complaint against him, he will be liable for false imprisonment; *Tracy v. Williams*, 4 Conn. 107; or for any cause not justified by law; *Streshley v. Fisher*, Hood (Ky.) 249; or if a warrant is issued, and the name of the respondent is wrong; *Scott v. Ely*, 4 Wend. (N. Y.) 555; or if a *capias* is issued against a defendant without a compliance with all the statutory provisions; *Whitcomb v. Cook*, 39 Vt. 584; or an arrest upon an execution issuing upon a void judgment, or one that has been fully satisfied, or a void warrant; *Woodall v. McMillan*, 38 Ala. 622.

² An officer having authority to execute criminal warrants, may arrest a person charged with felony without a warrant, upon information given by others, but he

standard or fixed rule as to what is reasonable ground of suspicion which can be laid down as applicable to all cases. "The charge," observes WATSON, B., "may be reasonable or unreasonable with reference to the circumstances and the character of the party making it. And while on the one hand a constable ought to be protected in the execution of his duties, he ought on the other to be guided in the discharge of those duties by ordinary reason, care, and caution." Where, therefore, a traveling showman told the defendant, a police-constable, at a fair, that he had had some harness stolen a year before, and that the stolen harness was on the plaintiff's horse, and the constable went to the plaintiff, and asked him where he got the harness, and the plaintiff gave the common thief's answer—that he had bought the harness of a man he did not know, and had given him a shilling for it,—whereupon the constable took the plaintiff into custody but it appeared that the constable had known the plaintiff for twenty years as a respectable householder, it was held that there was no reasonable cause for the arrest, and that the constable was responsible in damages for a wrongful imprisonment. (*e*) But if one man charges another with having robbed him, and desires a constable to apprehend the suspected thief, and the constable does so without warrant, the constable is not responsible for the imprisonment because it turns out that the charge is false, and that no felony had in fact been committed, (*f*) for if one man charges another with felony, and requires an officer to take him into custody, and carry him before a magistrate, "it would be most mischievous," observes Lord MANSFIELD, "that the officer should be bound first to try and at his peril exercise his judgment on the truth of the charge. He that makes the charge alone is answerable. The officer does his duty in carrying the accused before a magistrate, who is authorized to examine and

(*e*) *Hogg v. Ward*, 3 H. & N. 417; 27 Law J., Exch. 443.

(*f*) *Hale*, P. C., 177, *Davis v. Russell*, 2 M. & P. 607; 5 Bing. 354.

does so at his peril, for, unless he has reasonable grounds for believing the person arrested to be guilty of a felony, he will be liable for assault and false imprisonment. *Aarns v. Brunet*, 1 Phil. (Penn.) 175; *Wakeley v. Hart*, 6 Binn. (Penn.) 316; *Tom. v. Deacon*, 8 S. & R. (Penn.) 49.

commit or discharge." (g) If an arrest by a constable is in its inception wrongful, all other constables who aid and assist in the continuance of the wrongful imprisonment are responsible for the entire damage thereby caused to the plaintiff, although they had no knowledge of the unlawfulness of the imprisonment, and intended to act in strict discharge of their official duty. (h)¹ Every unlawful detainer of a pris-

(g) *Samuel v. Payne*, 1 Doug. 360.

28 Law J., Exch. 134. *Wright v. Court*,

(h) *Griffin v. Coleman*, 4 H. & N. 265;

3 B. & C. 596.

¹ In *Davis v. Russell*, 5 Bing. 354, the question of the powers, duties, and liabilities of an officer making an arrest without a warrant were fully discussed by the court. In that case the plaintiff, an elderly lady, was arrested at her lodgings, by the defendant, between the hours of ten and eleven o'clock at night, and detained in prison until the following day, when she was taken before a magistrate and was held in prison for twenty days. The defendant showed that some two months prior to the arrest, a robbery had been committed at the lodgings where the plaintiff then resided, and that among other things done by the thief, the plaintiff's trunk was broken open and a ten-pound note stolen therefrom. That shortly after the robbery, the plaintiff left those lodgings and went to reside in the lodgings at Cheltenham, where she was arrested. That on the day when she was arrested, Miss Hamerton, at whose house the robbery was committed, showed the defendant, then being superintendent of the Cheltenham police, a letter addressed to the plaintiff at her former lodging-house (Miss Hamerton's) which she (Miss Hamerton) alleged that, by looking in at the ends of the letter, she believed bore some reference to the robbery, and thereby induced the defendant to break it open. The letter, which was anonymous, purported to come from an accomplice in the robbery residing in London, and demanding money of the plaintiff as a joint perpetrator of the offense. Miss Hamerton also told him that four days after the robbery a letter had arrived for plaintiff in the same handwriting, bearing the London post-mark, and that the plaintiff refused to show it, and Miss H. then expressed her suspicions that the plaintiff was concerned in the robbery, and said she thought the defendant ought to arrest her, which he did.

The plaintiff, after having been detained twenty days, was discharged, it having transpired that the robbery was, in fact, committed by Miss Hamerton, who was tried and convicted therefor. The judge charged the jury, that if the constable had a complaint made to him under such circumstances as to induce him to believe it true, he had a right to take the plaintiff into custody, provided the facts were such as to warrant an apprehension; and that the jury must consider whether the statement they had heard, satisfied them, looking at the letter and the other facts, that the defendant had reasonable grounds to suppose the plaintiff implicated in the felony with which she had been charged, and whether, standing in his place, they would have made the arrest. The jury having found for the defendant, upon appeal the ruling of the court was fully sustained.

The authority of a constable to arrest one without a warrant, where the offense was committed in his view, or for a felony, when acquainted with the facts by another, has long been recognized. 1 *Hale's P. C.* 567; 4 *Inst.* 177-222; *Beck-*

oner after he has gained a right to be discharged is a fresh imprisonment. (i)

803. *Arrest by private persons without warrant.*—"If treason or felony be done," observes Lord COKE, "and one hath just cause of suspicion, this is a good cause and warrant in law for him to arrest any man; but he must show in certainty the cause of his suspicion, and whether the suspicion shall be just or lawful shall be determined by the justices in an action for false imprisonment brought by the party grieved, or upon a habeas corpus." (k) There is this distinction between an arrest for felony, by a private individual and a constable. In order to justify the private individual in causing the imprisonment, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed by some person or another, and that the circumstances were such that any reasonable person, acting without passion or prejudice, would have fairly suspected that the plaintiff committed it, or was implicated in it; (l) whereas a constable having reasonable ground to suspect that a felony has been committed, although in fact none has been, is authorized to detain the person suspected until he can be brought before a justice of the peace to have his conduct investigated. (m).¹

(i) Withers v. Henley, Cro. Jac. 379.

C. & P. 526. Hall v. Booth, 3 N. & M. 316.

(k) 2 Inst. 52. Davis v. Russell, 5

(m) Id. Tenterden, Beckwith v.

Bing. 357; 2 M. & P. 590.

(l) Tindal, C. J., Allen v. Wright, 8

Philby, 6 B. & C. 638.

with v. Philby, 6 B. & C. 637; Reynolds v. Kennedy, 1 Wils. 232; Ledwith v. Catchpole, Cold. 291; Samuel v. Payne, 7 H. 4, 35, pl. 3; Rohan v. Sawin, 5 Cush. (Mass.) 281; Com. v. McGahey, 11 Gray (Mass.) 194; McLennon v. Richardson, 15 Id. 74; In Re Powers, 25 Vt. 261.

¹ A private person may arrest a person for a felony, without a warrant, even though there is time to first obtain a warrant. Keenan v. State, 8 Wis. 132; Holley v. Mix, 3 Wend. (N. Y.) 350. But he must first be sure that the person has committed a felony, as otherwise he will be liable for trespass and false imprisonment, unless there was a reasonable ground to suspect the person arrested. Com. v. Deacon, 8 S. & R. (Penn.) 49; Pennsylvania v. Kerr Add (Penn.) 325; Wakeley v. Hart, 6 Binney (Penn.) 316. But see Findlay v. Pratt, 9 Port. (Ala.) 295; Aarns v. Brunet, 1 Phil. (Penn.) 175; where it was held that a private person arrested a person for a felony, without a warrant, at his peril, and that unless the person had, in fact, committed a felony, the arrest is illegal, and the person making it, liable in trespass therefor. See also to the same effect, Johnson v. Tompkins, 1 Bald. (U. S.) 578. But the defendant may show, in mitigation of damages, that

Every person to whom property is offered to be sold, pawned, or delivered, may, if he has reasonable cause to suspect that an offense punishable by the Larceny Amendment Act, 24 & 25 Vict. c. 96, has been committed on or with respect to such property, apprehend the person offering the same, and take him, together with the property, before a justice of the peace; (n) and any person "found committing" an offense punishable by the Act, except the offense of angling in the daytime, may be immediately apprehended by any person without a warrant, and taken before a justice, together with the property, if any.—*Ibid.*

804. *Arrest for a misdemeanor.*—Regularly no private person can of his own authority, without warrant, arrest another for a misdemeanor, except for a breach of the peace, whilst the strife is going on, and to prevent its continuance. But it is said in Hawkins' "Pleas of the Crown," "that any private person may lawfully arrest a suspicious night-walker, and detain him till he make it appear that he is a person of good reputation. Also it hath been adjudged that anyone may apprehend a common notorious cheat going about the country with false dice, and being actually caught playing with them, in order to have him before a justice of the peace, for the public good requires the utmost discouragement of all such persons; and the restraining of private persons from arresting them without a warrant from a magistrate would often give them an opportunity of escaping." (o) "These cases in Hawkins," observes Lord TENDERTEN, "are where the party is

(n) 24 & 25 Vict. c. 96, s. 103. See (o) Hawkins, P. C. 2, c. 12, s. 20.
32 & 33 Vict. c. 12, s. 10; c. 57, s. 6.

he had a reasonable ground to suspect the person arrested to have been guilty of a felony. *Phillips v. Trull*, 11 Johns. (N. Y.) 486; *Rogers v. Wilson*, Minor (Ala.) 407; *Wrexford v. Smith*, 2 Root (Conn.) 486; *Eames v. State*, 6 Humph. (Tenn.) 53; *Drennan v. People*, 10 Mich. 169. But a private person, as well as an officer, may arrest, without a warrant, any person whom he sees committing a felony or a breach of the peace. In *Re Powers*, *ante*; *People v. Adler*, 3 Parker C. R. Rep. (N. Y.) 249; *Brockway v. Crawford*, 2 Jones (N. C.) 483; *Knot v. Gay*, 1 Root (Conn.) 66; *Phillips v. Trull*, 11 Johns. (N. Y.) 486; *Taylor v. Strong*, 3 Wend. (N. Y.) 384; *Vanderveer v. Mattocks*, 3 Ind. 479; *City Council v. Payne*, 2 N. & M. (S. C.) 475; *Mayo v. Wilson*, 1 N. H. 53. So where a person who has been arrested for a felony, escapes, any person may arrest him without a warrant. *Com. v. Sheriff*, 1 Grant's Cas. (Penn.) 187; *Dow's Case*, 18 Penn. St. 37.

caught in the fact, and the observation there added assumes that the person arrested is guilty. Where the case is only one of suspicion, the arrest is unjustifiable. The instances in Hale of arrest on suspicion, after the act has been done, relate to felony. In cases of misdemeanor, the parties aggrieved should apply to a justice of the peace for a warrant, and not take the law into their own hands." (p)¹

805. *Arrest of the wrong party.*—If the wrong person is arrested by mistake, all persons causing the arrest are liable in trespass for the injury, (q) unless the party complaining has brought the injury upon himself by his own misstatements and misrepresentations. If there was lawful ground for arresting A, and B represents himself to be A, and is arrested in consequence of that representation, he has obviously no valid ground for complaining of the imprisonment which naturally resulted from his own act. But after he has given notice that he is not the person he represented himself to be, he can not lawfully be detained for a greater length of time than may be reasonably necessary to ascertain which of the several statements he has made is in accordance with the truth. (r)²

806. *Arrest for malicious injuries to property.*—The statutes for consolidating the laws relative to malicious injuries to property, enact that any person found committing any offense under that Act may be immediately apprehended, without a warrant, by any peace-officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighboring justice of the peace, to be dealt with according to law. (s) To justify an arrest under this statute, it must be shown that the offense prohibited and made punishable was actually committed, (t) that the

(p) Fox v. Gaunt, 3 B. & Ad. 800.

S. 495; 26 Law J., C. P. 267.

(q) Davies v. Jenkins, 11 M. & W. 754.

(s) 24 & 25 Vict. c. 97, s. 61.

(r) Dunston v. Paterson, 2 C. B., N.

(t) Parrington v. Moore, 2 Exch. 225.

¹ Wood v. Brooklyn, 14 Barb. (N. Y.) 425; Paw v. Becknel, 3 Ind. 475; Phillips v. Trull, 11 Johns. (N. Y.) 486.

² Aarns v. Brunet, 1 Phil. (Penn.) 175; Johnson v. Tompkins, 1 Bald. (U. S.) 578; and he must not be detained an unreasonable time. Johnson v. Americus, 46 Ga. 80; Flinn v. Graham, 3 Pitts. (Penn.) 195.

plaintiff was found and taken in the act, (*u*) and that the person arresting was either the occupier or the landlord of the property injured. It must also be shown that the trespass was a willful and malicious trespass.

807. *Willful and malicious trespass.*—A trespass can only be willful and malicious where it is committed by a person who knows that he has no claim or pretense of right to enter the land. If he had reasonable ground for supposing that he had a right, his conduct can neither be called willful nor malicious. (*x*)

808. *Arrest of persons committing indictable offenses in the night.*—It is lawful for a private individual to apprehend anyone who shall be “found committing” any indictable offense in the night, *i. e.*, between 9 P. M. and 6 A. M., and to convey him or deliver him to some constable or other peace-officer, to be conveyed before a justice of the peace, to be dealt with according to law. (*y*)

809. *Arrest for an assault and breach of the peace.*—A constable may *ex officio* arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a justice of the peace. “If A be dangerously hurt, and the common voice is that B hurt him, or if C thereupon come to the constable and tell him that B hurt him, the constable may imprison B till he knows whether A lives or dies, and until he can bring him before a justice. But if there be only an affray, and not in view of the constable, it hath been held he can not arrest him without warrant.” (*z*) If an assault be committed within view of a constable, he has authority to arrest the offender at the time, or as soon after as he conveniently can, so as to come within the expression “recently,” not only to prevent a further breach of the peace, but also to secure the offender for the purpose of taking him before a magistrate. (*a*) If a constable is preventing a breach of the peace, and any person stands in his way with intent to hinder him from so doing, the constable is justified in taking such

(*u*) *Simmons v. Millingen*, 2 C. B. 530.

(*x*) *Looker v. Halcomb*, 12 Moore, 416 4 Bing. 183.

(*y*) 14 & 15 Vict. c. 19, s. 11.

(*z*) *Hale*, P. C. 587.

(*a*) *Reg. v. Light*, 27 Law J., M. C. 1

person into custody, but not in giving him a blow, (*b*) nor in nandcuffing him.

Various statutes provide for the punishment of all persons who shall assault peace-officers or revenue officers, (*c*) metropolitan police-officers, (*d*) special constables and district constables, (*e*) in the execution of their duty, or who aid or incite others so to do.

810. *Arrest during the continuance of an affray.*—For the preservation of the peace, any individual who sees it broken may restrain the liberty of him he sees breaking it, so long as the conduct of such person shows that the public peace is likely to be endangered by his acts. Any bystander may, and ought to, arrest an affrayer at the moment of the affray, and detain him until his passion be cooled, and then deliver him to a peace-officer, to be carried before a justice of the peace, to be compelled to find sureties for keeping the peace; but a private individual who has witnessed an affray can not after the affray has ceased lawfully give the affrayers, or one or some of them, into custody, unless the affrayers continue on the spot, and refuse to disperse, and there is a reasonable apprehension of a renewal of the affray. (*f*) If the affrayers, on seeing or hearing that the police-constables are coming, run away and disperse, they can not lawfully be pursued and taken by constables, or given into custody by private individuals, for the affray that is then ended. (*g*) If during an affray a bystander calls up a policeman, and directs him to take one of the affrayers into custody, the bystander does not thereby render himself amenable to an action for false imprisonment. (*h*)

The continued ringing at a door-bell without cause or excuse does not in itself amount to a breach of the peace, so as to justify the arrest of a person by a private individual; but it is eminently calculated to lead to a breach of the peace, and if it is done and persisted in within view of a constable, the latter may take the aggressor into custody. (*i*) And if the nuisance be committed within the metropolitan police district,

(*b*) *Levy v. Edwards*, 1 C. & P. 40.

(*c*) 9 Geo. 4, c. 31, s. 25.

(*d*) 2 & 3 Vict. c. 47, s. 18.

(*e*) 1 & 2 Wm. 4, c. 41, s. 11; 2 & 3 Vict. c. 93, s. 8.

(*f*) *Timothy v. Simpson*, 1 C. M. & R. 757. *Price v. Seeley*, 10 C. L. & Fin.

39.

(*g*) *Paynes v. Brewster*, 2 Q. B. 385.

(*h*) *Derecourt v. Corbishley*, 5 Ell. & Bl. 188.

(*i*) *Grant v. Moser*, 5 M. & Gr. 123; 6 Sc. N. R. 466.

the offender may, if found in the act, be apprehended by the master of the house. (*k*) If a man threatens to force his way into the house of another, and collects a mob at the door, and refuses to go away when directed so to do, the owner of the house is justified in directing a constable to take him into custody, in order to preserve the peace. (*l*)¹

811. *What amounts to a breach of the peace.*—It must be shown that there was an actual breach of the peace in order to justify an imprisonment. It is not enough to show that the plaintiff “made a great noise and disturbance, and refused to depart, and was in great heat and fury, ready and desirous to make an affray and commit a breach of the peace.” (*m*) Disturbance and annoyance of a public meeting, by putting questions to the speaker, making observations on their statements, and saying, “That’s a lie,” do not constitute a breach of the peace. (*n*) But if a man comes into a public-house, and makes a very great noise and disturbance therein, and creates alarm and disquiets the neighborhood, his conduct amounts to a breach of the peace, and justifies the landlord in giving him into custody, if the disturbance occurs within view of the constable. (*o*) If a man stops before the door of a dwelling-house or shop, applying abusive and opprobrious epithets to the inmates, and attracts a crowd, and refuses to desist when requested, he commits a breach of the peace. (*p*)

812. *Arrest of persons disturbing divine service.*—Any person who is guilty of riotous, violent, or indecent behavior in any church or chapel, or duly certified place of religious worship, or in any churchyard or burial-ground, or who molests, disturbs, vexes, or troubles any preacher duly authorized to preach therein, or any clergyman celebrating

(*k*) *Simmons v. Millingen*, 2 C. B. 524.
See *post*.

(*l*) *Ingle v. Bell*, 1 M. & W. 516.

(*m*) *Wheeler v. Whiting*, 9 C. & P. 262.

(*n*) *Wooding v. Oxley*, 9 C. & P. 1.

(*o*) *Howell v. Jackson*, 6 C. & P. 723.
Webster v. Watts, 11 Q. B. 311; 17 Law J., Q. B. 73.

(*p*) *Cohen v. Huskisson*, 2 M. & W. 482.

¹ *Vanderveer v. Mattocks*, 3 Ind. 479; *Com. v. Deacon*, 8 S. & R. (Penn.) 47; *Taylor v. Strong*, 3 Wend. (N. Y.) 384; but not for past offenses, unless it amounts to a felony. *Com. v. McLaughlin*, 12 Cush. (Mass.) 615; *Phillips v. Trull*, 11 Johns. (N. Y.) 486.

divine service, &c., may, immediately on the commission of the misdemeanor, be apprehended by any constable or churchwarden of the place and taken before a magistrate; 23 & 24 Vict. c. 32, ss. 2, 3. To bring the offender within this statute it must be shown that the disturbance was willful and intentional. (q)

813. *Arrest of vagrants and persons found committing acts of public indecency.*—The Vagrant Act, 5 Geo. 4, c. 83, (r) authorizes any person whatsoever to apprehend anyone found committing any of the acts of vagrancy specified in s. 4 of the statute, such as fortune-telling, indecent exposure of the person in any street, road, or place of public resort, or within view thereof, with intent to insult any female; gathering of alms by exposure of wounds and deformities; collection of alms by false pretenses; playing or betting in streets or public places with instruments of gaming, &c.

814. *Arrest under the Merchant Shipping Act.*—By 25 & 26 Vict. c. 63, s. 37, power is given to the master or other officer of any duly surveyed passenger steamer and his assistants to detain persons whose name and address are unknown, and who have committed any of the offenses specified in the Act, such as being drunk and disorderly, and refusing to leave a steamer after request and return of the fare paid; molesting passengers after warning by an officer not to do so; persisting in entering or refusing to leave a steamer having its full complement of passengers; traveling, or attempting to travel, without previous payment of the fare, with intent to avoid payment; proceeding beyond the distance for which the fare is paid, with intent to avoid payment for the additional distance; refusing to leave the steamer on arriving at the point to which the fare is paid; refusing either to pay the fare, or to exhibit the ticket or receipt for the fare, when demanded; willfully obstructing any of the crew in the execution of their duty upon or about the steamer, &c.

815. *Arrest of a principal by his bail.*—The bail may, whenever they please, render their principal in their own discharge. They may take him up even upon a Sunday, and

(q) Williams v. Glenister, 2 B. & C. 699. and 32 & 33 Vict. c. 99, s. 9. See Hirst v. Molesbury, L. R., 6 Q. B. 130.

(r) Amended by 31 & 32 Vict. c. 52

confine him until the next day, and then render him ; and the doing it on a Sunday is no service of process, but rather like the case where a sheriff arrests by virtue of a process of court on Saturday, and the party escapes, and the sheriff takes him upon a Sunday, which he may do, for it is only a continuance of the former imprisonment. (s) A witness who has given bail is always supposed to be in the custody of his bail, and may be taken and rendered at any time, even while he is attending as a witness in a court of justice in obedience to his subpoena. (t)

816. *Arrest for offenses committed within the limits of the metropolitan police district.* (u)—The 2 & 3 Vict. c. 47, s. 54, enables any constable belonging to the metropolitan police force to take into custody, without warrant, any person who, within his view, (v) shall commit any of the various offenses therein specified, and forbidden within the limits of the metropolitan police district. Among these offenses may be enumerated the exposing, to the annoyance of the inhabitants or passengers, of horses for show or sale ; the exhibition of caravans, shows, or public entertainments ; suffering ferocious dogs to go at large unmuzzled, (x) or urging one dog to attack another ; negligent driving of cattle or animals ; (y) riding on the shafts of carriages without holding the reins ; furious driving ; willfully obstructing public crossings and public thoroughfares ; (z) riding animals or driving carriages, trucks, or barrows upon, or fastening horses across, footways ; (a) rolling any cask, tub, hoop, wheel, &c., upon footways, except for the purpose of crossing them, or loading or unloading carriages ; disregarding the police regulations for preventing obstructions in public thoroughfares ; posting bills or papers upon walls and buildings without consent of the owner or occupier ; using threatening, abusive, or insulting words or behavior, whereby a breach of the peace may be occasioned ; blowing of horns, or any other noisy instrument, for the pur-

(s) Per Cur. Anon. 6 Mod. 231.

(t) Lyne, *Ex parte*, 3 Stark. 132. Horn v. Swinford, D. & Ry. N. P. C. 20.

(u) See 31 & 32 Vict. c. 67, s. 4. And see the Metropolitan Street Act, 1867 ; 30 & 31 Vict. c. 131 ; and 32 & 33 Vict. c. 12, s. 6, as to ships, persons, &c., suspected of unlawfully being in possession

of Government stores.

(v) Justice v. Gosling, 21 Law J., C. P. 94.

(x) See 30 & 31 Vict. c. 134, s. 18.

(y) See 30 & 31 Vict. c. 134, s. 7.

(z) See 30 & 31 Vict. c. 134, ss. 6, 15

(a) As to costermongers, street hawkers, &c., see 31 & 32 Vict. c. 5.

pose of calling persons together, or announcing any show or entertainment, or for the purpose of selling articles, or obtaining money or alms; wantonly discharging fire-arms, stones, or other missiles, to the danger of any person; making bonfires, or throwing or setting fire to any firework; willfully and wantonly disturbing any inhabitant, by pulling or ringing any door-bell, or knocking at any door without lawful excuse, or willfully and unlawfully extinguishing the light of any lamp; flying a kite or playing at any game, to the annoyance of the inhabitants and passengers, or making a slide upon the ice or snow in any thoroughfare.

Metropolitan police constables, and all persons whom they shall call to their assistance, are further empowered (s. 63) to arrest, without warrant, any person who, within view of any such constable, shall offend in any manner against the act, and whose name and residence shall be unknown to, and can not be ascertained by, such constable; also, all disorderly persons disturbing the public peace, whom he shall have good cause to suspect of having committed, or being about to commit, any felony, misdemeanor, or breach of the peace; also, persons charged with aggravated assaults, where he has good reason to believe that the assault has been committed, though not within his view, and that by reason of the recent commission of the offense a warrant could not have been obtained for the apprehension of the offender; also, all persons found committing any offense punishable, either upon indictment, or as a misdemeanor upon summary conviction, by virtue of the statute.

Any person, also, found committing an offense punishable, upon indictment, or as a misdemeanor upon summary conviction, by virtue of the Metropolitan Police Act, may be apprehended by the owner of the property, on or with respect to which the offense shall be committed, or by his servant, or any person authorized by him, and may be detained until he can be delivered into the custody of a constable, to be dealt with according to law (ss. 63, 66). In order to justify a private individual in arresting and detaining an offender within the 66th section, the latter must be actually "found committing" the offense, and must be taken *flagrante delicto*; it is not enough to show that he had committed the offense,

however recently. If the offense be, that the party has knocked and rung at a dwelling-house, to the disturbance of the inmates, and the offender has ceased to knock and ring, and has walked away, whether a yard or a quarter of a mile it matters not, he is not within the words or the policy of the section, which only applies where the offender is arrested in the course of committing the offense, and it is necessary to apprehend him in order to prevent a continuance of the nuisance. (*b*)

817. *Arrest by servants of railway companies.*—Many Acts of Parliament, under which railway companies are incorporated, authorize any officer or agent of the company to seize and detain any person whose name and residence shall be unknown, who shall commit any offense against the act, and to convey him with all convenient dispatch before some justice, &c., without any other warrant or authority than that given by the act. These statutes do not authorize railway companies, their officers or agents, to take a person into custody, or to detain him, for riding in a first-class carriage with a second-class ticket, or for riding in a carriage without a ticket, or for refusing to pay his fare when it is demanded, or for mere acts of omission, or offenses against by-laws. (*c*) By 8 Vict. c. 20, ss. 103, 104, a penalty is imposed upon any person traveling on a railway without having paid his fare, with intent to avoid payment thereof, and power is given to all officers and servants, on behalf of the company, to apprehend such person until he can conveniently be taken before a justice. In the ordinary course of affairs, the company must determine whether they will submit to what they believe to be an imposition, or use this summary power for their protection; and as the decision whether a particular passenger shall be arrested or not must be made without delay, it must be presumed that the officers of the company charged with the management of traffic have authority to determine whether passengers are to be taken into custody for this offense; and if by mistake an innocent person is apprehended by order of

(*b*) *Simmons v. Millingen*, 2 C. B. 533.
 (*c*) *Chilton v. Lond. and Croydon Rail. Co.*, 16 M. & W. 231. *Tollemache v. Lond. and S.-West. Rail. Co.*, 26 Law

T. R. 222. *Goff v. Gt. North. Rail. Co.*, 30 Law. J., Q. B. 148. See *Poulton v. Lond. and S.-Weston Rail. Co.*, *post*.

a superintendent, the company will be answerable for the wrong done. (*d*) Pulling down boards set up by the company, and other injuries to their property, seem to be offenses for which persons found in the commission of them are liable to be at once taken into custody, and carried before a magistrate.

818. *Detention of recruits and deserters.*—The Articles of War do not justify the arrest and detention by an officer or any but a recruit or a soldier. The annual Mutiny Act generally enacts, that every person who shall knowingly receive enlistment-money from certain persons employed in the recruiting-service “shall be deemed to be enlisted as a soldier in Her Majesty’s service.” (*e*) If a person apprehended as a deserter turns out to be a civilian, and not a recruit or soldier, the parties who apprehended him, or ordered or procured his imprisonment, will be responsible in damages for the wrong done, for none are bound by the Mutiny Act or the Articles of War except Her Majesty’s forces.¹

819. *Imprisonment of dangerous lunatics.*—A private person may, without any warrant or authority, confine a person disordered in his mind, who seems disposed to do mischief to himself or to any other person, (*f*) the restraint being necessary both for the safety of the lunatic, and the preservation of the public peace; but as the custody of those unfortunate persons is matter of great public interest, the legislature has, by a series of enactments, established appropriate tribunals and forms of proceeding for ascertaining their exact mental condition, and imposing the necessary restraint upon their actions, under the supervision of public functionaries.

The 8 & 9 Vict. c. 100, and 16 & 17 Vict. c. 96, (*g*) establish a form of proceeding, based upon medical certificates, for the purpose of facilitating the reception of persons of unsound mind, who are dangerous to themselves or to others, in asylums where they are to be properly restrained and treated. If the forms of proceeding prescribed by this Act

(*d*) Goff v. Gt. North. Rail. Co., *ut* pl. 28.

sup.

(*e*) See Wolton v. Gavin, 16 Q. B. 48. P. 109.

(*g*) See Gore v. Grey, 33 Law J., C.

(*f*) Bro. Abr. FAUX IMPRISONMENT,

¹ A private person can not arrest a deserter. Trask v. Payne, 43 Barb (N. Y.) 569.

are not strictly complied with, the imprisonment is unlawful. (*h*) The fact of a person's acting so as to appear to be of unsound mind is no justification to another for locking him up as a lunatic, without compliance with the requisite form of proceeding. It must be proved that the person imprisoned was, at the time the restraint was put upon him, a dangerous lunatic. The statutes now in force as to the certificates required to be made by the friend of a supposed lunatic and the medical men, protect every person acting in pursuance of the Act, except the person signing the order for the confinement of the lunatic. The certificates of all the doctors and physicians in the world will not justify one person in taking and confining another as a lunatic, unless it be proved that the person confined was really a dangerous madman, or unless the person justifying the imprisonment is the medical man, or the keeper of the asylum, or his servant, entitled to statutory protection. (*i*)

SECTION III.

OF ACTIONS FOR AN ASSAULT AND BATTERY, AND FOR FALSE IMPRISONMENT. (*j*)

820. *Statutory protection to constables and their assistants from vexatious actions.*—By 7 Jac. 1, c. 5, and 21 Jac. 1, c. 12, s. 5, it is enacted, that if any action upon the case, trespass, battery, or false imprisonment, shall be brought against constables, their deputies or assistants, for or concerning any matter by them done by virtue of their offices, the said action shall be laid within the county where the trespass or fact shall be done or committed, and not elsewhere and that it shall be lawful for such constables, &c., to plead the general issue, not guilty, and to give any special matter discharging them from liability in evidence to the jury and that if upon the trial of any such action the plaintiff shall not prove to

(*h*) Coleridge, J., Reg. v. Pinder, 24 Law J., Q. B. 148. Reg. v. Munster, 20 1b M. C. 48. Norris v. Seed, 3 Exch. 782.

(*i*) Fletcher v. Fletcher, 28 Law J., Q. B. 134.

(*j*) See 30 & 31 Vict. c. 142 s. 10 *ante*.

the jury that the trespass, battery, imprisonment, or other fact or cause of action, was committed or done within the county wherein the action shall be laid, the jury shall find the defendant not guilty, without regard to any evidence on the merits.

By the 1 & 2 Wm. 4, c. 41, providing for the appointment of special constables, it is enacted (s. 19), for the protection of persons acting in execution of the Act, that all actions and prosecutions to be commenced against any person for anything done in pursuance of the Act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give the Act and the special matter in evidence at the trial; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before action brought, or if a sufficient sum of money shall have been paid into court after action by or on behalf of the defendant.

The Municipal Corporations Act, 5 & 6 Wm. 4, c. 76, regulating the appointment of constables for boroughs, further provides (s. 76), that the men sworn as such constables shall not only within the borough, but also within the county in which the borough or any part thereof is situate, and in any county within seven miles of the borough, have all such powers and privileges, and be liable to all such duties and responsibilities, as any constable duly appointed then had, or thereafter might have, within his constablewick by virtue of the common law, or of any statutes made or to be made; and s. 113 contains the usual clause for the protection of persons acting in execution of the Act, making all actions against such persons triable only in the county where the act was done, limiting them to six months from the accrual of the cause of action, making one calendar month's notice of action essential, and enabling the defendant to plead the general issue, and give any special matter of justification or excuse in evidence at the trial, and prohibiting the plaintiff from recov-

ering after tender of sufficient amends before action, or payment of a sufficient sum into court after action.

By 2 & 3 Vict. c. 71, for regulating the police courts of the metropolis, it is enacted (s. 53), that no action, suit, information, or other proceeding, shall be brought against any person for anything done, or omitted to be done, in pursuance of the Act, or in the execution of the powers thereof, unless twenty days' previous notice in writing shall be given, nor unless the action shall be commenced within three calendar months next after the act committed, or, in case of continuing damage, within three calendar months next after such damage has ceased, nor unless the actions, &c., shall be brought in the county of Middlesex. And see s. 52.

And by 2 & 3 Vict. c. 93, for the establishment of county and district constables, it is provided (s. 8) that the chief constable, and other constables appointed under that Act, shall have all the powers, privileges, and duties throughout the county, and in all liberties, franchises, and detached parts of counties locally situate within the county, and also in any adjoining county which any constable has within his constablewick, by virtue of the common law, or any statute made or to be made, (~~k~~) and every protective provision of the 1 & 2 Wm. 4, c. 41, is to be deemed to extend to the constables appointed under that Act. This last-mentioned statute is amended by 2 & 3 Vict. c. 93, which provides for the consolidation of county and borough police establishments, and of their mutual powers, privileges, and duties throughout counties and boroughs; and the 19 & 20 Vict. c. 69, for rendering more effectual the police in counties and boroughs, makes (s. 15) further provision for the consolidation of county and borough police, their powers, privileges, duties, and responsibilities; and by 20 Vict. c. 2, s. 4, the statutes 2 & 3 Vict. c. 93, 3 & 4 Vict. c. 88, and 19 & 20 Vict. c. 69, are to be construed together as one Act.

821. *Protective clauses in favor of parties acting in the execution of Acts of Parliament.*—Most Acts of Parliament conferring special powers and authorities upon constables and others for the accomplishment of particular purposes, contain the usual protective clauses for the benefit of persons acting

(~~k~~) See *Mellor v. Leather*, 1 Ell. & Bl. 623.

in the execution of the Act; making the cause of action local, and requiring the action to be commenced within a certain limited period, and notice of action to be given; and enabling the defendant to plead the general issue, and give the special circumstances of justification in evidence; and prohibiting the plaintiff from recovering after tender of amends. This is the case with the annual Mutiny Act, the Larceny Act, (*l*) the Malicious Trespass Act, the Metropolitan Police Act, the Game Acts, the Statute for the Prevention of Cruelty to Animals, (*m*) the Revenue, Excise, and Customs Acts, the Public Health Act, the Contagious Diseases (Animals) Act, 1869, (*n*) and various statutes, enabling constables and private individuals to arrest persons found in the commission of a felonious or prohibited act.

822. *Limitation of actions, and notice of action.*—Protective clauses in Acts of Parliament in favor of constables and officers acting in the execution of their offices, or in favor of constables or of private individuals acting in the execution or in pursuance of particular Acts of Parliament, are intended for the benefit of those who want to act rightly, but have by mistake done wrong. It has been frequently observed by the courts, that the notice which is directed to be given to constables and officers before actions brought against them, is of no use to them when they have acted within the strict line of their duty, and was only required for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceeded it. (*o*) “The object,” observes Lord ELLENBOROUGH, “clearly is to protect persons acting illegally, but in supposed pursuance, and with a bona fide intention, of discharging their duty under the Act of Parliament. Where the law is not exceeded the protection is not required.” (*p*) “It is not wanted,” observes JERVIS, C. J., “by those who are in the right, and have a perfect justification under the Act of Parliament, but by those who are in the wrong, in order that they may have an opportunity of tendering amends. If the defendant bona fide believed that

(*l*) 24 & 25 Vict. c. 96, s. 113. See 32 & 33 Vict. c. 12, s. 10; c. 57, s. 6.

(*m*) Hopkins v. Crowe, 4 Ad. & E. 774.

(*n*) 32 & 33 Vict. c. 70, ss. 110–113.

(*o*) Per Ld. Kenyon, C. J., Greenway v. Hurd, 4 T. R. 555.

(*p*) Theobald v. Crichmore, 1 B. Ald. 229.

he was acting in pursuance of the statute, and in the exercise of a legal right, that is all that is necessary to entitle him to notice of action. It is not necessary that he should know the Act, chapter, and verse." "Whether he had reasonable grounds for believing," further observes MAULE, J., "that he was acting in pursuance of the statute, may be very fit to be considered when the question is as to his bona fides, for a case may be supposed, where there is such a want of reasonable ground for belief as to negative his bona fides." (q) In order to establish a claim to the statutory protection, it must appear that the act done was of that nature and description that the person doing it might reasonably suppose that the Act of Parliament gave him authority to do it. (r) Where there is no reasonable ground for supposing that the act done is authorized, the party is not protected by the statute, and notice of action is not requisite. (s)

Where the owner of property, injured by the act of another, bona fide supposes that he has a right to give the person injuring his property into custody, and there is a fair color for the proceeding, he is entitled to notice of action, though he was altogether mistaken in the assertion of his rights, and can not justify the trespass under the statute. (t) The protection afforded by the statute is not confined strictly to the owner of the property injured, but is extended to all persons who had a bona fide belief, founded on some grounds, that they filled the character mentioned in the statute, and acted under that belief. (u) If the plaintiff was found in the act of committing a malicious trespass, and the defendant had reasonable ground for believing that he had authority from the owner of the property to interfere, and take or give the plaintiff into custody, the defendant will be entitled to notice of action. (v) But as the statute only authorizes the arrest

(q) *Read v. Coker*, 22 Law J., C. P. 205; 13 C. B. 861. *Booth v. Clive*, 10 C. B. 827; 2 L. M. & P. 283. *Jones v. Howell*, 29 Law J., Exch. 19. *Smith v. Hopper*, 9 Q. B. 1014. *Cox v. Reid*, 13 Q. B. 558.

(r) *Rudd v. Scott*, 2 Sc. N. R. 633. See *Chamberlain v. King*, *post*.

(s) *Cook v. Leonard*, 6 B. & C. 356. *Fermann v. Seneschall*, 13 C. B., N. S.

392; 32 Law J., C. P. 43. See *Leete v. Hart*, *post*.

(t) *Beachy v. Sides*, 9 B. & C. 809. *Norwood v. Pitt*, 29 Law J., Exch. 127.

(u) *Hughes v. Buckland*, 15 M. & W. 346. *Horn v. Thornborough*, 3 Exch. 849. *Chamberlain v. King*, L. R., 6 C. P. 474.

(v) *Kine v. Evershed*, 10 Q. B. 150.

of persons "found committing an offense within the statute," the defendant must, if the plaintiff was not taken *flagrante delicto*, show that a malicious trespass had been committed; that the plaintiff was on the spot; that there was reasonable ground for believing that the mischief was still going on, and that the plaintiff was the author or instigator of it. (*w*)

"Several decisions have established that *bona fides* is not alone sufficient to bring a case within the privileges of these Acts of Parliament." (*x*) If there is no pretense or color for the notion that the injurious act was done in execution of the statute under which the defendant shelters himself, he could have had no fair and reasonable ground for supposing that he was privileged and protected, and can not, consequently, claim protection. (*y*) "It would be wild work," observes WILLIAMS, J., "if a party might give himself protection by merely saying that he believed himself to be acting in pursuance of a statute. Still, protecting clauses of this sort would be useless if it were necessary that the person claiming the benefit of them should have acted quite rightly. The cases to which they refer must lie between a mere foolish imagination and a perfect observance of the statute." (*z*) And it is now quite settled, that if the defendant honestly believes in the existence of a state of things, which, if it had existed, would have justified his doing the acts complained of, he is entitled to notice, and the reasonableness of his belief, provided some grounds exist for an honest belief, is not material. (*a*)

When the privilege is accorded to a person who fills a particular character and situation, the defendant, who claims the privilege on the ground that he acted in good faith on the belief that he was clothed with the official character, must show some reasonable ground for his belief. A general persuasion that the defendant had the power he claimed to exercise will not entitle him to the privilege, but a mistaken

(*w*) *Cann v. Clipperton*, 10 Ad. & E. 588. *Dallinger v. Ferris*, 1 M. & W. 631. See *Chamberlain v. King*, *infra*.

(*x*) *Ld. Denman, C. J., Smith v. Hopper*, 9 Q. B. 1014. *Cook v. Leonard*, 6 B. & C. 351. *Home v. Grimble, Car. & M.* 23.

(*y*) *Shatwell v. Hall*, 10 M. & W. 525. *Eliot v. Allen*, 1 C. B. 37.

(*z*) *Cann v. Clipperton*, 10 Ad. & E. 589. *Hopkins v. Crowe*, 4 Ad. & E. 777. See *Leete v. Harte*, L. R., 3 C. P. 322.

(*a*) *Chamberlain v. King*, L. R., 6 C. P. 474.

opinion on any of the facts which must exist to give him the power will not deprive him of his right to the protection of the statute. (b) If, as a reasonably reflecting and careful person, he must have known that he was not clothed with the requisite official character, he has no ground for claiming the protection of notice of action. (c)

823. *Notice of action to persons acting in execution of the Larceny Act.*—By 24 & 25 Vict. c. 96, s. 113, (d) it is enacted that all actions for anything done in pursuance of that Act shall be laid and tried in the county where the fact was committed, and shall be commenced within six months after the fact committed, and notice in writing of such action and of the cause thereof shall be given to the defendant one month at least before the commencement of the action, and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before the action is brought. An ordinary arrest for felony is not a thing done under the power or authority of this Act, but by virtue of the common law, which authorizes the arrest by private individuals of persons reasonably suspected of felony. Several new offenses are, however, created and made criminally punishable by this statute, and sect. 103 (e) enacts that any person found committing any offense punishable either upon indictment or summary conviction by virtue of the Act, except only the offense of angling in the daytime, may be immediately apprehended without warrant by any person, and forthwith taken, together with such property, if any, before some neighboring justice of the peace, to be dealt with according to law. To entitle a person to notice of action in respect of an arrest made under this section, it must be shown that at the time of the arrest he believed that the offense had been committed, and believed that he had found the person arrested in the act of committing it. (f) Where, therefore, the offense, if any, was committed at 1 P. M., and the pursuit of the supposed offender not commenced till 3 P. M., it was held that the person arresting was not entitled to notice. (g)

(b) *Kine v. Evershed*, 10 Q. B. 150.

(c) *Lidster v. Borrow*, 9 Ad. & E. 654.
Booth v. Clive, 10 C. B. 835.

(d) See 32 & 33 Vict. c. 12, s. 10; c. 57, s. 6.

(e) See 32 & 33 Vict. c. 12, s. 10

(f) *Roberts v. Orchard*, 2 H. & C. 769; 33 Law J., Exch. 65.

(g) *Downing v. Capel*, L. R., 2 C. P. 461. See *Leete v. Hart*, *supra*.

824. Notice of action to persons acting in execution of the Metropolitan Police Act.—The 79th section of the Metropolitan Police Act, 2 & 3 Vict. c. 47, enacts that that Act is to be construed as one Act with the 10 Geo. 4, c. 44, the 41st section of which provides that notice of action must be given to all persons acting in the execution of that Act. If, therefore, a person has reasonable grounds for believing that he is entitled to arrest a person found committing an act prohibited by the Metropolitan Police Act, he is entitled to notice of action. (*h*)

825. Persons entitled to the benefit of the protection.—A person who acts as a prime mover and principal in setting a constable in motion, who commands the constable, instead of being commanded by the latter, is not acting in aid of such constable, and is not entitled to the benefit of the statute; (*i*) but he who acts only when required by the constable to assist him, is within the protecting clauses of the statutes.¹

826. Length of notice of action.—By 5 & 6 Vict. c. 97, s. 4, it is enacted that in all cases where notice of action is required to be given, such notice shall be given one calendar month at least before any action shall be commenced, and such notice shall be sufficient, any Act to the contrary thereof notwithstanding. In the computation of the calendar month, the day of giving the notice and the day of suing out the writ are to be both excluded, for otherwise the intervening period is not a whole month as required by the statute. (*j*) In the computation of time, the day of an act done or an event happening is to be excluded, for our law rejects fractions of a day. Therefore the act and the day are co-extensive, and the act can not properly be said to be passed until the day is passed. (*k*)

827. Statement of the cause of action.—A notice of action against a constable or officer should set forth the substantial ground of complaint against him, and should specify the

(*h*) *Danvers v. Morgan*, 1 Jur., N. S., Exch, 1051.

(*i*) *Staight v. Gee*, 2 Stark. 449. See *post*.

(*j*) *Young v. Higgon*, 6 M. & W. 49.

(*k*) *Lester v. Garland*, 15 Ves. 248.

Webb v. Fairmaner, 3 M. & W. 476. See per Lord Kenyon, C. J., in *Ex parte Fallon*, 5 T. R. 286.

¹ *Coyles v. Hartin*, 10 Johns. (N. Y.) 85.

time and place of the commission of the grievance. (*l*) If the notice contains a reference to a wrong statute, the wrong reference may be rejected, as a reference to the statute requiring notice to be given is not an essential part of the notice; (*m*) but the court in which the action is brought, if stated at all, should be correctly stated, particularly if several notices of action have been served. (*n*) It is not necessary in the notice to name all the persons meant to be made parties to the action, nor to express whether it is intended to be brought against several persons jointly, or against one person only, (*o*) but every plaintiff who sues must give notice of action, and every defendant must receive notice. Notice on behalf of two complaining parties, one of them being dead, was held not to support an action brought by the survivor. (*p*) It is quite sufficient if the notice affords plain and substantial information of the cause of action; it is not necessary to describe in specific words precisely how the injury took place; nor is it in all cases material to state precisely where the cause of injury arose. (*q*) When the statute requires the name and place of abode of the attorney of the party giving the notice to be endorsed on the notice, any material error or misstatement calculated to mislead will invalidate the notice; but if the information given is sufficiently specific and sufficiently accurate to enable the defendant to avail himself of the privileges and advantage that the act intended to confer upon him, it will be sufficient, and it is for the defendant to show that the error or misstatement, or insufficient description in the notice, has deprived him of the opportunity of taking advantage of the statute. (*r*) The Christian name of the attorney need not be written out at full length, (*s*) nor need his private residence be specified; for the place where an attorney abides for the purpose of carrying on his business is his place of abode within the meaning of the statute. "Either will do, the place of resi-

(*l*) Breese v. Jerdein, 4 Q. B. 585. Martins v. Upcher, 3 Q. B. 668. Taylor v. Nesfield, 23 Law J., M. C. 169. Jones v. Nicholls, 13 M. & W. 361. See Burton v. Le Gros, 34 Law J., Q. B. 91.

(*m*) MacGregor v. Galsworthy, 1 C. & K. 8.

(*n*) Elstob v. Wright, 3 C. & K. 35.

(*o*) Bax v. Jones, 5 Pr. 168.

(*p*) Pilkington v. Riley, 3 Exch. 741.

(*q*) Jones v. Bird, 1 D. & R. 503; 5 B. & Ald. 837.

(*r*) Osborn v. Gough, 3 B. & P. 554.

(*s*) James v. Swift, 3 B. & C. 681.

dence or the place of business." (t) Care must be taken to address the notice to the right parties, and to serve it in the proper quarter. (u)

828. *Tender of amends*.—The statutes, requiring notice of action to be given, further provide, generally speaking, that no plaintiff shall recover for any wrongful proceeding in execution of the act, if tender of sufficient amends shall have been made before action brought, and that if the jury at the trial are of opinion that the plaintiff is not entitled to damages beyond the sum tendered or paid into court, they are to give a verdict for the defendant, and the plaintiff can not elect to be nonsuited.

829. *Payment of money into court*.—Every constable, officer, and private person who is entitled to the ordinary statutory protection, may, after action commenced, and before issue joined, pay money into court, and give evidence of such payment under the plea of not guilty by statute; and if at the trial the jury are of opinion that the plaintiff is not entitled to damages beyond the sum paid into court, they are bound to give a verdict for the defendant, and the plaintiff can not elect to be nonsuited, and the defendant's costs are to be paid out of the money paid into court. If the plaintiff accepts such money in satisfaction of the damages, it is to be paid out of court to him, and the defendant is to pay him his taxed costs, and thereupon the action is to be determined. (v)

830. *Parties to be made plaintiffs—Master and servant*.—The person actually assaulted is in general the only person who can maintain an action for damages, unless the assault has caused his death, in which case the action, if maintainable, must be brought by his personal representative; or unless the person assaulted is a servant, and the master has lost the benefit of his service by reason of the assault, in which case an action for damages is maintainable both by the servant and the master; but the master can not have an action for the beating unless the battery is so great that, by reason thereof, he loses the services of his servant, but the servant himself, for every small battery, shall have an action; and the reason of the difference is, that the master has not any damage by

(t) *Roberts v. Williams*, 4 Dowl. P. C. 486; 2 C. M. & R. 561.

(u) *Hilder v. Dorell*, 1 Taunt. 384.

(v) See II & 12 Vict. c. 41, s. 9, II.

the personal beating of his servant, but by reason of the loss of service. (*w*)

Where two have a joint interest, they may, as we have seen, join in the same action, but they can not do so where the wrong done to one is no wrong done to the other, as in the case of false imprisonment, or assault and battery, where what one man suffers is altogether different from the injury that accrues to another from the same cause. (*x*)

831. *Of the parties to be made defendants.*—Every private unofficial person not acting in a judicial capacity, or in the authorized execution of legal process (*post*, chs. 14, 15), is responsible in damages for a wrongful imprisonment, ordered, directed, or authorized by him. (*y*) He is not responsible for the orders or decrees of judges, and justices, before whom he has laid a complaint or made a charge; but if he officiously interferes and gives orders or directions to police constables for the imprisonment of the plaintiff, he will be responsible in damages if he is unable to excuse or justify the act. Where the defendant out of spite and ill-will, and for the purpose of getting the plaintiff out of the way, went to the place of rendezvous for the impress service near the Tower, and gave information there which caused the plaintiff to be seized by the press-gang and carried on board the tender, where he was detained until it was discovered that the information was false, and that he had never been in a ship before, it was held that the defendant was liable to an action for false imprisonment. “If a person,” observes Lord ELLENBOROUGH, “causes another to be impressed, he does it at his own peril, and is liable in damages if that person proves not to have been subject to the impress service. If the defendant in this case had said that she believed the plaintiff had been a sailor, and was liable to be impressed, leaving it to the officer of the press-gang to make the necessary inquiries, and to act as he should think most advisable, she would not then have been amenable to this action, but she took upon herself positively to aver that the plaintiff was compellable to serve in a king’s ship, and caused him to be seized, and she must answer for

(*w*) Robert Mary’s case, 9 Co. 205.

Moore, 451.

(*x*) Best, C. J., Barratt v. Collins, 10

(*y*) *Ante*.

the consequences." (z) Here the person giving the information was the sole moving cause of the arrest, and herself trumped up a false story for the very purpose of wrongfully depriving the plaintiff of his liberty. There is a wide distinction, therefore, between this case and the case of a man who gives bona fide information, or makes a bona fide charge against another to a police constable, leaving the constable to make inquiry into the circumstances, and act as he may think fit in the matter.

Where a felony had been committed in the house of the defendant, and the latter sent for the police and complained of the robbery, and stated various circumstances of suspicion which had come to his knowledge, and the policeman made inquiry into those circumstances, and on his own authority arrested the plaintiff and took him to a police-station, and at the same time requested the defendant to come to the station and sign the charge-sheet, which he did, charging the plaintiff with the felony, it was held that these facts did not render the defendant responsible for a trespass, as charging a person with an offense was a different thing from giving him into custody. "The arrest and detention of the plaintiff," observes POLLOCK, C. B., "were the acts of the police-officer; and the defendant did nothing more than he was, under the circumstances, bound to do, viz., sign the charge-sheet. He might have been liable if he had acted *mala fide*, but not otherwise. We ought to take care that people are not put in peril for making a complaint when a crime has been committed. If a charge be made *mala fide*, there are ample means of redress." (a) But if the defendant gives the plaintiff in charge, (b) or directs the policeman to take him into custody, he will be answerable in damages for the imprisonment if he can not establish a justification, (c) and the signing of a charge-sheet by the defendant is *prima facie* evidence against him that he ordered and directed the arrest. (d)¹

(z) *Flewster v. Royle*, 1 Campb. 188.

(a) *Grinham v. Willey*, 4 H. & N. 499; 28 Law J., Exch. 242. *Brown v. Chapman*, 6 C. B. 374.

(b) *Hopkins v. Crowe*, 4 Ad. & E. 774. *Wheeler v. Whiting*, 9 C. & P. 262.

(c) *Warner v. Riddiford*, 4 C. B., N. S. 200. *Ashurst, J.*, in *Morgan v. Hughes*, 2 T. R. 231. *Stonehouse v. Elliot*, 6 Ib. 315.

(d) *Harris v. Dignum*, 39 Law J., Exch. 23.

¹ Where there is not probable cause for the arrest of a person on a criminal war-

Al. persons aiding and assisting in the unlawful confinement of another are responsible in damages for the trespass, although they had nothing to do with the original arrest, and had no knowledge that the arrest and imprisonment were unlawful at the time they had a hand in it. (*e*)¹

If a person has been arrested and imprisoned under the authority of legal process which has been set aside as irregular, both the attorney who sued out the process and the client who set the attorney in motion, are responsible in damages in an action for an assault and false imprisonment; for as the client gives to the attorney the right to represent him in the conduct of a cause, he is responsible for whatever the attorney does within the scope of his authority. The writ is a justification to the officer of the court who acted under it, and he had no option but to obey it (*post*, ch. 14), but it is no protection, after it has been set aside, to the attorney who sued it out, (*f*) or to the client who set the attorney in motion. (*g*) But a person causing process to be issued is not responsible for anything that is done under it where the process is afterwards set aside, not for irregularity, but for error. In the one case a man acts irregularly and improperly, without the sanction of any court. He therefore takes the consequences of his own unauthorized act. But where he relies upon the judgment of a competent court he is protected. (*h*) And so if a judgment, regularly signed, be acted on, and the plaintiff taken on a ca. sa. issued under it, the defendant will not be liable if the judgment be set aside, nor for irregularity

(*e*) Griffin v. Coleman, 28 Law J., & N. 361.
Exch. 137; 4 H. & N. 265.

(*f*) Parsons v. Lloyd, 2 W. Bl. 844.

(*g*) Barker v. Braham, 2 W. Bl. 865;
post, ch. 17, s. 2. Collett v. Foster, 2 H.

(*h*) Williams v. Smith, 14 C. B., N. S.
596. Cooper v. Harding, 7 Q. B. 928.
Phillips v. Biron, 1 Str. 509.

rant, both the complainant and the magistrate must be held liable for false imprisonment. Wilson v. Robinson, 6 How. Pr. (N. Y.) 110; Comfort v. Fulton, 13 Abb. Pr. (N. Y.) 276; Francisco v. State, 24 N. J. 30; Curry v. Pringle, 11 Johns. (N. Y.) 444; Garvin v. Blocker, 2 Brev. (S. C.) 157; Woodard v. Washburn, 3 Den. (N. Y.) 369; Green v. Rumsy, 2 Wend. (N. Y.) 611.

¹ A person who aids or abets an unlawful arrest is liable for false imprisonment, although not present Stavel v. Lawrence, 3 Day (Conn.) 1; Clifton v. Grayson, 2 Stew. (Ala.) 412; Floyd v. State, 12 Ark. 43; Stoddard v. Bird, Kirby (Conn.) 65. So when a person *abuses* a lawful power or process. Pease v. Burt, 3 Day (Conn.) 485.

or bad faith on the part of the defendant, but in the exercise of the equitable jurisdiction of the court, because judgment has been signed for too much, and as a favor to the plaintiff. (*i*)

832. *Liability of a corporation to an action for an assault.*—

An action for an assault and battery will lie against a corporation whenever the corporation can authorize the act to be done, and it has been done by their orders or authority. (*j*) But it is otherwise if the corporation can not legally authorize the act to be done. Where, therefore, a station-master arrests a person traveling by a railway in charge of a horse, for not paying for the carriage of the horse on demand, and there was no power in the railway company by law to arrest a person for such non-payment, but only to detain the goods, it was held that no authority could be implied to the station-master, and that the railway company were not responsible. (*k*) So if a foreman porter, in temporary charge of a station, or a ticket clerk, arrests a servant of the company, or a stranger, on a charge of stealing the company's goods, or robbing the till, as they have no implied authority so to arrest, the company are not responsible for it. (*l*) So where one of the defendant's servants, a constable, after the conclusion of a scuffle in a station yard, wrongfully gave the plaintiff into custody, and all that the constable was authorized by the regulations of the company to do, was to interfere in any fight or affray occurring at any of the stations, for the purpose of stopping it, it was held that the company were not responsible. (*m*) On the other hand, where the plaintiff, who refused to show his ticket, was removed from the station with unnecessary violence, by order of the inspector, the company were held responsible. (*n*)

833. *Subsequent ratification of wrongful imprisonment rendering the ratifying party responsible for the wrong.*—An action will lie against every person who has ratified and adopted an act of imprisonment effected or ordered by his servant or

(*i*) *Smith v. Sydney*, L. R., 5 Q. B. 203.

(*j*) *Goff v. Gt. North. Rail. Co.*, 30 Law J., Q. B. 148.

(*k*) *Poulton v. Lond. and S. Western Rail. Co.*, L. R., 2 Q. B. 534.

(*l*) *Edwards v. L. & N. W. Rwy., L.*

R., 5 C. P. 445. *Allen v. L. & S. W. Rwy.*, L. R., 6 Q. B. 65.

(*m*) *Walker v. South-Eastern Rwy. L. R.*, 5 C. P. 640.

(*n*) *S. C.*

agent for his use and benefit, although the imprisonment was effected in the first instance without his knowledge. "But he that agreeth to a trespass after it be done, is no trespasser unless the trespass was done to his use or for his benefit, (o) and then his agreement subsequent amounteth to a commandment." (p) An imprisonment of a person liable to a railway company for not having paid his fare is an act for the benefit of the company, which may be ratified by the company. (q)

834. *Declarations for an assault and false imprisonment.*—The venue or county where an action for an assault and false imprisonment is to be tried, must be stated in the margin of the plaintiff's declaration of his cause of action, (r) and the venue is local and must be laid, as we have seen, within the county where the trespass or wrong was done, in all actions against justices of the peace, mayors, bailiffs, constables, tax-collectors, churchwardens, overseers and their deputies, and other public officers, for anything done by them touching or concerning their offices, (s) and in all actions for anything done under the Malicious Trespass Act. (t) When the action is brought pursuant to a notice of action and the action is not maintainable without notice of action, the declaration must disclose the same cause of complaint as is contained in the notice. (u)

The short form of declaration in a common case of false imprisonment given in the schedule of the Common Law Procedure Act, 15 & 16 Vict. c. 76, merely alleges "that the defendant assaulted and beat the plaintiff, gave him into custody to a policeman, and caused him to be imprisoned in a police office."

835. *What may be given in evidence under the plea of not guilty.*—Under the plea of not guilty in an action for an assault, or battery, or wounding, those facts only can be given

(o) See *Walker v. South-East. Rwy.*, *supra*.

(p) 4 Inst. 317.

(q) *East. Counties Rail. Co. v. Broom*, 6 Exch. 327. *Goff v. Gt. North Rail. Co.*, *ut sup.*

(r) Reg. Gen. Hil. T. 16 Vict.; 1 Ell. & Bl. App. lxxix. R. 4.

(s) 21 Jac. 1, c. 12, s. 5. Touching or

concerning their offices means, that they were intending to act under color of their office, although by error and mistake they did not in point of fact do so. *Staight v. Gee*, 2 Stark. 448, *ante*; and see *post*, ch. 15.

(t) See *Thomas v. Saunders*, 5 B. & Ad. 462.

(u) *Elstob v. Wright*, 3 C. & K. 39.

in evidence which tend to show that the defendant did not do the act complained of. (*v*) Any defense which admits the trespass and seeks to show the fact of its being excusable by some accident, or justifiable, is matter for a special plea. (*w*) If the act complained of has been done by the leave and license or permission of the plaintiff, it is not an assault, and the leave and license may consequently be given in evidence under the plea of not guilty. If two persons agree to play at cricket together, and the one strikes the other with the ball in the course of the game, this is not an assault, for "it is a contradiction in terms to say that the defendant assaulted the plaintiff by the leave and license or permission of the latter." (*x*)

If two persons proceeding through the streets on foot or on horseback, or driving carriages and horses, run or drive against each other, the question as to which of them caused the collision, or struck the person of the other, is raised by the general issue of not guilty. (*y*) If both are in fault and both caused the collision, so that it is impossible to fasten the wrong and injury exclusively upon the one or the other, the evidence tending to establish such a state of facts is likewise admissible under the plea of not guilty. If the act complained of is the exclusive act of the defendant; if he drives against a horse or carriage which is standing still in the street, or over a drunken man who is lying down on the road, or over a person who has fallen from the kerb or footway into the carriageway, and the defendant seeks to set up some excuse or justification on the ground that it was an inevitable accident, he must plead the facts specially on the record. (*z*) But if he seeks to show that the act was not his act, and that he was not a voluntary agent in the matter, the evidence pointing to such a result is admissible under the plea of not guilty. Thus, if a horse being suddenly frightened by a flash of lightning or clap of thunder runs away with his rider, and the latter loses all power and control over the animal, and is unable to guide him, the injuries inflicted by the un-

(*v*) *Pearcy v. Walter*, 6 C. & P. 232.

(*w*) *Hall v. Fearnley*, 3 Q. B. 921.

(*x*) *Christopherson v. Bare*, 11 Q. B.

(*y*) *Pearcy v. Walter*, 6 C. & P. 232.

(*z*) *Hall v. Fearnley*, 3 Q. B. 919.

Knapp v. Salisbury, 2 Campb. 500. *Cotterill v. Starkey*, 8 C. & P. 691.

governable horse under such circumstances are not injuries done by the rider, and the latter is in substance not guilty of committing them. (*a*) It may be proved, under the plea of not guilty, that the defendant is an officer of the Queen and government, and that the assault was committed by him whilst he was acting in discharge of his public duty as an officer carrying out the orders of his government. (*b*)

Every defense which goes to show that the imprisonment complained of was not the act of the defendant is admissible under the plea of not guilty; such as, that the defendant went before a magistrate and preferred his complaint to the magistrate, who thereupon issued his warrant for the apprehension of the defendant, (*c*) or that the defendant accused the plaintiff of embezzlement, and that the plaintiff insisted on having the charge investigated, and accompanied the defendant to a magistrate, who, on hearing the charge, ordered the plaintiff to be placed in the dock as a prisoner, to answer it, and detained him until the charge had been heard, and then dismissed him. (*d*)

836. *Not guilty by statute.*—Acts of Parliament containing clauses for the protection of persons intending to act in the execution of the statute provide, as we have seen, that the defendant may give the Act and the special matter in evidence under the general issue, and that the acts were done in pursuance or by the authority of the Act, and that if they shall appear to be so done, the jury shall find for the defendant. To enable a defendant to avail himself of the plea of guilty by statute, and to give special circumstances of justification or excuse in evidence under it, he must show that the act complained of was done under the authority and pursuant to the powers and provisions of the statute upon which he relies, (*e*) or if the privilege is given to persons holding certain offices, and being clothed with a certain official character, it must be shown that he had, in point of fact, been appointed to the office. (*f*) In every case in which a defendant pleads the general issue, intending to give

(*a*) *Gibbons v. Pepper*, 2 Salk. 637; 1 Ld. Raym. 38; 4 Mod. 404.

(*b*) *Buron v. Denman*, 2 Exch. 167.

(*c*) *Barber v. Rollinson*, 1 Cr. & M. 330. *West v. Smallwood*, 3 M. & W.

421.

(*d*) *Brown v. Chapman*, 6 C. B. 374.

(*e*) *Witham Nav. Co. v. Padley*, 4 B. & Ad. 69.

(*f*) *Bush v. Green*, 4 B. N. C. 49.

the special matter in evidence by virtue of an Act of Parliament, he must insert in the margin of the plea the words, "by statute," together with the year or years of the reign in which the Act of Parliament upon which he relies was passed, and the chapter and section of the Act, and must specify whether the Act is public or otherwise, or he will not be entitled to the benefit of the Act; and such memorandum must be inserted in the margin of the issue and of the nisi prius record. (*g*)

837. *Pleas setting forth a previous hearing and dismissal by magistrates.*—By 24 by 25 Vict. c. 100, s. 42 (which is for the most part a re-enactment of the 9 Geo. 4, c. 31, s. 27), it is enacted, that where any person shall unlawfully assault or beat any other person, two justices, upon complaint by or on behalf of the party aggrieved, may hear and determine such offense; and (s. 44) if the justices, upon the hearing of any such case of assault and battery upon the merits, where the complaint was preferred by or on behalf of the party aggrieved, shall deem the offense not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit punishment, and shall dismiss the complaint, they shall forthwith make out a certificate under their hands, stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred. And if any person (s. 45) against whom any such complaint shall have been preferred by or on behalf of the party aggrieved shall have obtained such certificate, or having been convicted shall have paid the whole amount adjudged to be paid, or suffered the imprisonment awarded, such party shall be released from all further proceedings, civil or criminal, for the same cause. If a certificate under this statute is relied upon as a defense, it must be specially pleaded, (*h*) and shown to have been granted on one of the grounds specified in the Act. (*i*) If the magistrate merely orders the accused to enter into recognizances to keep the peace and pay the recognizance fee, that will be no bar to an action within the 45th section. (*k*) Under 9 Geo. 4, c. 31,

(*g*) Reg. Gen. 16 Vict.; 1 Ell. & Bl. App. lxxxii.

(*h*) *Harding v. King*, 6 C. & P. 427.

(*i*) *Skuse v. Davis*, 10 Ad. & E. 639.

(*k*) *Hartley v. Hindmarsh*, L. R., 1 C. P. 553.

s. 27, if the plaintiff, after the defendant had been summoned before justices, and had appeared and pleaded "Not guilty," withdrew his complaint without offering any evidence, and the charge was dismissed, or if he gave notice that he did not mean to attend the hearing, and the defendant attended and claimed to have the information dismissed, the defendant was entitled to a certificate in the terms of the statute, which was a bar to any subsequent action for the same assault; (*l*) but this has been altered by the above statute, which requires the hearing to be on the merits, in order to entitle the defendant to the certificate. If the magistrate takes cognizance of the complaint and decides it to be frivolous, he is bound forthwith to grant a certificate that he has so decided. The granting or withholding the certificate by the magistrate is not discretionary. The defendant is entitled to it *de jure*, and whether the complainant was present or absent at the time of the grant of such certificate is wholly immaterial. (*m*) When the complaint has been once duly made before justices, it can not be withdrawn, and further proceeding upon it discontinued by arrangement between the parties, if the justices think fit to oppose such an arrangement. (*n*)

The word "forthwith," in s. 44 of the statute, does not mean that the certificate is to be granted forthwith upon the dismissal of the complaint by the magistrate, but forthwith upon the application of the party entitled to the certificate. It is not the duty of the magistrate to grant the certificate not being asked for it, but when the magistrate is asked for it he can not refuse it; it is a record merely of what he has judicially decided, and is demandable *ex debito justitiae*. If, therefore, justices refuse to grant the certificate on application made to them, the Court of Queen's Bench will grant a *mandamus* to compel them to do it. (*o*)

838. *Pleas of justification*.—When there are several distinct and separate assaults charged in the declaration, the defendant, by his plea of justification, must cover and answer

(*l*) *Tunnicliffe v. Tedd*, 5 C. B. 553. C. 196.

Vaughton v. Bradshaw, 9 C. B., N. S.

115. *Bradshaw v. Vaughton*, 30 Law J.,

C. P. 93.

(*m*) *Hancock v. Somes*, 23 Law J., M.

(*n*) *Reg. v. Hawkins*, 2 N. R., p. 62.

(*o*) *Costar v. Hetherington*, 28 Law J.,

M. C. 198, overruling *Rex v. Robinson*,

12 Ad. & E. 672.

the whole chain of trespasses, and show the circumstances leading to each assault; and exonerating the defendant from liability, (p) and if any one of the long series of wrongful acts is left unanswered, the plaintiff will be entitled to a verdict. (q) But where the attendant circumstances afford mere matter of aggravation and amplification of the original trespass, and do not in themselves constitute substantive trespasses, it is sufficient if the defendant justifies the principal act. (r)

When the trespass is a continuing trespass, consisting of a series of acts connected together, but extending over a considerable interval of time, the acts constituting the entire trespass are divisible, and the defendant may plead not guilty to, or traverse, some of them, and justify others. Where the plaintiff's declaration alleged that the defendant entered the plaintiff's house and stayed therein four days, and the defendant set up a justification entitling him to enter and stay two days, to which the plaintiff replied, denying his right to enter at all, but alleging that if he had the right, it was to stay two days only, and that he had stayed two days more without any color of authority, it was held that the trespass was divisible, and the replication good. (s) If there are divers counts in the plaintiff's declaration embracing divers assaults, and the defendant by his plea narrows them all to one assault, and justifies that, and the plaintiff takes issue, he is confined to the assault set forth in the plea. (t)

839. *Defense of neighbors and friends.*—If the assault complained of was committed by the defendant in the necessary and proper defense of a third party from the unlawful violence of the plaintiff, it is justifiable under a plea to the effect that the plaintiff first assaulted A B, being the child or relative, wife, husband, servant, apprentice, neighbor, or friend of the defendant, and was continuing to do so, whereupon the defendant laid his hands on the plaintiff to defend the

(p) *M'Curday v. Driscoll*, 1 C. & M. 618. *Stammers v. Yearsley*, 10 Bing. 35. *Noden v. Johnson*, 16 Q. B. 218.

(q) *Bush v. Parker*, 4 M. & Sc. 588; 1 B. N. C. 72.

(r) *Taylor v. Cole*, 1 H. Bl. 561.

(s) *Loweth v. Smith*, 12 M. & W. 582. *Worth v. Terrington*, 13 M. & W. 789.

(t) *Gale v. Dalrymple*, Ry. & M. 118.

said A B against the plaintiff, and to prevent him from further assaulting the said A B. (u)

840. *Moderate correction by parents, schoolmasters, masters of ships, &c.*—To an action of trespass for an assault and battery, it is a good plea to plead that the person assaulted was the son of the plaintiff, and was an infant within the age of twenty-one years, still domiciled under the paternal roof, and under the care and control of the plaintiff, that he behaved saucily and contumaciously to the plaintiff, and refused to obey his lawful commands, whereupon the plaintiff moderately and in a reasonable manner chastised his said son; (x) or that the plaintiff was the apprentice of the defendant, and conducted himself improperly and saucily, wherefore the defendant moderately chastised him, as he had a right to do; (y) or that the defendant was the head master of a school or college of which the plaintiff was a pupil, that the plaintiff was a member of a society or combination of pupils for purposes subversive of the discipline of the school, wherefore, &c.; (z) or that the defendant at the time of the assault was the captain of a merchant vessel trading to China, and the plaintiff was a mariner on board the vessel, serving under the orders of the defendant; that the plaintiff conducted himself in a mutinous and disorderly manner, and refused to obey the lawful and necessary commands of the defendant, whereupon the defendant caused the plaintiff to be moderately and properly corrected and flogged; (a) or that the plaintiff was a passenger by the ship of which the defendant was captain, and that by reason of the plaintiff's conduct it became necessary for the preservation of the discipline or for the safety of the ship to imprison him. (b) If the chastisement or imprisonment has been immoderate, the excess must be specially replied.

841. *Pleas of justification of imprisonment.*—If a man does any act which is *prima facie* a trespass, he must, unless the act were done under the authority of an Act of Parliament

(u) *Leward v. Baseley*, 1 Ld. Raym. 62; 1 Salk. 407; 3 Salk. 46.

(x) *Winterburn v. Brooks*, 2 C. & K. 16.

(y) *Penn v. Ward*, 2 C. M. & R. 338.

(z) *Fitzgerald v. Northcote*, 4 F. & F.

656. As to the powers of a schoolmaster generally, see *Ibid.* in notes, *post.*

(a) *Lamb v. Burnett*, 1 Cr. & J. 295.

(b) *Aldworth v. Stewart*, 4 F. & F. 957.

enabling the defendant to plead the general issue and give the special matter of justification in evidence under it, justify the act, by showing the authority under which he acted; as, for instance, if there be a judgment against a person, and process is issued to take him in execution, and the sheriff takes him on that process, he must show his authority for so doing.

(c) A plea of justification of imprisonment, ordered, or directed, or authorized, by a private individual, on the ground that a felony had been committed, and that there was reasonable ground to suspect the plaintiff of having committed it, must state the particulars of the felony, and set forth circumstances showing a reasonable ground of suspicion against the plaintiff, and reasonable and probable cause for the arrest, in order that the judge may determine whether they amount to reasonable and probable cause, not merely for suspecting, but for arresting and imprisoning the plaintiff. (d) The question of reasonable and probable cause is a question for the judge and not for the jury. (e)

"Probable cause," observes TINDAL, C. J., "is, no doubt, a question of law, and within the province of a judge to decide; but the jury must not only find the facts which are supposed to constitute probable cause, but they are also warranted in forming their conclusion from those facts, and it is frequently difficult to draw the line between the matter of law and matter of fact." (f) If, in the opinion of the judge, founded on facts proved before a jury, there was reasonable ground for suspecting either that the plaintiff had committed, or that he was about to commit, a felony, he can not recover damages from a constable for arresting and detaining him, although no felony had, in fact, been committed. (g) The fact that the defendant acted upon hearsay evidence alone in causing the plaintiff to be arrested, if such evidence could easily have been tested, is one element—though not a conclusive one, if the informant be a trustworthy person, or other

(c) As to pleas of justification of imprisonment under color of legal process, see *post*, ch. 14.

(d) Maule, J., *West v. Baxendale*, 9 C. B. 152. *Broughton v. Jackson*, 21 Law J., Q. B. 265. *Mure v. Kaye*, 4 Taunt. 34.

(e) *Hailes v. Marks*, 30 Law J., Exch. 392.

(f) *Davis v. Russell*, 2 M. & R. 604; 5 Bing. 354.

(g) *Beckwith v. Philby*, 6 B. & C. 635; 9 D. & R. 487.

circumstances exist—in considering the question of reasonable and probable cause. (*h*)

A justification of an imprisonment on the ground that the plaintiff had committed felony, and an abandonment of the plea at the trial, or a failure to prove it, is evidence of malice, and a great aggravation of the original wrong; but a justification of a false imprisonment on the ground that a felony had been committed, and that the defendant had reasonable and probable cause to suspect that the plaintiff had been guilty of it, is very different. Such a justification is in the nature of an apology for the defendant's conduct. (*i*)

An imprisonment can not be justified on the ground that the plaintiff unlawfully entered the defendant's house and made a great noise and disturbance therein, and would not depart when requested so to do, whereupon the defendant sent for a police-officer and gave the plaintiff into custody. (*k*) To make the plea good, there must be a direct allegation, either of a breach of the peace, continuing at the time of the giving of the plaintiff into custody, or that a breach of the peace had been committed, and that there was reasonable ground for apprehending its renewal. (*l*) In an action for an assault and false imprisonment the defendant justified, on the ground that he was possessed of a house and shop, that the plaintiff was unlawfully therein, and was requested to depart, which he refused to do, whereupon the defendant gently laid hands on him to remove him, that the plaintiff then assaulted the defendant in the presence of a police-officer, and was given into custody. At the trial it was not shown that any assault had been committed by the plaintiff upon the defendant, and it was held that the imprisonment was unlawful, and the plaintiff entitled to damages. (*m*)

If the defendant pleads that he had a right to imprison the plaintiff for a certain reasonable time to preserve the peace, or prevent him from disturbing divine service, the time is divisible, and the plaintiff may by his replication deny that

(*h*) *Perryman v. Lister*, L. R., 3 Exch. 197; 4 Engl. & Ir. App. 521.

(*i*) *Warwick v. Foulkes*, 12 M. & W. 109.

(*k*) *Green v. Bartram*, 4 C. & P. 308.

Rose v. Wilson, 8 Moore, 362; 1 Bing. 353.

(*l*) *Grant v. Moser*, 5 M. & Gr. 123; 6 Sc. N. R. 46. *Price v. Seeley*, 10 Cl. & Fin. 39.

(*m*) *Reece v. Taylor*, 4 N. & M. 469.

there was any cause for imprisoning him, but that if there was, the imprisonment was for a longer time than was justified by such cause. (*n*)

If the defendant relies upon the fact of his being a superior officer in the army or navy, and of his having imprisoned the plaintiff in order to bring him before a court-martial, and that he did so bring him, and relies on the sentence of the court-martial as conclusive, he should plead the facts by way of estoppel, and not leave them at large to be considered by a jury. (*o*) However, even though an officer be arrested and kept in confinement, for an intentional act of discourtesy to his superior officer, for several days, and is not ultimately brought to a court-martial, no action lies if the matter of complaint arises between military men subject to the Articles of War, and be fairly cognizable before a military tribunal, (*p*) even though it be done maliciously, and without reasonable or probable cause. (*q*)¹

842. Evidence at the trial—Proof of an assault.—In order to prove an assault, the plaintiff must show that he was actually struck by the defendant, or that the defendant threatened to strike him or to inflict some injury upon him, having the means of carrying that threat into effect. Where one assault only is charged in the plaintiff's declaration of his cause of complaint, the plaintiff is confined to the proof of one assault. He is not bound to the precise time stated in the declaration, but may prove an assault on another day. (*r*) Having, however, proved one assault, he can not go on to prove other

(*n*) *Worth v. Terrington*, 13 M. & W. 789.

(*o*) *Hannaford v. Hunn*, 2 C. & P. 148.

(*p*) *Dawkins v. Lord Rokeby*, 4 F. & F. 806.

(*q*) *Dawkins v. Lord Paulet*, L. R., 5

Q. B. 94, Cockburn, C. J., diss.; and see *Keighly v. Bell*, 4 F. & F. 763; and *post.*

(*r*) *Cheasley v. Barnes*, 10 East, 80. *Polkinhorn v. Wright*, 8 Q. B. 206; Litt. sect. 485.

¹ As to special grounds of justification, it may be shown by the defendant that the process issued without his direction; *Gold v. Bissell*, 1 Wend. (N. Y.) 210; *Burns v. Erben*, 26 How. Pr. (N. Y.) 273; that the plaintiff was suspected of a crime, and that he has since been convicted of it; *Wrexford v. Smith*, 2 Root (Conn.) 171; that the defendant had probable cause for suspecting the plaintiff to be guilty of a crime; *Claw v. Wright, Brayt.* (Vt.) 118; *Winebiddle v. Porterfield*, 9 Penn. St. 137; *Floyd v. State*, 12 Ark. 43; that the process was regular and not void, although erroneous. *Wood v. Kinsman*, 5 Vt. 588.

prior or subsequent distinct assaults, for the purpose of enhancing the damages or selecting the best to rely upon. (s) If the assault is of a continuing nature, and consists of a series of wrongful acts of violence, following one upon the other, so as to constitute one continued wrongful act, then the wrong being of a continuous nature, the various acts of violence may be given in evidence as constituting one continuing trespass. (t)

843. *Proof of an arrest and imprisonment.*—It is not necessary in order to constitute an arrest, that there should be a power of detention of the person arrested. If, therefore, an officer, in the execution of civil process, touches a person through a window without breaking the premises, this is a good arrest. (u) In order to establish the fact of an imprisonment, the plaintiff must prove that some restraint was placed upon his personal freedom by the defendant.

A prima facie case will be established against a defendant in an action for false imprisonment, by showing that the plaintiff was taken into custody by a policeman, and that the defendant came down to the station-house and signed a charge-sheet accusing the plaintiff of having committed felony. (v) It is not absolutely necessary to show that the defendant gave any personal orders or directions to the police touching the arrest, in order to establish a prima facie case against the defendant. If it is shown that the defendant made a charge against the plaintiff, and the surrounding circumstances, and the conduct and acts of the defendant or his servants, raise a fair and reasonable presumption that the wrongful act was ordered or directed to be done by the defendant, there is enough to call upon him to answer the charge and rebut the presumption; and if no evidence is offered by him for that purpose, the jury are justified in finding him guilty. (x) If the defendant charges the plaintiff with a felony in the presence of a policeman, and stands by and sees the plaintiff

(s) *Stante v. Prickett*, 1 Campb. 472; Bull. N. P. 86. *English v. Purser*, 6 East, 395. *Taylor v. Smith*, 7 Taunt. 156.

(t) *Monkton v. Ashley*, 6 Mod. 38; 2 Salk. 638. *Burgess v. Freelove*, 2 B. & P. 425.

(u) *Anon.*, 7 Mod. 8. *Sandon v. Jarvis*, Ell. Bl. & Ell. 935; 28 Law J., Exch. 156. Arrest upon mesne process is abolished by 32 & 33 Vict. c. 62.

(v) *Harris v. Dignum*, ante.

(x) *Glynn v. Houston*, 2 Sc. N. R. 554.

taken into custody, and is silent, this is evidence of the defendant's having authorized or directed the policeman to act in the matter. (*γ*)

A declaration alleging that the defendant caused the plaintiff to be arrested and imprisoned without reasonable or probable cause, on a false and malicious charge of felony, is a declaration in trespass for an assault and false imprisonment, and not an informal count for a malicious prosecution, and therefore requires no evidence of malice or want of reasonable and probable cause. (*z*)¹

844. *Evidence for the defense.*—The facts which may be given in evidence under the plea of not guilty, to rebut a prima facie case on the part of the plaintiff, have already been pointed out. If the defendant relies upon a plea of son assault demesne, he must show an assault by the plaintiff commensurate with the assault charged upon the defendant; for if the assault proved to have been committed by the plaintiff is trifling, and altogether disproportioned to the assault committed by the defendant, and forms no excusable or justifiable cause for it, the plaintiff will be entitled to a verdict. (*a*) Where, under a plea of son assault demesne, the defendant proved that the plaintiff got off his horse, and held up his stick, and offered to strike the defendant, and the latter thereupon gave him a beating, it was held that a moderate battery was, by reason of the provocation, justifiable, and that, if the plaintiff relied upon the fact of the defendant's having beaten him more violently than he ought to have done, the excessive beating should have been replied, and specially set forth on the record. (*b*) If the plaintiff complains of having been struck with a stick by the defendant, the defendant may, under a plea of son assault demesne, show that the plaintiff first struck him with his fist. (*c*)

(*γ*) Warner v. Riddiford, 4 C. B., N. S. 200. See Grinham v. Willey, *ante*.

(*z*) Chivers v. Savage, 5 Ell. & Bl. 697. Brandt v. Craddock, 27 Law J., Exch. 314.

(*a*) Dean v. Taylor, 11 Exch. 68.

Cockcroft v. Smith, 1 Salk. 641; Little-dale, J., Reeve v. Taylor, 4 N. & M. 470.

(*b*) Dale v. Wood, 7 Moore, 33. Penn v. Ward, 2 C. M. & R. 338.

(*c*) Blunt v. Beaumont, 2 Cr. M. & R. 412. Oakes v. Wood, 3 M. & W. 150.

¹ Detaining a person, against his will, in a building, by merely locking the door, even when no force is used, is a false imprisonment. Woodard v. Washburn, 4 Den. (N. Y.) 369; Pike v. Hamson, 9 N. H. 491; Clifton v. Grayson, 2 Stew. (Ala.) 412; Johnson v. Tompkins, 1 Bald. (U. S.) 571.

If the defendant rests his defense upon a plea of the previous hearing and dismissal of the charge by magistrates, he must produce the certificate of the fact of the dismissal, signed by two justices, which will be *prima facie* evidence of the dismissal of the complaint, without proof of the genuineness of the signatures of the magistrates who have signed it. (*d*) If the defendant relies upon a conviction under the same statute, the record of the conviction, or an examined copy of it, must be produced. (*e*) If the defendant relies upon some plea of justification or excuse, he must prove so much of his plea as constitutes an answer to the assault to which it is pleaded. If he does that, it is enough, and he is not bound to prove the residue of his plea. (*f*) If the plea of justification consists of two facts, each of which would, when separately pleaded, amount to a good defense, the plea of justification will be supported if one of these facts only be found by the jury. (*g*)

When the defendant justifies in defense of his possession of realty or personalty, he must prove the fact of his possession at the time he committed the assault, and that the assault was of a defensive and not of an offensive character. (*h*)

845. *Damages recoverable*.—"The court," observes TINDAL, C. J., "never interferes with the discretion of the jury as to the amount of damages for an assault and false imprisonment, unless they are grossly excessive, or clearly founded upon a mistaken or improper view of the matter." (*i*) The circumstances of time and place as to when and where the assault was committed, and the degree of personal insult, must be considered in estimating the nature of the offense and the amount of damages. "It is a greater insult to be beaten upon the Royal Exchange than in a private place." (*k*) When the assault is accompanied by a false charge, affecting the honor, character, and position in society, of the plaintiff, the offense will, of course, be greatly aggravated, and the dam-

(*d*) 8 & 9 Vict. c. 113, s. 1, *post*, ch. 21.

(*e*) *Hartley v. Hindmarsh*, L. R., 1 C. P. 553.

(*f*) *Atkinson v. Warne*, 1 C. M. & R. 827.

(*g*) *Spilsbury v. Micklethwaite*, 1 Taunt. 149.

(*h*) *Dean v. Hogg*, 10 Bing. 349.

(*i*) *Edgell v. Francis*, 1 Sc. N. R. 121.

Huckle v. Money, 2 Wils. 206.

(*k*) *Tullidge v. Wade*, 3 Wils. 18.

ages proportionably increased; and if the plaintiff has been assaulted and imprisoned under a false charge of felony, where no felony has been committed, or where there was no reasonable ground for suspecting and charging the plaintiff, exemplary damages will be recovered.

Circumstances of provocation and excuse may be given in evidence, in mitigation of damages, so long as they do not amount to a justification, and could not be pleaded as such. (*l*) But if they constitute an answer to the action by way of justification for the assault, they must be pleaded, and can not then be given in evidence in reduction or mitigation of the damages. (*m*) Where, in an action for an assault, it was contended that the blow was unintentionally struck, the defendant intending to strike A, when he accidentally in the scuffle struck B, BOSANQUET, J., told the jury that there could be no doubt but that, as the defendant struck the plaintiff, the plaintiff was entitled to a verdict, whether it was done intentionally or not, but that the intention was material in determining the amount of damages. (*n*) If it be proved that the blow was unintentionally struck, and that an apology was immediately offered, the evidence would tend materially to reduce the amount of damages.

Where the plaintiff, in an action for an assault and false imprisonment, sought to make the defendant responsible for the consequences of a remand by a magistrate, it was held that he was liable only for the first imprisonment and taking before the magistrate, and not for the remand or any subsequent detention thereunder, they being the acts of the justice; (*o*)¹ but in an action for a malicious prosecution, the defendant will be liable for the injury resulting from a remand. (*p*) Where a railway company removed a passenger from the train (without any unnecessary violence), under a mistaken impression that he had no ticket, and the passenger left a pair of race-glasses behind him, it was held he could not recover the value of them as part of the damages for the

(*l*) *Post*, ch. 22, s. 1.

(*m*) *Watson v. Christie*, 2 B. & P. 224.
Speck v. Phillips, 7 Dowl. 473. *Lingford v. Lake*, 3 H. & N. 276.

(*n*) *James v. Campbell*, 5 C. & P. 372.

(*o*) *Lock v. Ashton*, 12 Q. B. 876.

(*p*) *Post*, ch. 13.

¹ *State v. Guest*, 6 Ala. 778.

assault, although the court admitted it would have been otherwise had he lost any part of his property in a scuffle with the railway servants. (g)

846. *Damages, where there are several co-trespassers.*—Where several persons have associated themselves together in the pursuit of a common object, and they all trespass upon the plaintiff's land in following out the common design, each is answerable for the whole of the damage done by all. (r) And whenever two persons have so conducted themselves as to be liable to be jointly sued, each is responsible for the injury sustained by their common act. The true criterion of damage in such cases is the whole injury which the plaintiff has sustained from the joint act of all. Where, therefore, two persons have a joint purpose, and thereby make themselves joint-trespassers, and one beats violently and the other a little, the real injury is the aggregate of the injury received from both, and each is responsible for all the damage; but the malignant motive of one party can not be made a ground of aggravation of damage against the other, who was altogether free from any improper motive. (s)

847. *Prospective damages.*—In all cases of serious assault the jury should take into their consideration, in assessing the damages, the probable future injury that will result to the plaintiff from the act of violence perpetrated by the defendant, for the damages, when given, are taken to embrace all the injurious consequences of the wrongful act, unknown as well as known, which may arise hereafter, as well as those which have arisen, so that the right of action is satisfied by one recovery. Thus, where the plaintiff had received a blow on the head, and sustained little apparent injury, and recovered small damages; and afterwards, and in consequence of the blow, a portion of his skull came away, and it then appeared that the skull had been fractured, and he then brought a second action, which was attempted to be supported on the ground that the former recovery was for a mere battery and this for mayhem, it was held that no action lay, for there was but one blow, and that was the cause of action in both suits and not the consequences. And the distinction was pointed

(g) *Glover v. Lond. & S. Western Rail. Co.*, L. R., 3 Q. B. 25.

(r) *Hume v. Oldacre*, *ante*.
(s) *Clark v. Newsam*, 1 Exch.

out between this case, and one of continuing nuisance, where each continuance was a fresh nuisance. (t) No fresh action, therefore, arises by reason of subsequent new damage resulting from the wrongful act, if the act itself were actionable; for, if the action were brought, all the damages which he ever could recover for that injury could be recovered by the plaintiff in that action if he succeeded. (u) ¹

848. *Special damages in actions for false imprisonment.*—Money paid by the attorney of the plaintiff to procure the release of the plaintiff from an unlawful imprisonment is recoverable as part of the damages naturally and directly resulting from the wrongful act, provided the plaintiff claims them in his declaration, “for a man may say that he has been forced to pay that which another, who is his agent, has been forced to pay for him.” (x) The allegation that the plaintiff has been forced to pay, &c., is a material allegation, and proof of actual payment is necessary to support it. Every expense that the plaintiff necessarily incurs in order to restore himself to a complete state of freedom from imprisonment is recoverable as part of the damages, if the plaintiff has claimed them in his declaration. Where a plaintiff, by being bailed, obtained only an imperfect release, being in the hands and at the mercy of persons who might at any time render him back to jail, it was held that the expense of removing himself from that position was only one of the steps necessary for completing his discharge from the original imprisonment, and

(t) *Fetter v. Beal*, 1 Ld. Raym. 339, 27 Law J., Q. B. 390.

92. (x) *Pritchett v. Boevey*, 1 Cr. & M.

(u) *Coleridge, J., Bonomi v. Backhouse*, 778.

¹ In an action for an assault and battery, damages should be given as nearly as possible in conformity to the consequences which have ensued and those likely to ensue therefrom, and in estimating them, the jury is not to be restricted to the actual loss, but may consider the pain and suffering, the wounded feelings of the plaintiff, and, if the act was wanton, may give vindictive damages. *Shelter v. York, Crabbe* (U. S.) 449; *Slater v. Rink*, 18 Ill. 527; *Shereden v. Furber*, 1 Bl. & H. (U. S.) 423; *Gurthor v. Blowers*, 11 Md. 536. Wounded feelings; *West v. Forrest*, 22 Mo. 344. Vindictive damages; *Wilson v. Middleton*, 2 Cal. 54; *Causee v. Anders*, 4 Dev. & B. (N. C.) 246; *Cook v. Ellis*, 6 Hill (N. Y.) 466; *Day v. Woodworth*, 13 How. (U. S.) 363. And in all cases, unless the provocation is such as to amount to a legal justification, the damages should be compensatory. *Birchard v. Booth*, 4 Wis. 67.

that, if it were necessary for the plaintiff to set aside an inquisition in order to restore himself to a complete state of freedom, he was entitled to recover the expense thereof, as part of the damages of the original wrongful act. (*y*)¹

849. *Evidence in mitigation of damages.*—In an action for false imprisonment in giving the plaintiff in charge to a police-officer, it may be shown, in mitigation of damages, that the plaintiff had for several days annoyed and insulted the defendant, by following him about the streets, and telling him to pay his debts. (*z*) But all facts and circumstances amounting to a justification, or to a contradiction of a material fact admitted upon the record, must be specially pleaded, and can not be given in evidence in mitigation of damages. (*a*) In an action of assault, therefore, a defendant can not, under a plea of not guilty, prove that he committed the assault in self-defense, or in fear of his life; and a sheriff who has imprisoned the plaintiff can not, if he pleads not guilty only, give evidence of his writ in mitigation of damages. (*b*)

The recovery of damages in an action for false imprisonment is no bar to an action for a malicious prosecution. (*c*)

(*y*) Foxall v. Barnett, 2 Ell. & Bl. 298;
23 Law J., Q. B. 7.

(*z*) Thomas v. Powell, 7 C. & P. 807;
and see *post*, ch. 22.

(*a*) Linford v. Lake, 27 Law J., Exch.
334.

(*b*) Speck v. Phillips, 5 M. & W. 281.

(*c*) Guest v. Warren, 9 Exch. 379; 23
Law J., Exch, 121; *post*, ch. 22.

¹ In an action for false imprisonment, even where there is no malice, the damages should be compensatory, and the jury are to take into consideration the plaintiff's loss of time, interruption to his business, and his suffering, bodily and mental, arising from the act. The actual pecuniary loss is never the measure. The jury not only may, but should consider the indignity to the plaintiff and the mental and bodily suffering incident to the act, and say, in view of all the facts, how much the plaintiff ought to have, and the defendant ought to pay, for the injury. *Parsons v. Harper*, 16 Gratt. (Va.) 54; *Page v. Mitchell*, 13 Mich. 63; *Blythe v. Thompkins*, 2 Abb. Pr. (N. Y.) 468; *Jay v. Almy*, 1 Woodb. & M. (U. S.) 262; *Tracy v. Swartwout*, 10 Pet. (U. S.) 80. And where there is evidence of malice or bad faith, exemplary damages may be given; *Day v. Woodworth*, 13 How. (U. S.) 363; *Brown v. Chadsey*, 39 Barb. (N. Y.) 263; but not otherwise. *Williams v. Garrett*, 12 How. Pr. (N. Y.) 456.

CHAPTER XIII.

OF MALICIOUS CONSPIRACY, MALICIOUS PROSECUTION, AND
ARREST—MALICIOUS ABUSE OF LEGAL PROCESS.SECTION I.—*Of malicious conspiracy,
malicious prosecution
and arrest—Malicious
abuse of legal process.*

- 850. Malicious conspiracy.
- 851. Malicious exhibition of articles of the peace against another.
- 852. Malicious prosecution.
- 853. What is evidence of a want of reasonable and of probable cause, and of malice.
- 854. Prosecution by persons who manifest a consciousness of the innocence of the accused.
- 855. Prosecutions under the advice of counsel.
- 856. Malicious complaints before magistrates—Maliciously causing a justice's warrant to be issued against the plaintiff.
- 857. Continuance by defendant of proceedings commenced without his knowledge.
- 858. Effect of the complaint or information before the magistrate being followed up by a conviction of the plaintiff.
- 859. Maliciously causing a search warrant to issue.
- 860. Malicious indictment.
- 861. Malicious prosecution by court martial.
- 862. Malicious assertion of a legal right.
- 863. Malicious and unfounded actions.
- 864. Maliciously putting the process of the law in motion in the name of a pauper or insolvent.
- 865. Maliciously issuing execution for a larger sum than is due upon a judgment.

866. Maliciously causing an extent to issue.

867. Malicious proceedings in bankruptcy.

868. Malicious abuse of legal process.

869. Malicious detention of judgment debtors after tender of the debt and costs.

870. Malicious arrest.

871. What amounts to a malicious arrest—Proof of actual custody.

SECTION II.—*Of actions for malicious
arrest and malicious
prosecution.*

872. Parties to be made defendants.

873. Pendency of a rule for a criminal information against the defendant.

874. Declarations for a malicious prosecution.

875. Of the plea of not guilty in actions for a malicious arrest and malicious prosecution.

876. Pleas of justification.

877. Evidence at the trial—Proof on the part of the plaintiff—Malicious arrest or prosecution.

878. Proof of malicious informations and complaints before magistrates.

879. Proof of certified copy of the record of the prosecution and acquittal.

880. Proof of malice and of want of reasonable and probable cause.

881. Proof on the part of the defendant.

882. Of the damages recoverable in actions for a malicious prosecution.

SECTION I.

OF MALICIOUS CONSPIRACY, MALICIOUS PROSECUTION AND
ARREST—MALICIOUS ABUSE OF LEGAL PROCESS.

850. *Malicious conspiracy*.—A conspiracy to do an unlawful act, and the doing of the act in pursuance of the conspiracy, to the damage of the plaintiff, create a good cause of action against all the parties to the conspiracy. A criminal proceeding by way of indictment lies for the mere act of conspiring, but a civil action is not maintainable unless the plaintiff has been aggrieved, or has sustained "actual legal damage" by some overt act done in pursuance of the conspiracy. (a) ¹

(a) Crompton, J., *Castrique v. Behrens*, 30 Law J., Q. B. 168.

¹ *Herron v. Hughes*, 25 Cal. 555; *Hutchings v. Hutchings*, 7 Hill (N. Y.) 104. It is the damage and not the conspiracy that is the *gist* of the action; *Tappan v. Powers*, 2 Hall (N. Y.) 277; and the damage need not be specific; it is enough, if trouble, inconvenience, or expense is occasioned. *Swan v. Saddlemire*, 8 Wend. (N. Y.) 676.

Therefore, if there is no damage of any kind an action will not lie. Thus where the defendants after a will had been made, conspired to secure and actually did secure its revocation by the testator, it was held that no action would lie, as no actual interest in the testator's property had vested in the plaintiff, and he could not be said to have lost anything, or to have been legally damaged by the act. *Hutchings v. Hutchings*, 7 Hill (N. Y.) 104.

There must be a legal injury, and the act must be unlawful. If persons merely conspire to do an act lawful in itself, an action will not lie, even though another is damaged thereby. Thus, if a sheriff holding an execution against A. conspires with B. to levy an execution which he holds against A. and C., A. being a surety merely upon the claim upon which the judgment on which the execution is predicated, upon the property of A. only, an action for conspiracy will not lie, for the sheriff might lawfully levy the execution upon the property of either, or both. *Eason v. Petway*, 1 Dev. & B. (N. C.) 44.

But if persons conspire to set up a judgment that has been fully paid, as unsatisfied, and issue execution thereon, and cause it to be levied on land on which a lien had been acquired by the judgment when in force, but which land has since been sold to a third person, they are liable to the person who had thus purchased the land, although the execution is void, and no valid title passes under it, because it is an injury to and a cloud on his title. *Swan v. Saddlemire*, 8 Wend. (N. Y.) 676.

So, where A. was engaged in a trade that was profitable, because the knowledge upon which it depended was known to but a few, and B. in A.'s absence conspired

Where the plaintiff's declaration of his cause of action set forth that he exercised the profession of an actor, and was engaged to perform in the character of Hamlet, in Covent Garden Theatre, and that the defendants and others maliciously conspired together to prevent the plaintiff from so performing, and from exercising his profession in the theatre, and in pursuance of the conspiracy hired and procured divers persons to go to the theatre and hoot the plaintiff, and the persons so hired did in pursuance of the conspiracy go to the theatre and hoot the plaintiff, and interrupted his performance, and prevented him from exercising his profession, and thereby caused the plaintiff to lose his engagement and divers gains and emoluments, and to be brought into public scandal and disgrace, it was held that the declaration disclosed a good cause of action. (*b*)

(*b*) *Gregory v. Duke of Brunswick*, 6 M. & Gr. 205.

with A.'s foreman to obtain the secrets, and was thus enabled to set up as a rival in the business, whereby his trade was injured and his profits lessened, it was held that B. was liable to A. therefor. *Jones v. Baker*, 7 Cow. (N. Y.) 445.

So, where two or more persons enter into a conspiracy to defraud another by fraudulent misrepresentations or concealments, or by any fraudulent and unlawful means, if the scheme is carried into effect, and actual damage results, an action will lie therefor; *Page v. Parker*, 43 N. H. 363; but in order to make out the cause of action there must be an active collusion and participation in the scheme or its execution shown; *Brannack v. Boulden*, 4 Ired. (N. C.) 61; *Davenport v. Lynch*, 6 Jones (N. C.) 545; and a fraudulent or wrongful intent. *Hinchman v. Ritchie*, Bright (Penn.) 143.

Thus a fraudulent conspiracy to cause a sane person to be confined in a lunatic asylum, actually carried out, is actionable; *Davenport v. Lynch*, *ante*; but not if the defendants acted conscientiously, and without malice. *Hinchman v. Ritchie*, *ante*.

If persons conspire to entice a person from another state to come into another state, in order that he may be arrested, then an action lies therefor. *Phelps v. Goddard*, 1 Tyler (Vt.) 60. But a mere conspiracy, unless attended with actual legal injury, is never actionable. *Swan v. Saddle mire*, 8 Wend. (N. Y.) 676; *Tappan v. Powers*, 2 Hall (N. Y.) 277; nor unless two or more persons are engaged in it; *Hinchman v. Ritchie*, *ante*; *State v. Rawley*, 12 Conn. 101; *State v. Myberry*, 48 Me. 218; and a husband and wife being one person in law can not be made liable for a conspiracy. *Kirtley v. Deck*, 2 Munf. (Va.) 15.

Conspiracy to charge a person with a crime, is actionable; *Parker v. Huntington*, 2 Gray (Mass.) 124; but an actual conspiracy must be proved by competent proof; *Ganner v. Backhouse*, 37 Penn. St. 350; *Newhall v. Jenkins*, 26 Id. 159; but when a conspiracy is once established the acts of any one of them, in pursuance of the general plan, may be shown; *Tappan v. Powers*, *ante*; *Moore v. Tracy*, 7 Wend. (N. Y.) 229; *Breden v. Breden*, 3 Penn. St. 81; *Eason v. Westbrook*, 2 Murph. (N. C.) 329 and a verdict may be taken against one alone. *Eason v. Westbrook*, *ante*.

But a conspiracy to institute legal proceedings and to obtain a judgment by means of false testimony, and the giving of such testimony, and the procurement of the judgment, to the pecuniary loss of the plaintiff, can not be made the ground of an action for damages so long as the judgment remains unreversed, whether the judgment be the judgment of one of our own courts of justice or the judgment of a foreign tribunal, if it appears that the plaintiff had an opportunity, if he had thought fit to avail himself of it, of appearing and controverting the false testimony, or if it can be shown that he did appear and was heard, and that the matter was decided against him. (c)¹

Where the plaintiff's declaration of his cause of action set forth that he was possessed of premises on which he carried on the business of a skin-dresser, and that the defendant and another person unlawfully and maliciously conspired together to procure possession of a portion of the said premises, and set up thereon a secret still for distilling spirits; that in pursuance of such conspiracy they induced the plaintiff to let to them a portion of the premises, by representing that they wanted them for the purpose of carrying on the business of ink-manufacturers; and that having thereby got possession of that part of the premises, they set up thereon certain private stills, and illegally distilled spirits, and caused it to appear that the plaintiff had himself set up the stills, and was illegally distilling upon his premises, and that the plaintiff in consequence thereof was arrested, convicted, fined, and imprisoned, averring that the plaintiff was wholly ignorant of the stills being on his premises; it was held, that the action was not maintainable, as it did not appear that the arrest, conviction, and imprisonment of the plaintiff were the direct result of the wrongful act of the defendant, or that the defendant should in anywise be made responsible for the illegal acts contemplated by him. The defendant's act of conspiring, it was observed, merely enabled him to obtain possession of part of the plaintiff's premises. The only ground of damage was the plaintiff's being illegally convicted. And if it could have been

(c) *Castrique v. Behrens*, 30 Law J., Q. B. 163.

¹ *Hall v. Eaton*, 25 Vt. 458; *Eason v. Petway*, 1 Dev. & B. (N. C.) 44.

shown that the conspiracy was entered into for the purpose of procuring a conviction of the defendant for having possession of a secret still, or for unlawfully distilling, the only remedy would have been an action for a malicious prosecution; and to such an action the conviction of the defendant would be an answer, for it must be assumed that the facts relied upon by him were brought before the tribunal for his exculpation, and were decided against him. (a)

If two confidential agents of a partnership conspire together to obtain for themselves the shares of the partners at an undervalue by keeping the accounts of the partner fraudulently, so as to conceal from the partners the true value of their shares, they will be responsible both at common law and in equity for the damage resulting from their breach of duty. (e) ¹

851. *Malicious exhibition of articles of the peace against another*, supported by a false oath of threats having been used, may be made the foundation of an action for damages, notwithstanding that the accused person has been required to find sureties, and been imprisoned for default, for the truth of the articles can not be controverted before the court, which has no discretion, and can pronounce no judgment on the truth of the facts, but is bound to act upon the statement sworn to before them. (f) Where, therefore, the plaintiff's declaration of his cause of action set forth that the defendant falsely and maliciously, and without any reasonable or probable cause, made information on oath before a magistrate that the plaintiff had used certain specified threatening language to him, whereby the defendant went in fear of bodily harm, and then caused the plaintiff to be arrested and brought before justices of the peace, and required to find sureties, and to be imprisoned, it was held that the declaration disclosed a good cause of action, although it appeared that the proceeding terminated against the accused, it being founded upon a

(d) Barber v. Lesiter, 7 C. B., N. S. 183.

(f) Rex v. Doherty, 13 East, 171.
Venafrá v. Johnson, 3 M. & Sc. 847; 10

(e) Walsham v. Stainton, 33 Law J., Ch. 68.

Bing. 301.

¹ Jones v. Baker, 7 Cow. (N. Y.) 445.

statement on oath, which the person charged was not at liberty to controvert. (g) ¹

852. *Malicious prosecution*.—To put the criminal law in force maliciously, and without any reasonable or probable cause, is wrongful; and if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action. (h) “Malice alone is not sufficient, because a person actuated by the plainest malice may nevertheless have a justifiable reason for the prosecution. On the other hand, the substantiating the accusation is not essential to exonerate the accuser from liability to an action, for he may have good reason to make the charge, and yet be compelled to abandon the prosecution by the death or absence of witnesses, or the difficulty of producing adequate legal proof. The law, therefore, only renders him responsible where malice is combined with want of probable cause.” (i) But though abandoning a prosecution be not of itself proof of want of probable cause, yet where the prosecution is persisted in and kept hanging over the head of the plaintiff for a long time, and is then dropped at the very hour of trial, there is strong ground for supposing that the prosecutor had no justifiable reason for commencing it. (k) ²

(g) *Steward v. Gromett*, 7 C. B., N. S. 191; 29 Law J., C. P. 170.

(h) *Churchill v. Siggers*, 3 Ell. & Bl. 937.

(i) *Tindal, C. J., Willans v. Taylor*, 6 Bing. 186; 3 M. & P. 350; 2 B. & Ad. 845.

(k) *Gaselee, J., 6 Bing. 190.*

¹ *Stone v. Stevens*, 12 Conn. 219; *Secor v. Babcock*, 2 Johns. (N. Y.) 203; *Harris v. Easall*, 2 Penn. St. 843; *Gregory v. Thomas*, 2 Bibb. (Penn.) 286; *Streight v. Bell*, 37 Ind. 550; *Baner v. Clay*, 8 Kan. 580; *Dennis v. Ryan*, 63 Barb. (N. Y.) 145; *Strauss v. Young*, 36 Md. 246.

² In order to render a person liable for malicious prosecution, there must be both *malice* and *want of probable cause*. Malice alone is not enough, for if there was probable cause, however *malicious* the prosecution may be, or the motive that actuated it, no legal injury has been done, and therefore no action will lie. But malice may be proved by the zeal and activity of the defendant in conducting or aiding the prosecution, or it may be inferred from want of probable cause. *Shafer v. Loucks*, 58 Barb. (N. Y.) 426; *Deitz v. Langfeet*, 63 Penn. St. 234; *Preston v. Cooper*, 1 Dill. (U. S.) 589; *Strauss v. Young*, 36 Md. 246; *Bauer v. Clay*, 8 Kan. 580; *Fullenwaiter v. McWilliams*, 7 Bush. (Ky.) 389; *Kitton v. Bevins, Cooke* (Tenn.) 90; *Pangborn v. Bull*, 1 Wend. (N. Y.) 349; *Morris v. Corson*, 7 Cow. (N. Y.) 231; *Lyon v. Fox*, 2 Browne (Penn.) 67; *Doll v. Shoneberg*, 2 Dis. (Ohio) 54; *Almstead v. Partridge*, 82 Mass. 38; *Stone v. Stevens*, 12 Conn. 219; *Campbell*

853. *What is evidence of a want of reasonable and probable cause, and of malice.*—The want of reasonable and probable cause for a malicious prosecution, and the evidence of malice, depend so much upon the particular circumstances of the individual case as to render it impossible to lay down any general rule upon the subject, but the facts ought to satisfy any reasonable mind that the accuser had no ground for the proceeding but his desire to injure the accused. (*l*) If circumstances of suspicion existed which might have been readily removed by proper inquiry, and no inquiry at all was made, (*m*) there is evidence of a want of reasonable and probable cause, and if in the opinion of the judge there was no reasonable or probable cause for the prosecution, the jury may, from that fact alone, infer malice. (*n*) If a person prefers an indictment, or sets the criminal law in motion, knowing at the time he does so that he has no reasonable ground for it, that alone is evidence of malice on his part. "By the term 'malice' is meant any indirect motive of wrong. Any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice, is a malicious motive on the part of the person who acts under the influence of it. If a case is trumped up out of very weak and flimsy materials, for purposes of annoyance or of frightening other people, and deterring them from committing depredations upon private property, there is no legitimate foundation for a criminal prosecution, and persons who put the criminal

(*l*) Tindal, C. J., 6 Bing. 186; 2 B. & Ad. 845. Farmer v. Darling, 4 Burr. 1972.

(*m*) Perryman v. Lister, *ante*.

(*n*) Busst v. Gibbons, 30 Law J., Exch. 75.

v. Threlkeld, 2 Dana (Ky.) 425; O'Driscoll v. McBirney, 2 N. & M. (S. C.) 54; Blunt v. Little, 3 Mason (U. S.) 102; Young v. Gregorie, 3 Call. (Va.) 446; Ritchey v. Davis, 11 Iowa, 124; Burnap v. Albert, Lang. (U. S.) 244; Masury v. Whipple, 8 R. I. 360; but the mere fact that the plaintiff was acquitted is not conclusive evidence of malice or want of probable cause, for there may have been probable cause, when in fact no crime had been committed; Ross v. Innis, 26 Ill. 259; Thorpe v. Balliet, 25 Id. 339; Adams v. Lisher, 3 Blackf. (Ind.) 445; and the plaintiff may, by his own acts or folly, have placed himself in a position where a reasonable suspicion of guilt might be predicated against him, and if this suspicion was generally shared in by those residing in the neighborhood, it may be shown to disprove malice. Stone v. Stevens, 12 Conn. 219; Burlingame v. Burlingame, 8 Cow. (N. Y.) 141; Cecil v. Clarke, 17 Md. 508.

law in motion under such circumstances lay themselves open to a charge of being influenced by malice." (o) ¹

From the most express malice, the want of probable cause

(o) *Stevens v. Mid. Rail. Co.*, 10 Exch. 356; 23 Law J., Exch. 328.

¹ Malice may be inferred from want of probable cause; *Murray v. Long*, 1 Wend. (N. Y.) 140; *Stone v. Stevens*, 12 Conn. 219; *Pangborn v. Bull*, 1 Wend. (N. Y.) 345; *Turner v. Walker*, 3 Gill. & J. (Md.) 377; *Burnap v. Albert*, Tan. Dec. (U. S.) 244; but the want of probable cause can not be inferred from the want of express malice. *Murray v. Long*, *ante*; *Pangborn v. Bull*, *ante*; *Blunt v. Little*, 3 Mas. (U. S.) 102; *Murray v. McLean*, 5 Hall L. J. 514; *Wheeler v. Nesbitt*, 24 How. (U. S.) 544. As to what is *probable cause* within the rule excusing one from the prosecution, where there is no cause, *in fact*, it may be said to be such facts and circumstances as would excite belief in the mind of a reasonable person, acting upon the facts, that the person charged was guilty of the crime for which he was prosecuted; *Wheeler v. Nesbitt*, *ante*; *Wilmarth v. Mountford*, 4 Wash. (U. S.) 79; *Hays v. Blizzard*, 30 Ind. 457; and to make out such a probable cause as will be a defense to an action, there must be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff was guilty. *Shafer v. Loucks*, 58 Barb. (N. Y.) 426; *Masury v. Whipple*, 8 R. I. 360; *Shaul v. Brown*, 28 Iowa, 37; *Center v. Spring*, 2 Iowa, 393; *Scanlan v. Cowley*, 2 Hilt. (N. Y.) 489; and in all cases, though want of probable cause raises a presumption of malice, yet it may always be rebutted by proof tending to show that the defendant acted in good faith and from honest motives; *Wheeler v. Nesbitt*, *ante*; *Munns v. Dupont*, 3 Wash. (U. S.) 31; *Levi v. Brannan*, 39 Cal. 485; *Brigham v. Aldrich*, 105 Mass. 212; *Hawley v. Butler*, 54 Barb. (N. Y.) 490; as that he acted under the advice of counsel; *Levi v. Brannan*, 39 Cal. 485; *Turner v. Walker*, 2 G. & J. (Md.) 377; *Blunt v. Little*, 3 Mas. (U. S.) 102; *Cooper v. Utterback*, 37 Md. 282; *Soppington v. Watson*, 50 Mo. 83; *Ames v. Rathburn*, 55 Barb. (N. Y.) 194; *Collings v. Hayte*, 50 Ill. 337; but he can not show that he acted under the advice of a magistrate, or other person *not* learned in the law. *Strauss v. Young*, 37 Md. 282; *Olmstead v. Partridge*, 82 Mass. 381. Nor will the fact that he acted under the advice of counsel be enough, unless he shows that he fully and fairly stated the matter to his counsel, *and acted thereon in perfect good faith*, and it may be shown that facts subsequently came to his knowledge which materially changed the aspect of the matter, and stripped the case of *probable cause* against the plaintiff. *Cole v. Curtis*, 16 Minn. 182; *Ames v. Rathburn*, 55 Barb. (N. Y.) 194; *Davenport v. Lynch*, 6 Jones (N. C.) 545; or that there were reasonable grounds for suspicion against the plaintiff; *Wilmarth v. Mountford*, 4 Wash. (U. S.) 79; *McMahan v. Armstrong*, 2 S. & P. (Ala.) 151; as in *Miller v. Brown*, 3 Mo. 127, that the plaintiff was notoriously a bad character and regarded as dishonest; or that the grand jury found a true bill against him; *Garrard v. Willett*, 4 J. J. Marsh. (Ky.) 628; or that the plaintiff was convicted on trial; *Hathaway v. Allen*, 1 Brayt. (Vt.) 152; *Whitney v. Peckham*, 15 Mass. 243; or that he was generally suspected of the crime; *Cecil v. Clark*, 17 Md. 508; *French v. Smith*, 4 Vt. 363; and special acts of the plaintiff may be shown, similar to the one with which he was charged; *Barron v. Mason*, 31 Vt. 189; *Gregory v. Thomas*, 2 Bibb (Penn.) 206; *Sherwood v. Reed*, 35 Conn. 450; but not his character for truth and veracity; *Roger v. Lamb*

can not be implied. A man from a malicious motive may take up a prosecution for real guilt, or he may from circumstances which he really believes proceed upon apparent guilt, and in neither case is he liable to an action. With whatever feelings of malice the defendant may have acted in instituting the prosecution, still, if there was reasonable and probable cause for it in the opinion of the judge, the defendant is entitled to a verdict. (*p*)¹

(*p*) Patteson, J., *Turner v. Ambler*, 10 Q. B. 257. *Hailes v. Marks*, 7 H. & N. 56. 3 Blackf. (Ind.) 155. What facts and circumstances amount to probable cause, is wholly a question for the court. *Turner v. Walker*, 3 G. & J. (Md.) 377; *Stone v. Crocker*, 24 Pick. (Mass.) 81; *Munns v. Dupont*, 3 Wash. (U. S.) 31; *Marston v. Deyo*, 2 Wend. (N. Y.) 424; *Driggs v. Burton*, 44 Vt. 124; *Cole v. Curtis*, 16 Minn. 182; *Waldhiem v. Sichel*, 1 Hilt. (N. Y.) 45; *Cloon v. Gerry*, 13 Gray (Mass.) 201; *Berson v. Southard*, 10 N. Y. 236. But whether such facts exist as amount to probable cause, is a question for the jury, as well as whether the defendant acted maliciously; *Lefford v. McCallum*, 1 Hill (N. Y.) 82; *Nye v. Otis*, 8 Mass. 122; *Munns v. Dupont*, *ante*; *Classon v. Staples*, 42 Vt. 209; and the mere fact that the plaintiff in the action failed to push it to judgment, does not warrant a presumption of malice; facts and circumstances must be shown, that prove that he *knew* that he had no cause of action, or that there was no ground of complaint, and that the action was brought for the purposes of vexation. *Ray v. Law*, Pet. C. C. (U. S.) 207; *Adams v. Lisher*, 3 Blackf. (Ind.) 445; *Lindsay v. Larned*, 17 Mass. 190; *Ives v. Bartholomew*, 9 Conn. 309. If a person has reason to believe that he has a cause of action, he can not be charged with malice, although in point of fact his claim was untenable; and the same is true of the bringing of a criminal charge; if the person bringing it acted in *good faith*, although mistakenly, the mere fact that the plaintiff was acquitted does not amount to even *prima facie* evidence of malice or want of probable cause, for the defendant may have acted in good faith, and upon probable cause, even though the plaintiff was innocent. *Adams v. Lisher*, *ante*; *French v. Smith*, 4 Vt. 363; *Ray v. Law*, *ante*. But a recovery in an action or a verdict of guilty in a criminal prosecution is generally conclusive evidence of probable cause, because if there was evidence sufficient to warrant a judgment, the defendant was warranted in his action; *Whitney v. Peckham*, 15 Mass. 243; *Com. v. Davis*, 11 Pick. (Mass.) 343; *Rosenstein v. Brown*, 7 Phil. (Penn.) 144; *Basher v. Matthews*, L. R. 2 C. P. 684; but if the plaintiff can show that the verdict was unfairly obtained, he may do so to rebut the presumption arising therefrom. *Burt v. Place*, 4 Wend. (N. Y.) 591. In *all* cases the plaintiff must show that the prosecution or suit claimed to be malicious, is at an end; *Stewart v. Thompson*, 51 Penn. St. 158; *Pratt v. Page*, 18 Wis. 337; *Smith v. Shackleford*, 1 N. & M. (S. C.) 36; *O'Driscoll v. McBurney*, 2 Id. 54; *Mayor v. Natter*, 64 Penn. St. 283; *Brown v. Randall*, 36 Conn. 56; *O'Brien v. Brady*, 106 Mass. 300; and that he prevailed therein. *Monroe v. Maples*, 1 Root (Conn.) 553; *Driggs v. Burton*, 44 Vt. 124.

¹ *Murray v. McLean*, Hall, L. J. (U. S.) 514; *Wiggin v. Coffin*, 3 Story (U. S.) 1; *Wheeler v. Nesbitt*, 24 How. (U. S.) 544; *Murray v. Long*, 1 Wend. (N. Y.) 140.

854. *Prosecution by persons who manifest a consciousness of the innocence of the accused.*—Proof of the absence of belief in the truth of the charge by the person making it and putting the criminal law in motion, is almost always involved in the proof of malice. Where the plaintiff complained of a prosecution for perjury, which the defendant had instituted against him for the purpose, as the plaintiff alleged, of suppressing evidence, and it was proved that the defendant, on being told that there was not sufficient ground for the indictment, declared that it was no matter, and that it would tie up the mouth of the plaintiff in a proceeding in which he would be likely to give evidence against the defendant, it was held that the judge was right in asking the jury whether the prosecutor believed at the time he preferred the indictment that the defendant had really been guilty of perjury, and whether he instituted the prosecution bona fide under such a belief or from an improper motive, and in telling them, that if the defendant had acted from an improper motive they might infer malice. (g) ¹

If a person has been assaulted with a consciousness that, by his own misconduct, he provoked the assault, and has no reasonable ground to complain of it, and he nevertheless prefers an indictment, upon which the plaintiff is tried and acquitted, it is for a jury to say whether the defendant instituted the prosecution with a consciousness that he was wrong; and if they think so, there is a total absence of reasonable and probable cause for it, and evidence from which malice may be fairly inferred. (r) If the defendant appears to have put the criminal law in motion for the purpose of enforcing payment of a debt, or obtaining the restitution of goods unlawfully detained, without having any reasonable ground for preferring a criminal charge, there is evidence of malice, and of want of reasonable and probable cause for the prosecution. (s)

If a man's own declarations and conduct, or the surrounding circumstances of the case, show that an act, which was

(g) Haddrick v. Heslop, 12 Q. B. 267. 131.

Broad v. Ham, 8 Sc. 50; 5 B. N. C. 722.

(s) Brooks v. Warwick, 2 Stark. 393.

(r) Hinton v. Heather, 14 M. & W. McDonald v. Rooke, 2 B. N. C. 219.

¹ Weaver v. Townsend, 14 Wend. (N. Y.) 192.

made the foundation for a charge of felony, was not believed by the prosecutor himself to be a felony, there is no reasonable or probable cause for a charge of felony. If the circumstances show that the prosecutor believed that a person he proceeded against as a thief took the goods under an erroneous notion that he had a lien upon them, or had a right to take and detain them, there is evidence of malice, and of want of reasonable and probable cause for the prosecution for a felony. (t) ¹ In an action for a malicious prosecution of the plaintiff by the defendant for obtaining goods from the defendant by false pretences, it appeared that the plaintiff, who had been insolvent, went to the shop of the defendant in his absence, and obtained five shillings' worth of marble hall-paper from his assistant, saying that it was for Mr. Hills, a neighbor, and that the bill was to be made out to Mr. Hills, which was done, and the bill was delivered to the plaintiff, who took it and the paper away with him; but Mr. Hills had not authorized the plaintiff to get the paper, and would not pay for it, and the defendant was told this a few hours after the paper had been obtained, and knew who the plaintiff was, and where he resided, but made no complaint against him for three months; and being asked the reason, said that the transaction had slipped his memory until he was going through his books, when seeing the entry of the paper against Mr. Hills, he went to him, and finding that he still repudiated the transaction, and refused to pay for the paper, he went before a magistrate, and charged the plaintiff with having obtained the paper by false pretenses. Upon these facts WIGHTMAN, J., asked the jury, first, whether they thought the plaintiff obtained the paper by falsely pretending that it was for Mr. Hills; and this question being answered in the affirmative, they were then asked whether they thought that the defendant at the time he went before the magistrate, believed that the plaintiff intended to defraud him of the price of the paper; and this question being answered in the negative, WIGHTMAN,

(t) *Huntley v. Simson*, 2 H. & N. 600; 27 Law J., Exch. 134.

¹ If the defendant knew that the plaintiff claimed or had a *prima facie* right to the property, he will be held liable for malicious prosecution, for charging him with feloniously stealing the goods. *Weaver v. Townsend*, 14 Wend. (N. Y.) 192.

J., held that there was no reasonable and probable cause for the prosecution. (u)

Any statements or declarations made by the defendant tending to show that he was actuated by spite and ill-will in instituting the prosecution are of course evidence of malice.

(x) "When a person says to the prosecutor of an indictment for perjury that there really is no case against the man he has indicted, and the prosecutor answers, 'I indict him to stop his mouth,' there is reasonable evidence from which a jury may infer that the prosecutor knows that the man is not guilty, but only indicts him for the purpose he has mentioned." (y)¹

(u) Williams v. Banks, 1 F. & F. 557.

(y) Maule, J., Heslop v. Chapman, 23

(x) Michell v. Williams, 11 M. & W. Law J., Q. B. 49.

217.

¹ It is always competent to show any fact that tends to show want of good faith in the defendant in bringing the prosecution, or a malicious intent; Pierce v. Thompson, 6 Pick. (Mass.) 193; Tefft v. Windsor, 17 Mich. 486; Spencer v. Anness, 3 Vroom. (N. J.) 100; Hayes v. Hayman, 20 La. Ann. 336; Lyon v. Hancock, 35 Cal. 372; Moore v. Sanborn, 42 Mo. 490; and malice may be inferred from want of probable cause; Wood v. Weir, 5 B. Mon. (Ky.) 544; Merriam v. Mitchell, 13 Me. 439; Hall v. Hawkins, 5 Hump. (Tenn.) 357; but this presumption is not conclusive, as a person may have acted in good faith, and upon what he believed to be a probable cause, when the facts were not such as to sustain him. In determining the question of probable cause, the question is not, whether the plaintiff was guilty or innocent of the crime charged, *but whether the defendant believed him guilty*, for, if he acted *without malice* he is not liable, even though he acted without probable cause; Casperson v. Sprawl, 39 Mo. 39; Seibert v. Price, 5 W. & S. (Penn.) 438; Hill v. Palm, 38 Mo. 13; so, on the other hand, if there was probable cause, he can not be held chargeable, however maliciously, rashly, or zealously he may have acted. Travis v. Smith, 1 Penn. St. 234. Thus it will be seen that the two elements, *malice and want of probable cause*, must concur, to render a person liable for malicious prosecution, and *both* must be established by the plaintiff; proof of the one without the other, is not enough, therefore, although proof of want of probable cause will warrant a presumption of malice; Murphy v. Redler, 16 La. Ann. 1; McNull v. Herring, 8 Tex. 151; Grant v. Moore, 29 Cal. 644; Malone v. Murphy, 2 Kan. 250; Cook v. Walker, 30 Ga. 519; Holbern v. Neal, 4 Dana (Ky.) 120; Brown v. Griffin, Cheves (S. C.) 32; Robertson v. Spring, 16 La. Ann. 252; yet this presumption may be disproved by evidence tending to show that the defendant acted under an honest although mistaken belief, and any evidence calculated to throw any light upon the character of the defendant's motives, may be given in evidence either for or against him. Smith v. Ege, 52 Penn. St. 419; Woodall v. McMillan, 38 Ala. 622; McRae v. O'Neal, 2 Dev. (N. C.) 167; Swaim v. Stafford, 3 Ired. (N. C.) 289; Burhaus v. Sanford, 19 Wend. (N. Y.) 417; Humphries v. Parker, 52 Me. 502; Leach v. Wilbur, 9 Allen (Mass.) 212; Lisk v. Hurst, 1 W. Va. 83; Gaggans v. Monroe, 31 Ga. 331; Chapman v. Dodd, 10 Mich. 350; East-

The fact that overseers of the poor have taken out a summons before justices, and have caused a warrant of distress and a warrant of arrest to issue against the plaintiff for the non-payment of poor-rates, they knowing at the time that the plaintiff was bankrupt, and had obtained his protection, is no evidence of malice to support an action for a malicious prosecution against the overseers. (z)

855. *Prosecutions under the advice of counsel*.—It is no answer to an action for a malicious prosecution to show that the defendant was bound over by recognizance to prosecute and give evidence, if it appears that the prosecution originated in malice, and that the recognizance was the result of prior malicious proceedings, instigated by the defendant. (a) Counsel's opinion is of no avail to a man who has instituted an unfounded and malicious prosecution. "It would be a most pernicious practice," observes HEATH, J., "if we were to introduce the principle that a man, by obtaining the opinion of a counsel, by applying to a weak man or an ignor-

(z) *Philips v. Naylor*, 4 H. & N. 565; *Fitz John v. Mackinder*, 30 Law J., C. 27 Law J., Exch. 222.

(a) *Dubois v. Keats*, 11 Ad. & E. 332.

man v. Keaser, 44 N. H. 518; *Palmer v. Avery*, 41 Barb. (N. Y.) 290; *Phillips v. Bonham*, 16 La. Ann. 387; *McKown v. Hunter*, 30 N. Y. 625; *Schofield v. Ferris*, 47 Penn. St. 194; *Ammerson v. Crosby*, 26 Ind. 451. In order to maintain an action the plaintiff must prove, 1st. That he has been prosecuted by the defendant either civilly or criminally, and that the prosecution is at an end, and that it ended in his favor. 2nd. That the prosecution was instituted maliciously and without probable cause; and 3rd. That he has sustained damage therefrom. *Ritchie v. Davis*, 11 Iowa, 124; *Cecil v. Clark*, 17 Md. 504; *Stancliff v. Parmeter*, 18 Ind. 321; *Steet v. Williams*, Id. 161; *Bloss v. Gregor*, 15 La. Ann. 421.

Thus, in *Long v. Rodgers*, 19 Ala. 321, the plaintiff and another person were arrested upon the complaint of the defendant, and charged with the abduction of his daughter. The court held that the plaintiff was bound to prove not only want of probable cause, but malice also, and that certain facts and circumstances might exist which did not really amount to probable cause, and yet, might be sufficient to entitle the defendant to a verdict, because they show that the defendant was not actuated by malice in fact, but that, when the plaintiff established want of probable cause, the law implied malice, and it then became the duty of the defendant to overcome the presumption, by proof that he acted under a reasonable belief of the plaintiff's guilt. *Ewing v. Sanford*, 19 Ala. 605; *Honeycut v. Freeman*, 13 Ired. (N. C.) 320; *Carpenter v. Sheldon*, 5 Sandf. (N. Y.) 77; *Goodrich v. Warner*, 21 Conn. 432; *Brainard v. Brackett*, 33 Me. 580; *McGurn v. Brackett*, 33 Id. 331.

ant man, may shelter his malice in bringing an unfounded prosecution." (b)

"A prosecution," observes COCKBURN, C. J., "though in the outset not malicious, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malo animo* in the prosecution, with the intention of procuring *per nefas* a conviction." (c)

In an action for a malicious prosecution it appeared that the defendant had sued the plaintiff in the county court, who pleaded a set-off, and the defendant, in order to get rid of the set-off, forged a receipt of the plaintiff for a sum of money, and swore before the county court judge that the handwriting to that receipt was the handwriting of the plaintiff. The plaintiff denied it, and the county court judge, believing the plaintiff to have been guilty of perjury, committed him for trial, and bound over the defendant to prosecute. The defendant proceeded to the assizes, went before the grand jury, and procured a bill of indictment to be found against the plaintiff, and stuck to the charge at the trial, and endeavored to maintain it by perjured evidence, but the plaintiff was acquitted. The plaintiff then brought an action against the defendant for malicious prosecution, and having satisfied a jury that the defendant preferred the charge with the knowledge of its falsehood, recovered £200; and it was held that the action was maintainable, because the defendant persisted to the last in the false charge, having no reasonable or probable cause for the charge, but preferring it with knowledge of its falsehood, and endeavoring at the trial to maintain it with further and perjured evidence. (d) "But for the order of the county court judge," observes WILLES, J., "the action would, beyond all doubt, have been maintainable, and then that order ought not to aid the defendant; first, because it was occasioned by his own contrivance and wrong; and, secondly, because as a judicial act it is void, having been obtained by fraud on the court." (e) Although the defendant was compelled to prosecute, there was no compulsion upon

(b) *Hewlett v. Cruchley*, 5 Taunt. 283.

(c) *Fitz John v. Mackinder*, 30 Law J., C. P. 264.

(d) *Fitz John v. Mackinder*, 30 Law J., C. P. 257.

(e) 29 Law J., C. P. 170.

him to persist in a false charge. He might have discharged his recognizances by appearing and telling the truth. "It is supposed," observes Lord DENMAN, "that a charge can not be preferred before a grand jury maliciously, if the party be bound to prefer it, though the recognizance be obtained in consequence of his malicious proceeding. I have not the smallest doubt that a recognizance so obtained does not justify a party, or prevent his subsequent conduct from being malicious." "If an unwilling party," further observes LITLEDALE, J., "were bound over by recognizance to prosecute, the recognizance would furnish an answer for this reason only, that in such a case the plaintiff could not prove that the defendant was actuated by a malicious motive." (f) ¹

856. *Malicious complaints before magistrates*—*Maliciously causing a justice's warrant to be issued against the plaintiff*.—If a defendant maliciously and without reasonable and probable cause has attended before a magistrate and made a complaint, and induced the magistrate to issue a warrant against the plaintiff, the defendant is responsible in damages in an action for a malicious prosecution. If he goes before a magistrate and states that he has just cause to suspect that the plaintiff has robbed him, and upon that representation a warrant is granted, it does not lie in his mouth to say that the magistrate ought not to have granted the warrant; and if he has knowingly made a false charge, and had no real bona fide ground of suspicion, he is answerable for it. (g) But to show that the defendant was influenced by malice, it must be proved that the charge was willfully false, or that the state-

(f) *Dubois v. Keats*, 11 Ad. & E. 332. (g) *Elsée v. Smith*, 1 D. & R. 105.

¹ The mere fact that a person acted under the advice of counsel is not sufficient to establish probable cause, or lack of malice. He must also show that he stated to the counsel consulted, all the facts and circumstances bearing upon the guilt or innocence, or the liability of the plaintiff, which he knew, or by reasonable diligence could have ascertained, and that he acted honestly and in good faith upon such advice. *Hill v. Palm*, 38 Mo. 13; *Whitefield v. Brooks*, 40 Miss. 311; *Williams v. Vanmeter*, 8 Mo. 339; *Laird v. Davis*, 17 Ala. 27; *Levi v. Brannan*, 39 Cal. 485; *Collins v. Hayte*, 50 Ill. 339; *Blunt v. Little*, 3 Mas. (U. S.) 102; *Ames v. Rathbun*, 55 Barb. (N. Y.) 194; *Turner v. Walker*, 3 G. & J. (Md.) 377; *Sappington v. Watson*, 50 Mo. 83; *Cooper v. Utterback*, 37 Md. 282; *Glasscock v. Brydges*, 15 La. Ann. 672; *Davenport v. Lynch*, 6 Jones (N. C.) 545; *Roberts v. Bayles*, 1 Sandf. (N. Y.) 47; *Ross v. Innis*, 26 Ill. 259; *Bartlett v. Brown*, 6 R. I. 37.

ments made by him before the magistrate were un true to his knowledge at the time he made them, (*h*) or that they were of such a nature that no well-intentioned person would state them, and found a criminal charge upon them, without ascertaining whether they were true or false, the means of inquiry and of ascertaining the truth being within his reach, if he had thought fit to avail himself of them. "A man may prefer a charge either on the foundation of what he knows or of what he suspects. But there is a wide difference, as regards both the accuser and the party accused, whether the charge be made on the one ground or the other. That which is founded on the accuser's own knowledge will require proof to that extent to warrant such a charge; whereas that which rests on suspicion only will be satisfied by circumstances sufficient to induce suspicion on the mind of a cautious person." "This distinction," observes BAYLEY, J., "between a direct charge and one upon suspicion only, is well known. I may know that a person has stolen my property by having seen him commit the act, or by having heard him confess it, and in either of these cases the charge would proceed directly from my own knowledge, but information to a less extent might reasonably create in me a suspicion, and then the charge would proceed in a form less direct." (*i*)¹

It has been held, that if a person goes and lays his complaint of the loss of his property before a magistrate, and tells him of its having been taken or appropriated by the plaintiff, the complaining party is not responsible for what the magistrate may think fit to do upon the strength of this information. If, therefore, the magistrate, acting upon the statement or deposition bona fide given, treats the matter as a felony, and issues his warrant for the apprehension of the plaintiff on the charge of felony, and in so doing forms an erroneous judgment, and conceives that to be a felony which is not a felony, but only matter for a civil action, the complaining person, who has thus set the magistrate in motion and caused the warrant to be issued, is not responsible for the erroneous

(*h*) *Cohen v. Morgan*, 6 D. & R. 8.

(*i*) *Davis v. Noake*, 6 M. & S. 32.

¹ *Latham v. Libby*, 38 Barb. (N. Y.) 339; *Comfort v. Fulton*, 39 Id. 56 *Saville Biquenaud*, 15 La. Ann. 605.

judgment of the magistrate. and the acts consequent thereupon. (k) But if there is no reasonable or probable cause for a charge of felony, and a charge of felony is made, the party preferring the charge will be responsible for it, though he acted under the advice of the magistrate, and preferred the charge at his suggestion.

It is often a doubtful question whether a particular offense amounts to a felony, and it often depends upon the fact of the prisoner's having acted with conscious dishonesty, or under a notion of right on his part. But "some persons suppose that no man can lay his hands on goods that do not belong to him without being guilty of felony. If you could get at the bottom of a man's mind, he might say he was justified, because the plaintiff had no right to do it, no matter how honest his intention; but if that is his opinion, it is a blunder on his part, and one of those blunders," observes BRAMWELL, B., "for which a man who commits it should be punished, as it is very likely that the person charged with felony through the blunder will, as long as he lives, be sometimes asked, whether he had not been had up before the magistrate for felony." (l)

It is not necessary, in order to maintain an action against a person for having made a false and unfounded charge of felony against another before a magistrate, to show that the charge was taken down in writing, and acted upon by the magistrate. But it is necessary that the jury should be satisfied that it was made to the magistrate with a view of inducing him to entertain it as a charge of felony. (m)

857. *Continuance by defendant of proceedings commenced without his knowledge.*—When the proceedings have not been commenced by the defendant, but have only been continued by him, his responsibility commences at the point at which he becomes cognizant of the proceedings. And there is a material distinction between instituting a prosecution and merely attending the hearing upon a proceeding already commenced. It does not at all follow that the defendant, by attending the hearing, adopts the proceeding, or renders himself responsible

(k) Leigh v. Webb, 3 Esp. 165. Wyatt v. White, 5 H. & N. 371; 29 Law J., Exch. 193.

(l) Huntley v. Stinson, 27 Law J., Exch. 137; 2 H. & N. 600.

(m) Clarke v. Poutan, 6 C. & P. 423.

for the motives or actions of the person who instituted it, although that person may be an agent of the defendant. (n)¹

858. *Effect of the complaint or information before the magistrate being followed up by a conviction of the plaintiff.*—A conviction of the plaintiff by a magistrate, so long as it has not been reversed on appeal, affords a conclusive answer to the charge that the complaint or information which led to it was founded in malice, and was preferred without reasonable or probable cause. (o)²

859. *Maliciously causing a search warrant to issue.*—If a person, without reasonable and probable cause, and from malicious or corrupt motives, causes a search warrant to issue, he is liable to an action for damages at the suit of the party who has been damnified by the execution of the warrant; but if a person goes before a magistrate, and lays before him fair grounds of suspicion for the magistrate to exercise his judgment upon, and the magistrate thinks fit, in the exercise of the functions of his office, to issue the warrant, the person so attending before the magistrate is not then responsible for the issue of the warrant, unless he has knowingly or recklessly, and without due inquiry, sworn to what was false. (p)

860. *Malicious indictment.*—If an indictment preferred by the defendant contains several charges against the plaintiff, and he is convicted on some and acquitted on others, this does not prevent the plaintiff from maintaining an action for a malicious prosecution in respect of the charges of which he was acquitted. (q) The question whether there was or was not probable cause for some parts of the charge would affect the amount of the damages recoverable, but not the plaintiff's right to a verdict. (r)

(n) *Weston v. Beeman*, 27 Law J., H. & N. 565; 27 Law J., Exch. 222; 28 Exch. 57.

(o) *Mellor v. Baddeley*, 2 Cr. & M. 678; *supra*.

Cost, ch. 15, and s. 2 of this chapter. (q) *Reed v. Taylor*, 4 Taunt. 617.

(p) *Cooper v. Booth*, 3 Esp. 144; (r) *Delisser v. Towne*, 1 Q. B. 343
cited 1 T. R. 535. *Philips v. Naylor*, 4 Ellis v. Abrahams, 8 Q. B. 713.

¹ *Ruffner v. Williams*, 3 W. Va. 243; *Burns v. Erben*, 26 How. Pr. (N. Y.) 273; *Latham v. Libby*, 38 Barb. (N. Y.) 339; *Gold v. Bissell*, 1 Wend. (N. Y.) 210.

² *Whitney v. Peckham*, 15 Mass. 243; *Burt v. Place*, 4 Wend. (N. Y.) 591; *Wood v. Laycock*, 3 Met. (Ky.) 192; *Driggs v. Burton*, 44 Vt. 124; *O'Brien v. Barry*, 106 Mass. 300; *Williams v. Woodhouse*, 3 Dev. (Ill.) 257; *Clark v. Cleaveland*, 6 Hill (N. Y.) 344; *Herman v. Brookerhoff*, 8 Watts (Penn.) 240.

861. *Malicious prosecution by court-martial.*—An action for a malicious prosecution will not lie at the suit of a subordinate officer against his commanding officer for maliciously, and without reasonable or probable cause, bringing him to a court-martial, as it is an act done in the course of discipline, and under the powers legally incident to his situation in the public service. (s) Nor can an action be brought by a private soldier against his commanding officer for a malicious discharge. (t)

862. *Malicious assertion of a legal right.*—The malicious assertion of a legal right is not actionable. "Let a prosecution be never so maliciously carried on, yet if there be probable cause or ground for it, no action for a malicious prosecution will lie." (u) No man can be sued for the exercise of his legal right to issue execution upon a judgment, though it be averred that he acted maliciously, and without reasonable and probable cause. (v)¹

863. *Malicious and unfounded actions.*—If one man prosecutes a civil action against another maliciously, and without reasonable and probable cause, an action for damages is not maintainable against the prosecutor of the action. Thus, if one man slanders another in an action in a proper court, no action will lie for it. (w) There is a great difference between the bringing of an action and indicting maliciously and without cause. When a man brings an action he claims a right to himself, or complains of an injury done to him; and if a man fancies he has a cause of action he may sue and put forward his claim, however false and unfounded it may be. The common law, in order to hinder malicious and frivolous and vexatious suits, provided that every plaintiff should find pledges, which were amerced if the claim was false. But that method became disused, and then to supply it the stat-

(s) *Johnstone v. Sutton*, 1 T. R. 548.
Sutton v. Johnstone, 1 Bro. P. C. 76.
Floyd v. Barker, 12 Rep. 23. *Dawkins v. Lord Rokeby*, *ante*.

(t) *Frear v. Marshall*, 4 F. & F. 485.

See *ibid*, 486, in nota.

(u) *Anon*, 6 Mod. 73.

(v) *Roret v. Lewis*, 5 D. & L. 373

Magnay v. Burt, 5 Q. B. 394.

(w) *Beauchamp v. Croft*, *Keilw.* 26.

¹ *Parker v. Francis*, 1 Penn. St. 156; *Davis v. Clough*, 8 N. H. 157; *Woodmunsie v. Logan*, 1 Id. 93; *Stone v. Swift*, 4 Pick. (Mass.) 389; *Pierce v. Thompson*, 6 Id. 193; *Gorton v. De Angelis*, 6 Wend. (N. Y.) 418.

utes gave costs to the successful defendants. But there was no amercement upon indictments, and the party had not any remedy to reimburse himself but by action. But if A sues an action against B for mere vexation, in some cases upon particular damage, B may have an action, but it is not enough to say that A sued him falso et malitiose, but he must show the matter of the grievance specially, so that it may appear to the court to be manifestly vexatious. (x) ¹

864. *Maliciously putting the process of the law in motion in the name of a pauper or insolvent.*—No action will lie for improperly promoting a civil action in the name of a third person, unless it be alleged and proved to have been done maliciously, and without reasonable or probable cause; (y) but if there be malice and want of reasonable or probable cause the action will lie, provided there be also legal damage. (z) If the plaintiff in an action charges the defendant with having maliciously, and without any reasonable or probable cause, commenced and prosecuted an action against him in the name of a third person for his (the defendant's) own benefit, whereby the plaintiff has sustained damage, and it appears that the party so wrongfully put forward by the defendant was a person in solvent circumstances, the action will be defeated, inasmuch as the award of costs upon the failure of that action would, in contemplation of law, have been a full compensation for the unjust vexation caused by the bringing of the action, and no damage would be deemed to have been sustained; but if it appears that in the previous action there was judgment of non-suit, with an award of costs, and that the plaintiff was a pauper, or an insolvent, and could pay no costs, and that the defendant knew of the insolvency of the plaintiff at the time he induced the latter to bring the action, and had himself no

(x) Savile v. Roberts, 1 Ld. Raym. 374; 1 Salk. 13.

(y) Flight v. Leman, 4 Q. B. 883.

(z) Williams, J., in Cotterell v. Jones, 11 C. B. 730; 1 Roll. Abr. ACTION SUR CASE, H. pl. 1, p. 101.

¹ The declaration should set forth such facts as show affirmatively a want of probable cause; a mere allegation of malice amounts to nothing, for if there was probable cause, the most *express malice* would not render the defendant liable. Preston v. Cooper, 1 Dill. (U. S.) 589; Davis v. Clough, 8 N. H. 157; Fullenwider v. McWilliams, 7 Bush. (Ky.) 389.

interest in the subject-matter of the suit, there would appear to be a good ground of action. (a)

865. *Maliciously issuing execution for a larger sum than is due upon a judgment.*—Process of execution on a judgment for the purpose of obtaining the sum recorded is *prima facie* lawful, and the judgment creditor can not be rendered responsible in damages for issuing execution for more than is due upon the judgment, unless some actual damage can be shown to have been sustained by the plaintiff therefrom. It is not enough for the plaintiff to show that he was arrested and kept in custody for a greater amount than was due upon the judgment. (b) He must also prove that by reason of the arrest and detention for the larger sum his imprisonment was prolonged, or the expense of obtaining his discharge increased. His remedy, where the thing has been done inadvertently, without malice, is to apply to the court, or a judge, that he may be discharged, and that satisfaction may be entered up, on payment of the balance justly due. "But it would not be creditable to our jurisprudence," observes LORD CAMPBELL, "if the debtor had no remedy by action where his person or his goods have been taken in execution for a larger sum than remained due upon the judgment, the judgment creditor knowing the sum for which execution is sued out to be excessive, and his motive being to oppress or injure his debtor. The court or judge to whom summary application is made for the debtor's liberation can give no redress beyond putting an end to the process of execution on payment of the sum due, although by the excess the debtor may have suffered a long imprisonment, and have been utterly ruined in his circumstances." (c) An action, therefore, is maintainable against a judgment creditor for maliciously and without reasonable or probable cause indorsing a writ of *ca. sa.*, issued on such judgment to levy a larger sum than was due, and causing the debtor to be arrested

(a) *Cotterell v. Jones*, 11 C. B. 728, 730; 21 Law J., C. P. 3. *Attwood v. Monger*, Styles, 378. *Waterer v. Freeman*, Hob. 266. *Savile v. Roberts*, 1 Ld. Raym. 378; 12 Mod. 208. *Pechel v. Watson*, 8 M. & W. 691.

(b) See *Gerard v. Lewis*, L. R., 2 C. P. 305.

(c) *Churchill v. Siggers*, 3 Ell. & Bl. 938; 23 Law J., Q. B., 308. *Jenings v. Florence*, 2 C. B., N. S. 467; 26 Law J., C. P. 277. *Wentworth v. Bullen*, 9 B. & C. 849. *Saxon v. Castle*, 6 Ad. & E. 659.

thereunder, and it is not necessary for the plaintiff before bringing the action to obtain his discharge from custody by order of the court or a judge. (*d*) But where before judgment the plaintiff paid part of the debt for which he was sued, and subsequently judgment was signed and a ca. sa. issued for the whole amount, it was held that no action lay so long as the judgment stood for the full amount. (*e*)

866. *Maliciously causing an extent to issue.*—If a defendant, from feelings of ill-will, and with a view to annoy and injure the plaintiff, prays an extent to secure a debt due from the plaintiff to the crown, under the pretense that the debt is in danger of being lost to the crown, when he knows it not to be in danger, or has no reasonable or probable cause for believing it to be in danger, he will be responsible in damages in an action for a malicious prosecution. Such a proceeding is calculated to affect the plaintiff's credit, and bring demands upon him, and be productive of injurious and even ruinous consequences to him. In the action for the malicious prosecution, the law requires that the writ of extent should be traced to its close, and that may be done by showing it to be discharged by the court, though upon an arrangement, and by consent. (*f*)

867. *Malicious proceedings in bankruptcy.*—An action for a malicious prosecution will lie against persons who petition for an adjudication in bankruptcy, without reasonable or probable cause, and knowingly and willfully, or recklessly, swear to depositions false in fact. (*g*) In order, however, to prove a want of reasonable or probable cause, the proceedings must be superseded or set aside before the commencement of the action, for the very existence of a commission of bankruptcy has been held to be evidence of probable cause. (*h*) The mere fact, however, of the proceedings having been superseded or set aside, does not of itself establish the fact of the want of probable cause for them, and the plaintiff must give some prima facie evidence of want of probable cause, in order to

(*d*) Gilding v. Eyre, 31 Law J., C. P.

174. (*e*) Huffer v. Allen, L. R., 2 Exch. 15.

(*f*) Craig v. Hasell, 4 Q. B. 499.

(*g*) Farley v. Danks, 4 Ell. & Bl. 499.
Brown v. Chapman, 1 W. Bl. 427.

(*h*) Whitworth v. Hall, 2 B. & Ad. 698.

put the defendant upon proof of the existence of probable cause. (i)

868. *Malicious abuse of legal process.*—Whoever makes use of the process of the court for some private purpose of his own, not warranted by the exigency of the writ or the order of the court, is amenable to an action for damages for an abuse of the process of the court. Thus, where the defendant having instituted legal proceedings against the plaintiff, and caused a writ to be issued against him, employed the officer charged with the execution of the process to do a specific thing that he was not warranted by the writ to do, viz., to use it as a means of compelling the plaintiff to give up a ship's register, it was held that the defendant was responsible in damages to the plaintiff for causing him to be arrested and detained until he had given up the register, and for the injury he had sustained in being deprived of the register which he had given up to obtain his release from custody. And when the complaint is, that the process of the law has been abused and prostituted to an illegal purpose, it is perfectly immaterial whether or not it issued for a just cause of action or whether the suit was legally terminated or not. (j)¹

869. *Malicious detention of judgment debtors after tender of the debt and costs.*—The Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, authorizes the sheriff, jailer, or person in whose custody a prisoner may be under a writ of ca. sa., to discharge such prisoner on receiving an order in writing from the attorney in the cause; but the attorney is not to give the discharge without the consent of his client, nor is the sheriff or jailer, or person having the prisoner in custody, to liberate him, if the judgment creditor gives him notice not to do it. If, therefore, the latter, after tender of the amount of the judgment debt and costs, refuses to consent to the discharge

(i) Hay v. Weakley, 5 C. & P. 361. Cotton v. James, 1 B. & Ad. 134. See Johnson v. Emerson, L. R., 6 Exch. 329.

(j) Grainger v. Hill, 5 Sc. 580; 4 B. N. C. 212. Heywood v. Collinge, 9 Ad. & E. 274. See Keighly v. Bell, 4 F. & F. 763.

¹ Wanzer v. Bright, 52 Ill. 35; Stewart v. Cole, 46 Ala. 646; Mayer v. Walter, 64 Penn. St. 283; Baldwin v. Weed, 17 Wend. (N. Y.) 224; Fisher v. Deans, 107 Mass. 118.

of the prisoner, or interferes to prevent his liberation, he will be guilty of a wrongful act, and may render himself liable to an action for maliciously refusing to discharge the prisoner, and detaining him unlawfully in custody. (*k*)

870. *Malicious arrest.*—By 32 & 33 Vict. c. 62, s. 6 (which is a re-enactment in effect of 1 & 2 Vict. c. 110, ss. 1 to 10), arrest on mesne process is abolished; but it is enacted, that if a plaintiff shall at any time before final judgment prove, by evidence on oath, to the satisfaction of a judge, that he has a cause of action against the defendant to the amount of fifty pounds or upwards, and that there is probable cause for believing that the defendant is about to quit England, then it shall be lawful for the judge to order the defendant to be arrested and imprisoned for a period not exceeding six months, unless he gives the requisite security, not exceeding the amount claimed in the action, that he will not leave England without the leave of the court

The foundation, therefore, on which the liability of a person for a malicious arrest must now rest is, that the party obtaining the order or authority from a judge for the arrest has imposed on the latter by some false statement, some *suggestio falsi* or *suppressio veri*, and has thereby satisfied him not only of the existence of the debt to the requisite amount, but also that there is reasonable ground for supposing the debtor to be about to quit the country. If, without fraud or falsehood, upon an affidavit (*l*) fairly stating the facts, the party succeeds in satisfying a judge that the defendant is about to quit the country, and so obtains an order for a *capias* to arrest him, he is not liable to an action, though the defendant had no such intention.

The party arrested has the power of making an application to a judge or the court praying to be discharged out of custody, and the discharge will be granted as a matter of course, if such party succeeds in satisfying the judge or court that he has not, nor never had, the intention imputed to him; but the discharge affords no ground of action against the party procuring the arrest, if the original order for the

(*k*) *Crozer v. Pilling*, 4 B. & C. 26.

(*l*) See Reg. Gen. Mich. T. 1869, R. 6; L. R., 5 Q. B. 670, 671.

arrest was fairly obtained, (*m*) as it is a judicial act, and a person concerned in enforcing it is not responsible for its correctness. (*n*) Where, however, the facts are not truly stated, and the court or judge has been put in motion without reasonable and probable cause, and the party making the affidavit, or procuring the order for the arrest, was guilty of falsehood, or of culpable negligence in swearing to facts without knowing whether they were true or false, there will be evidence of malice, and he will be responsible in damages. (*o*)

Any statements or declarations made by the defendant tending to show that he had no reasonable or probable cause for believing, and did not believe, that the plaintiff was about to quit England, are of course evidence against him to show that he was actuated by malicious motives in procuring the order for the arrest. (*p*)

The arrest by a sheriff, under a writ from any of the Queen's courts, of a person privileged from arrest by reason of his attendance as a witness under the process of another court, does not form the ground of any action at law against the sheriff or his officer, though it is alleged to have been done maliciously. (*q*)

871. *What amounts to a malicious arrest—Proof of actual custody.*—Where the person submits to the process, or to the commands of an officer intimating that he is in custody, there is a perfect arrest. Actual contact is not necessary, as we have seen, to constitute an arrest. Where the defendant, for purposes of extortion, had placed a writ in the hands of a sheriff's officer, with instructions to arrest the plaintiff unless he would give up some property, and the officer finding his way to the plaintiff's sick-bed produced the writ and demanded the property, telling the plaintiff that unless it was delivered up to him a man would be left with him, and the plaintiff yielded to the pressure and gave up the property, it was held that these facts amounted in judgment of law to an arrest. (*r*)¹

(*m*) *Daniels v. Fielding*, 16 M. & W. 207.

(*n*) *Williams v. Smith ante*.

(*o*) *Gibbons v. Alison*, 3 C. B. 185.

Ross v. Norman, 5 Exch. 359.

(*p*) *Petrie v. Lamont*, 4 Sc. N. R. 339; 3 M. & G. 702.

(*q*) *Magnay v. Burt*, 5 Q. B. 381.

(*r*) *Grainger v. Hill*, 5 Sc. 580.

¹ In *Ahern v. Collins*, 39 Mo. 145, the court held that, in order to constitute an

SECTION II.

OF ACTIONS FOR MALICIOUS ARREST AND MALICIOUS PROSECUTION. (s)

872. *Parties to be made defendants.*—It is immaterial whether the defendant alone makes the charge, or whether he stirs up and procures another to do it. In either case he is liable in damages. (t)¹ If, for the gratification of his malice, a man gives his agent a plenary authority to institute a prosecution against another, he is equally responsible for all that is done under it; and if the agent have no cause for the proceeding, the principal is responsible, for it is his duty to inquire whether the proceeding be well founded or not. If, as against the agent, there was an absence of reasonable and probable cause for the prosecution, that is sufficient as against the principal, by whose authority and direction the agent acted. (u) But if the agent institutes the proceeding of his own head, and without the instigation or direction of the principal, the latter will not be responsible for the unauthorized proceedings of his agent, unless he adopts them and continues them, with knowledge of all the circumstances. When proceedings have been commenced by an agent without the knowledge of the principal, the responsibility of the latter commences at the point at which he becomes cognizant of the proceedings. (x)

(s) See 30 & 31 Vict. c. 152, s. 10, *a etc.*

(t) Savile v. Roberts, 1 Ld. Raym. 377.

(u) Michell v. Williams, 11 M. & W. 213.

(x) Weston v. Beeman, 27 Law J., Exch. 57.

arrest and false imprisonment, it was not necessary that the person should be touched, but that it was enough if he was ordered to do or not to do a thing, to move or not to move against his will, or if he is not left to his own free will to go and stay when and where he pleases, and force is offered, or there is reasonable ground to apprehend that coercive measures will be used if he does not yield. Jones v. Jones, 13 Ired. (N. C.) 446; Lawson v. Buzines, 3 Har. (Del.) 416; Strout v. Gooch, 8 Me. 127; Courtney v. Dozier, 20 Ga. 369; Hart v. Flynn, 8 Dana (Ky.) 190; Gold v. Bissell, 1 Wend. (N. Y.) 215; Emery v. Chesley, 18 N. H. 198; Field v. Ireland, 21 Ala. 240; Huntington v. Schultz, Harp. (S. C.) 453; Whitehead v. Keyes, 3 Allen (Mass.) 495.

¹ It is enough if the defendant instigated the prosecution, or actively promoted it. Welis v. Parsons, 3 Har. (Del.) 505; Stansbury v. Fogle, 37 Md. 369.

If an attorney maliciously and without reasonable and probable cause, knowing that his client has no just claim against the plaintiff, assists in putting the law in motion, and effects an unlawful and malicious arrest, he, as well as his client who has authorized the proceeding, will be responsible in damages. (*y*) If, in an action for a malicious prosecution against A and B, supported by proof that both A and B entered into a joint recognizance to prosecute and give evidence, it appear that A only employed the attorney, and that B attended before the magistrate and the grand jury at the request of the attorney, B will be entitled to an acquittal. (*z*)

A railway company is not liable for a malicious prosecution instituted by their servant without the knowledge or direction of the company, and a doubt has been thrown out as to whether a corporation can be actuated by that sort of malice which is essential to the maintenance of an action for a malicious prosecution. (*a*)¹

If an attorney appears on behalf of a railway company to prosecute for an assault made upon one of the company's servants, and the prosecution fails, and an action for a malicious prosecution is subsequently brought, it will be assumed, until the contrary be shown, that the depositions of the witnesses were taken by or known to the attorney, and therefore to the company, before the prosecution was undertaken, and therefore if the depositions disclose a reasonable and probable cause for the prosecution, the company will not be liable, the onus of proving that there was no reasonable or probable cause lying upon the plaintiff. (*b*)

873. *Pendency of a rule for a criminal information against the defendant.*—The mere fact of a criminal information being pending against the defendant on the prosecution of the plaintiff, for the same subject-matter, is no ground for staying the proceedings in the action; but if the plaintiff has resorted

(*y*) Stockley v. Hornidge, 8 C. & P. 16. 352; 23 Law J., Exch. 328.

(*z*) Eager v. Dyott, 5 C. & P. 4.

(*b*) Watker v. South-East. Rwy., L. R.

(*a*) Stevens v. Mid. Rail. Co., 10 Exch. 5 C. P. 640.

¹ A corporation can not be held chargeable for a malicious prosecution. Ouseley v. Montgomery R. R. Co., 37 Ala. 560; Childs v. Bank of Missouri, 17 Mo. 213. But see *contra*, Vance v. Erie R. R. Co. 32 N. J. 334; Goodspeed v. East Haddam Bank, 22 Conn. 530.

to his private remedy by way of action, the court will not in general allow him to proceed with the criminal information until the action has been discontinued. (*c*)

874. *Declarations for a malicious prosecution.*—The declaration must aver the termination of the prosecution, and set forth the means by which it was ended; otherwise the plaintiff might recover in the action, and yet be afterwards convicted on the original prosecution. (*d*) It must also aver that the proceedings terminated in favor of the plaintiff, if from their nature they be capable of such a termination, and it is not sufficient to allege that the plaintiff was convicted, and that there was by law no appeal against such conviction. (*e*) If there be any special damage, it should be stated with such reasonable particularity as to give notice to the defendant of the peculiar nature of the injury. (*f*)

875. *Of the plea of not guilty in actions for a malicious arrest and malicious prosecution.*—The plea of not guilty in actions for a malicious arrest, malicious prosecution, and maliciously presenting a petition in bankruptcy, puts in issue the fact of the arrest of the prosecution, &c., by or through the instrumentality of the defendant, the question of malice, and of the existence of reasonable and probable cause for the prosecution, (*g*) but not the fact of the discontinuance or termination of the proceedings. If, therefore, the declaration avers the discontinuance of the prosecution, or the termination of the proceedings by a dismissal of the complaint, charge, or petition, these material allegations must be specially traversed, in order to put the plaintiff upon proof of them. (*h*)

876. *Pleas of justification.*—If the defendant, instead of relying on the plea of not guilty, elects to bring the facts before the court in a plea of justification, he must allege as a ground of defense that the facts and circumstances, which he relies upon as showing reasonable and probable cause for the institution of the prosecution, were known to him at the time

(*c*) *Caddy v. Barlow*, 1 M. & Ry. 278.
Rex v. Sparrow, 2 T. R. 198.

(*d*) *Fisher v. Bristow*, 1 Doug. 215.
Arundell v. Tregona, Yelv. 116.

(*e*) *Baséb v. Matthews*, L. R., 2 C. P. 684.

(*f*) *Post*, ch. 22, s. 1.

(*g*) *Cotton v. Browne*, 3 Ad. & E. 312.

(*h*) *Watkins v. Lee*, 5 M. & W. 270.
Atkinson v. Raleigh, 3 Q. B. 85. *Haddrick v. Heslop*, 12 Id. 275.

the charge was made and formed the reason and inducement for his putting the law in motion. (i)

877. *Evidence at the trial—Proof on the part of the plaintiff (k)—Malicious arrest or prosecution.*—In an action against a defendant for a malicious arrest under a judge's order, the plaintiff must, under the plea of not guilty, be prepared to prove the affidavit made by the defendant before the judge by production of the original or an examined or office copy, (l) and must show that the defendant made the affidavit, or used it. (m) The judge's order for holding the plaintiff to bail should be proved by production of the original order, purporting to be signed by one of the judges of the superior courts. (n) The arrest of the plaintiff by virtue of the order, at the instance of the defendant, or by his procurement, may be established by the defendant's declarations and conduct in the matter of the arrest, and the surrounding circumstances of the case, as well as by the production of the writ and warrant.

Where the plaintiff put in evidence the judge's order, and a writ of capias which had been issued thereon and lodged with the sheriff, but the capias was not shown to have been returned, neither was any warrant produced, but it was proved that on the defendant being told that the plaintiff was in custody he said, as he had got him fast he would punish him, and further, that his attorney attended before the judge to oppose the plaintiff's discharge, it was held that there was sufficient proof against the defendant, without the production and proof of any warrant. (o) If the defendant has not by his conduct and declarations admitted that the arrest was made by his orders and directions, the writ under which the arrest was effected may be proved by production of the original writ, sealed with the seal of the court; or if it has been returned and become matter of record, it may be proved by a

(i) Delegal v. Highley, 5 Sc. 169; 3 B. N. C. 950. As to interrogatories in such a case, see Stewart v. Smith, L. R., 2 C. P. 293.

(k) As to interrogatories, where the action is against a municipal corporation, see M'Fadzen v. Mayor, &c., of Liverpool, L. R., 3 Exch. 279.

(l) Arundell v. White, 14 East, 224. Crook v. Dowling, 3 Doug. 75. Casburn v. Reid, 2 Moore, 60.

(m) Rees v. Bowen, McClel. & Y. 392. See ante.

(n) 8 & 9 Vict. c. 113, s. 2, post, ch. 21 s. 1.

(o) Petrie v. Lamont, 3 M. & Gr. 707.

certified or examined copy. The warrant from the sheriff to his officer may be proved in like manner, (*p*) and the fact of the arrest may be established by the evidence of the officer who effected it, and by the plaintiff's own testimony in the matter. (*q*)

The fact of the defendant's name being on the back of the bill of indictment does not prove that he was the prosecutor of the indictment, for the name of any person who can give evidence respecting the subject-matter of the indictment may properly be put upon the back of the bill. (*r*) The mere fact of a person having attended at the trial and given evidence as a witness, is no proof of his having instituted or instigated the prosecution. (*s*) Having proved that the defendant instigated the prosecution, it must then be shown that it was done maliciously, and without reasonable and probable cause. The plaintiff must give general evidence, showing that there was no reasonable ground for the prosecution. (*t*)

878. *Proof of malicious informations and complaints before magistrates.*—The 11 & 12 Vict. c. 42, s. 17, requires all magistrates before whom any person shall appear, or be brought charged with any indictable offense, to take the statement on oath or affirmation of those who know the facts and circumstances of the case, and to put the same into writing, and cause them to be read over to, and signed by, the witnesses, before they commit the accused person for trial, or admit him to bail. These depositions are afterwards (s. 20) to be delivered to the proper officer of the court in which the person committed or bailed is to be tried, and the latter is (s. 27) to be furnished with a copy thereof on application to the officer or person having the custody of the same.

Where the charge or complaint, or the examination, is by law required to be taken down in writing, it is always to be presumed that this was done, although the party was discharged on the ground that no case was made out against him. Unless, therefore, positive evidence be given that the examinations were not taken down, oral evidence can not be

(*p*) *Post*, ch. 21, s. 1.

(*q*) See *ante*.

(*r*) *Girlington v. Pitfield*, 1 Vent. 47.

(*s*) *Eager v. Dyott*, 5 C. & P. 5.

(*t*) *Inclendon v. Berry*, 1 Campb. 204.

n. See *post*.

given of what took place before magistrates; (*u*) for where matters are required by statute to be reduced into writing for the purpose of evidence, the writing is considered to be the best evidence, and must be produced, unless it can be shown to have been lost or destroyed. If it be proved that no depositions were taken, or that they were taken but not signed, then oral evidence of what took place before the magistrates is admissible. (*x*)

In order, therefore, to prove the proceedings before magistrates, it is in general necessary to serve the magistrate's clerk with a subpoena *duces tecum*, if the proceedings are in his custody; but if they have been returned to the clerk of the peace, or his deputy, or to the clerk of the arraigns, then the officer who has the custody of them is the proper person to be summoned to produce them. If the officer in whose custody they ought to be, if they exist, has searched for them and can not find them, secondary evidence may be given of their contents. (*y*) The oath and handwriting of the defendant should be proved, and the issue of the warrant on the strength of the information. If the charge was dismissed and was not taken down in writing, or if it was of such a nature, or made under such circumstances, that there was no obligation imposed by law upon the justices to take it down in writing, the nature of it may be proved by any person who was present and heard the charge made. (*z*)

In all actions against persons for going before justices of the peace, and lodging a complaint or information against the plaintiff, and obtaining a warrant for his arrest, and causing him to be arrested, it must be proved that the complaint and wrongful acts of the defendant in the matter were done maliciously, and without reasonable and probable cause. If it appears that the defendant laid his case before a magistrate, that the magistrate issued a summons, which was served on the plaintiff, requiring him to appear and answer the complaint, and that the plaintiff chose to take no notice of the summons, whereupon the magistrate directed a warrant to

(*u*) *Parsons v. Brown*, 3 C. & K. 296.

(*x*) *Jeans v. Wheedon*, 2 M. & Bob. 486. See *R. v. Reed*, M. & M. 403.

(*y*) *Freeman v. Arkell*, 2 B. & C. 494.

(*z*) *Clarke v. Postan*, 6 C. & P. 423.

issue, upon which the plaintiff was arrested, the defendant will not be responsible for the arrest, as it was caused by his own negligence and misconduct, rather than by the complaint made against him by the defendant. (a)

879. *Proof by certified copy of the record of the prosecution and acquittal.*—The 14 & 15 Vict. c. 99, enacts (s. 13), that in order to prove the trial and acquittal of any person charged with any indictable offense, it shall not be necessary to produce the (original) record of the trial and acquittal, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court, or other officer having the custody of the records of the court where the acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, and acquittal, omitting the formal parts thereof. (b) It has been declared by WILLES, C. J., that “every prisoner, upon his acquittal, has an undoubted right and title to a copy of the record of such acquittal, for any use he may think fit to make of it, and that, after a demand of it has been made, the proper officer may be punished for refusing to make it out.” (c)

880. *Proof of malice and of want of reasonable and probable cause.*—Scandalous charges and accusations made by the defendant against the plaintiff in connection with the prosecution are evidence of malice. Where the defendant put an advertisement in the newspapers of the finding of the indictment by the grand jury, the advertisement was held to be admissible in evidence to prove the malice of the defendant, although an information had been granted for it as a libel, but the jury were directed not to consider it in estimating the damages. (d)

The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable, or not probable, are true and existed, is a matter of

(a) *Philips v. Naylor*, 4 H. & N. 615; 27 Law J., Exch. 224; 28 Ib. 225. See *ante*, and *post*, ch. 14, s. 2.

(b) *Post*, ch. 21, s. 1. *Hunter v. French*, Willes, 517. *Caddy v. Barlow*, 1 M. & Ry. 277.

(c) *Rex v. Brangan*, 1 Leach, C. C. 27.

And see the statute, 46 Edw. 3, cited *Taylor on Evidence*, § 1340, p. 1265, n. 4, 4th ed., and printed in the appendix to the 9th vol. of the *Statutes at Large*, p. 45, 4to ed.

(d) *Chambers v. Robinson*, 2 Str. 691.

fact: but whether, supposing them to be true, they amount to probable cause, is a question of law for the decision of the judge. (e) The bona fide belief of the defendant in the truth of the charge preferred by him against the plaintiff, and in the plaintiff's guilt, is essential to the establishment of reasonable and probable cause for a criminal prosecution, and it is for the jury to determine what was the defendant's belief in the matter, and whether, if he believed the plaintiff to have done what he imputed to him, he had reasonable grounds for that belief; for if he formed his conclusion rashly and inconsiderately, he is not warranted in acting on his belief. (f) If the want of reasonable and probable cause for the prosecution is so strong and plain as to amount to evidence of malice, that must be shown by the plaintiff. An abandonment of the prosecution, or an acquittal for want of evidence is, as we have seen, no proof of malice, or of the prosecution being unfounded and unjust. (g)

The rule is, that however complicated the facts may be on which the question of reasonable and probable cause may depend, the judge must leave the facts to the jury, and on the facts found by them determine for himself whether there is reasonable or probable cause or not. (h) "There have been some cases," observes TINDAL, C. J., "which appear at first sight to have somewhat relaxed the application of the rule, but there has been no real departure from it. In some cases the reasonableness and probability of the ground for the prosecution has depended, not merely upon the proof of certain facts, but upon the question whether other facts which furnished an answer to the prosecution were known to the defendant at the time it was instituted. In other cases the question has turned upon the inquiry, whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not. In other cases the inquiry has been whether, from the conduct of the de-

(e) *Busst v. Gibbons*, 30 Law J., Exch. 75. *Johnstone v. Sutton*, 1 T. R. 545. *Panton v. Williams*, 2 Q. B. 193. *James v. Phelps*, 11 Ad. & E. 488; *Anon.* 6 Mod. 73. *Clements v. Ohrlly*, 2 C. & K. 689. *Mitchell v. Jenkins*, 5 B. & Ad. 594.

(f) *Douglas v. Corbett*, 6 Ell. & Bl. 514. *Dawson v. Van Sandau*, 11 W. R. 516.

(g) *Purcell v. Macnamara*, 1 Campb. 202; 9 East, 363.

(h) *Douglas v. Corbett*, 6 Ell. & Bl. 515.

fendant himself, the jury will infer that he was conscious he had no reasonable and probable cause. But in these and many other cases which might be suggested, it is obvious that the knowledge, the belief, and the conduct of the defendant, are so many additional facts for the consideration of the jury, so that, in effect, nothing is left to the jury but the truth of the facts proved and the justice of the inference to be drawn from such facts, the judge determining as matter of law, according as the jury find the facts proved or not proved, and the inferences warranted or not, whether there was reasonable and probable ground for the prosecution, or the reverse." (*i*)

881. *Proof on the part of the defendant.*—If the plaintiff makes out a *prima facie* case of malice, and of want of reasonable and probable cause for the prosecution, the defendant must bring forward circumstances to show that he acted bona fide, and had reasonable ground for believing that the facts within his knowledge constituted the offense which he charged. (*k*) In order to show bona fides on the part of the defendant, it is competent to him to prove any communication that may have been made to him prior to the commission of the grievance, to show the impression made on his mind, and the materials he had before him for forming an opinion. If the plaintiff had previously been guilty of felony, and the defendant was present at the trial, or had seen a record of the conviction which induced him to act in the matter of the complaint, these facts are receivable as evidence of bona fides. (*l*)

It is no answer to an action for a malicious prosecution to show that the indictment preferred against the plaintiff was not sustainable in point of law, "for a bad indictment serves all the purposes of malice, by putting the party to expense and exposing him, but no purpose of justice in bringing the party to punishment if he were guilty." (*m*) When the plaintiff in his declaration avers that up to the time of the prose-

(*i*) *Panton v. Williams*, 2 Q. B. 194.
Taylor v. Willans, 2 B. & Ad. 856.
Broad v. Ham, 8 Sc. 48.
(*k*) *Weston v. Beeman*, 27 Law J.,
Exch. 57. *Turner v. Ambler*, 10 Q. B.

260. *Delegal v. Highley*, 5 Sc. 169.
(*l*) *Thomas v. Russell*, 9 Exch. 764.
(*m*) *Wicks v. Fentham*, 4 T. R. 248
Pippet v. Hearn, 1 D. & R. 271.

cution by the defendant he had borne a good character, and claims damages for injury to his character, it may be shown on cross-examination of the plaintiff's witnesses, that he was at the time a man of notoriously bad character. (*n*) But where the plaintiff does not, in his declaration, expressly claim damages in respect of injury to reputation, general evidence as to the plaintiff's character is inadmissible. (*o*) Such general evidence affords no proof of probable cause for a prosecution. (*p*)

882. *Of the damages recoverable in actions for a malicious prosecution.*—In order to recover damages in an action for a malicious prosecution, the plaintiff must show that he has suffered either in person, reputation, or pocket. If, therefore, an indictment is prepared for a common assault, and is ignored by the grand jury, and the party indicted brings his action for a malicious prosecution, he must give some proof of actual damage, (*q*) and must show that he was forced to expend his money in necessary charges to acquit himself of the misdemeanor of which he was accused; for if ignoramus be returned where the indictment neither contains matter of scandal nor cause for imprisonment, or loss of life or limb, no action will lie; but if there is scandal, or loss of liberty, &c., an action will lie. "There are," observes HOLT, C. J., "three sorts of damages resulting from a malicious and unfounded indictment, any of which would be sufficient to support an action. 1. The damage to a man's fame, as if the matter whereof he is accused be scandalous. 2. Where a man is put in danger to lose his life, limb, or liberty. 3. The damage to a man's property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused." (*r*)

If two persons are indicted without reasonable and probable cause for a conspiracy, and one employs an attorney to defend them, and pays him the costs of the defense, and both are acquitted, and an action is brought for a malicious prose-

(*n*) *Rodriguez v. Tadmire*, 2 Esp. 721; *post*, ch. 17, s. 3.

(*o*) *Downing v. Butcher*, 2 M. & Rob. 374. *Cornwall v. Richardson* Ry. & M. 305.

(*p*) *Newsam v. Carr*, 2 Stark. 70. See *Thomas v. Russell*, *supra*.

(*q*) *Freeman v. Arkell*, 3 D. & R. 671. *Byne v. Moore*, 5 Taunt. 191.

(*r*) *Savile v. Roberts*, 1 Ld. Raym. 378.

cution and a verdict is given for the plaintiff, he is entitled to recover the amount of the attorney's bill as part of the damages, unless each had a distinct defense and the costs thereof were severable. (s) Every expense that the plaintiff has necessarily incurred in order to defend himself from the false and malicious charge brought against him is recoverable as part of the damages, if the plaintiff has claimed it in his declaration. (t)

In an action for a malicious prosecution, where the jury gave the plaintiff £10,000 damages, the court refused a new trial, saying they would not interpose on account of the largeness of the damages, unless they were so flagrantly excessive as to afford internal evidence of prejudice and partiality on the part of the jury; that is, unless they were most outrageously disproportionate either to the wrong received or to the situation and circumstances of either the plaintiff or the defendant. (u)

(s) Rowlands v. Samuel, 11 Q. B. 41.

(u) Leith v. Pope, 2 W. Bl. 1326.

(t) Foxall v. Barnett, *ante*.

1 Stewart v. Cole, 46 Ala. 646; Kindred v. Stett, 51 Ill. 401; Walker v. Martin, 52 Id. 347; Reno v. Wilson, 49 Ill. 95; Chapman v. Dodd, 10 Minn. 350.

CHAPTER XIV.

OF TRESPASSES IN EXECUTION OF VOID OR IRREGULAR PROCESS—RESPONSIBILITY OF JUDGES AND MINISTERIAL OFFICERS OF JUSTICE, AND PERSONS SETTING THEM IN MOTION.

SECTION I.—*Of trespass in execution of void or irregular process—Responsibility of judges and ministerial officers of courts of justice, and persons setting them in motion.*

- 883. Exemption of judges from actions in respect of things done in the exercise of their judicial functions.
- 884. Conditions precedent to the existence of jurisdiction on the part of a judge.
- 885. Disqualification of judges on account of interest.
- 886. Exemption of judges from actions where they have a *prima facie* jurisdiction, and no objection is taken to their jurisdiction.
- 887. Orders of commitment by county court judges.
- 888. Commitments for contempt.
- 889. Statutory forms of commitment by county court judges.
- 890. Who are judges and judicial officers.
- 891. Delegation of judicial functions.
- 892. Removal of the proceedings of inferior courts for revision by a superior tribunal.
- 893. Proceedings against county court judges to compel them to act in particular cases.
- 894. Proceedings of courts-martial.

SECTION II.—*Of the duties and respon-*

sibilities of ministerial officers of courts of justice.

- 895. Illegal assumption of the judicial office by ministerial officers.
- 896. Neglect of duty by ministerial officers of courts of justice.
- 897. Duties and responsibilities of the sheriff and his officers—Execution of writs.
- 898. Priority of writs of execution.
- 899. Trespasses by the sheriff and his officers.
- 900. Execution of writs by special bailiffs.
- 901. Trespasses in dwelling-houses by sheriffs and their officers under color of the execution of legal process.
- 902. Of the breaking open the outer door of a dwelling-house in the execution of legal process.
- 903. What amounts to a breaking of the outer door.
- 904. Of the breaking open of inner doors in the execution of a writ.
- 905. Illegality of an arrest or seizure of goods effected through the medium of an act of trespass.
- 906. When the sheriff becomes a trespasser by remaining on premises an unreasonable time.
- 907. Seizure of the goods of the wrong person.
- 908. Seizure by sheriffs and thei

officers of privileged or protected goods.

- 909 Power of the sheriff to compel rival claimants to interplead and establish their title.
- 910. Claims of landlords on sheriffs for rent in arrear.
- 911. Sale by sheriffs of goods taken in execution.
- 912. Capture of the wrong person.
- 913. Arrest of the right person under a wrong name.
- 914. Illegal arrest on Sundays.
- 915. Incurability of a wrongful imprisonment—Arrest under one of several writs.
- 916. Arrest of privileged persons.
- 917. Countermand of writs and warrants.
- 918. Liability of the sheriff for an escape.
- 919. Recapture upon fresh pursuit.
- 920. Discharge of debtors taken in execution.
- 921. Arrest of the person and seizure of goods under void or irregular process.
- 922. Exemption of sheriffs and others from responsibility when the injury has been brought about by the misrepresentation of the plaintiff.
- 923. False returns to writs of execution.
- 924. Extortion by sheriffs and their officers.
- 925. Duties and responsibilities of the high bailiff, bailiffs, and registrars, of the county court.
- 926. Liability of ministerial officers where the court has no jurisdiction and no authority to issue process.
- 927. Duty of bailiffs of the county court to satisfy the landlord's claim for rent.
- 928. Liabilities of jailers.
- 929. Liability of the messenger of the Court of Bankruptcy.

II.—7

SECTION III.—*Of actions against judges sheriffs, and ministerial officers, and their assistants, and parties setting them in motion.*

- 930. Actions against county court judges—Notice of action.
- 931. Remedies against sheriffs and officers for an escape.
- 932. Actions to recover money in the hands of the sheriff.
- 933. Actions against high bailiffs of county courts and their assistants.
- 934. Statutory protection to high bailiffs, and persons acting by their order, or in their aid, in the execution of county court warrants.
- 935. Of the staying of proceedings in actions against high bailiffs and officers of the county court.
- 936. Plaintiffs in actions against sheriffs.
- 937. Of the defendants in actions for wrongs done under color of legal process.
- 938. Declaration against a sheriff for not executing the Queen's writ, or for an escape.
- 939. Declarations against sheriffs for removing goods taken in execution without paying rent due to the landlord.
- 940. Declarations against sheriffs for treble damages for extortion.
- 941. The plea of not guilty.
- 942. Pleas of justification.
- 943. Justification in the execution of legal process.
- 944. Replications.
- 945. Evidence at the trial—Proof on the part of the plaintiff.
- 946. Proof of judgments, writs, and process from the superior courts.
- 947. Delivery of the writ to the sheriff, to be executed.
- 948. Proof of the sheriff's having directed or authorized the commission of the wrongful act.

- 949. Proof of false return to a writ.
- 950. When admissions by an under-sheriff and bailiffs are evidence against the sheriff.
- 951. Proof of the removal of goods taken in execution without paying the landlord's rent.
- 952. Evidence of the process under which the sheriff acted.
- 953. Evidence for the defense—Proof of rent being in arrear at the time of the levy.
- 954. Proof of proceedings in the county court.
- 955. Damages recoverable in actions against sheriffs and officers—Negligence and breach of duty.
- 956. Assessment of damages in actions for an escape.
- 957. Special damages.
- 958. Exemplary damages.
- 959. Recovery of treble damages for extortion.

SECTION I.

OF TRESPASSES IN EXECUTION OF VOID OR IRREGULAR PROCESS—RESPONSIBILITY OF JUDGES AND MINISTERIAL OFFICERS OF COURTS OF JUSTICE, AND PERSONS SETTING THEM IN MOTION.

883. *Exemption of judges from actions in respect of things done in the exercise of their judicial functions.*—When the executive power of the sovereign has been delegated to others, to be by them put in force in the form prescribed by law, the power thus conferred is termed an authority in law, and affords a justification for all acts and trespasses committed in the exercise of it, so long as the authority has not been abused or exceeded. Neither the judges in the king's courts nor any judicial officers are liable to answer personally for their judicial acts. An action, therefore, will not lie against a judge for a wrongful commitment or an erroneous judgment, nor for any act done by him in his judicial capacity; (a) nor against a grand jurymen for wrongfully presenting and finding a bill of indictment; nor against a petty jurymen for a wrong verdict; nor against the vice-chancellor of the university for a wrongful imprisonment; (b) nor against a coroner, who is a judicial officer, for any matter done by him in the exercise of his judicial functions. If, therefore, a coroner thinks that an inquest ought to be conducted in secrecy, he has power to exclude all persons not necessarily engaged in

(a) *Hamond v. Howell*, 1 Mod. 184; 2 Mod. 219.

(b) *Kemp v. Neville*, 10 C. B., N. S. 523; 31 Law J., C. P. 158.

the inquiry; and if the exclusion of any particular person appears to him to be necessary or proper, it is for him to decide who is to be excluded. And if a person has by order of the coroner been forcibly turned out of a room when an inquisition was about to be taken, the person so expelled has no right of action against the coroner for an assault. (*c*)

"Arbitrators whom parties by consent have chosen to be their judges shall never," observes LORD HOLT, "be arraigned more than any other judges," (*d*) for if it should be allowed to make arbitrators defendants, and give them the trouble to defend their judgments and set forth the particular reasons upon which they founded their award, it would introduce very great inconvenience, and be a discouragement to any person to undertake a reference. If there is any palpable mistake made by an arbitrator, or any miscalculation in an account laid before him, the person aggrieved may bring his bill of complaint against the party in whose favor the award is made to have it rectified, but not against the arbitrator. (*e*) Arbitrators, therefore, are not responsible in damages for their mistakes or omissions, or for negligence or carelessness in the discharge of the duties intrusted to them; but if they abuse the office of judge, and act fraudulently and corruptly, or maliciously, they are answerable in damages to the parties grieved. (*f*) Where, under a building contract, an architect is clothed with the duties of an arbitrator in the settlement of differences arising between the builder and employer, and in determining charges to be made for extras, he can not be made responsible for mere errors of judgment in the discharge of the duties devolved upon him, but he may be sued for neglecting to exercise the functions he has undertaken to perform, and any undue bias under which he labors will invalidate his award. (*g*) If arbitrators neglect to hear one of the parties, it will invalidate their award, and will be good ground for setting it aside, but it can not be pleaded to an action on the award. (*h*) The general rule as regards judges and judicial officers is, that if they do any act beyond the

(*c*) *Garnett v. Ferrand*, 6 B. & C. 611.

(*d*) *Morris v. Reynolds*, 2 Ld. Raym.

857.

(*e*) Ld. Hardwicke, *Anon.* 3 Atk. 644.

(*f*) *Wills v. Maccarmick*, 2 Wils. 148.

Tozer v. Child, 7 Ell. & Bl. 333. See

Re Hopper, L. R., 2 Q. B. 367. *Pappa v. Rose*, L. R., 7 C. P. 32.

(*g*) *Kemp v. Rose*, 1 Giff. 258. See *Kimberly v. Dick*, L. R., 13 Eq. Ca. 1.

(*h*) *Thorburn v. Barnes*, L. R., 2 C. P. 384.

limit of their authority causing injury to another, they thereby subject themselves to an action for damages; but if the act done be within the limit of their authority, through an erroneous or mistaken judgment, they are not liable to an action, (i) A judge, therefore, is not answerable for slander spoken by him in the exercise of his judicial functions, in reference to a matter before him, although it be spoken maliciously and without reasonable cause, and be irrelevant and not bona fide in the discharge of his duty as judge; (j) but if he goes out of his way to make slanderous attacks upon the character of private persons in respect of matters not before him, and into which he has no jurisdiction to inquire, he will be responsible like any other individual for the consequences. (k)¹

Where parties are not acting as judges, but have only a discretion confided to them, an erroneous exercise of that discretion, however plain the miscarriage may be, will not render them answerable in damages, provided they have due legal authority and power to act in the matter. And where the law neither confers judicial power, nor any discretion at all, but requires certain things to be done, everybody on whom the duty of obedience attaches is bound to do the act required, and is responsible in damages for the consequences of his disobedience or neglect. (l)²

(i) *Doswell v. Impey*, 1 B. & C. 169. 289. *McGregor v. Thwaites*, 3 B. & C. 24; *post*, ch. 17, s. 1.
Gahan v. Laffitte, 5 Moore, P. P. C. 382.

(j) *Scott v. Stansfield*, L. R., 3 Ex. 220. (l) *Ferguson v. Kinnoul* (Earl of), 9 Cl. & Fin. 290; and see *Pedley v. Davis*, *post*, ch. 15, s. 1.

(k) *Lewis v. Levy*, 27 Law J., Q. B.

¹ So if a ministerial duty is attached to his office he will be liable for its wrongful execution, whether by fraud or mistake. *Stone v. Graves*, 8 Mo. 148; *Taylor v. Doremus*, 16 N. J. 473.

² Officers of municipal corporations, or, indeed, any persons in whom the law has vested certain powers, and left their exercise to the discretion of such officers or persons, are not liable for injuries resulting therefrom, unless the acts are *ultra vires*, or *fraudulent*, or *corrupt*. *Wells v. Atlanta*, 43 Ga. 67; *Coulson v. Portland*, *Deady* (U.S.), 481; *Donahue v. New York*, 3 Daly (N. Y.) 65. *All acts involved in the necessary performance of a duty prescribed by a municipal ordinance* are held to be strictly *ministerial*, and liability attaches for injuries resulting either from the willful or negligent execution of such acts; *Danbury, &c. R. R. Co. v. Norwalk*, 37 Conn. 109; *McCarthy v. Syracuse*, 46 N. Y. 194; *Lewenthal v. New York*, 5 Lans. (N. Y.) 532; *Williams v. Dunkirk*, 3 Id. 44; *but the decision as to whether or not an act shall be done*, is purely judicial; *Donahue v. New York*, *ante*.

This freedom from action and suit is given to judges, not so much for their own sake as for the sake of the public and for the advancement of justice, "that, being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice," observes LORD TENTERDEN, "ought to be."

884. *Conditions precedent to the existence of jurisdiction on the part of a judge.*—Every judge of a court of inferior jurisdiction must have before him some cause of action, charge, or complaint, into which he has by law authority to inquire, or his proceedings will be extra-judicial, and he will be responsible for the injurious consequences that result from them to others. The particulars of a plaintiff's claim, for example, in the county court, served on the defendant with the county court summons, must disclose some matter of complaint within the jurisdiction of the court; and if they disclose a cause of action over which the court has no jurisdiction, the judge can not alter the particulars by inserting therein a new cause of action, and proceeding to hear it, for the defendant has never been summoned to answer such new cause of action, and the judge has consequently no power to take cognizance of it, if the defendant objects to his so doing. (*m*)

885. *Disqualification of judges on account of interest.*—In accordance with the maxim, "Nemo debet esse judex in propria sua causa," it has been held, that whenever it appears that the judge is a party to a suit the judgment is erroneous. (*n*) If, therefore, he has any private or pecuniary interest in the subject-matter of the suit, he can not adjudicate upon it. (*o*) Such interest, however, must be direct and certain, and not merely remote or contingent. Where, therefore, at the time of taking an inquisition before the sheriff in a railway compensation case there was in existence an agreement not yet carried out between the company, which was taking the land, and another railway company, for their amalgamation, and the sheriff was a shareholder in the last-mentioned company, it was held that the proceedings were valid. (*p*)

(*m*) Hopper, In re, 32 Law J., Q. B. 104.
 (*n*) London (City of) v. Wood, 12 Mod. 688.
 (*o*) Dimes v. Grand Junction Canal Co., 3 H. L. C. 759. Reg v. Aberdeen Canal Co., 14 Q. B. 866. Kemp v. Rose, *supra*. See *post*, "Interested Justices."
 (*p*) Reg. v. Manchester and Sheffield Rail., L. R., 2 Q. B. 336. The case was

886. *Exemption of judges from actions where they have a prima facie jurisdiction, and no objection is taken to their jurisdiction.*—A judge of a court of record in England with limited jurisdiction is not responsible in damages for the consequences of his acts and proceedings in respect of matters over which he had no jurisdiction, if he had a prima facie jurisdiction in the matter, and had not the knowledge, or means of knowledge, of which he ought to have availed himself, of his want of jurisdiction. Thus it has been held, that if one be arrested by a process out of an inferior court for a cause of action which did not arise within its jurisdiction, the party arrested may well maintain an action against the plaintiff who levied the plaint, and should be intended to know where the cause of action arose; but not against the judge or officer who had entered the plaint or the officer who had executed it, for when it was impossible for them to know that the cause of action did not arise within their jurisdiction, it would not be agreeable to any rules of justice to make them liable to an action; but the proper and just remedy was against the plaintiff. (q) It has accordingly been held, that the judge of a court of record in a borough is not responsible as a trespasser for the imprisonment of a defendant, where he had no means of knowing, except through the plaintiff or defendant, and did not know, that the cause of action arose without the limits of the borough. (r) ¹

decided under s. 39 of the Lands Clauses Act, but it was considered that the words "interested in the matter in dispute," used in that section, were merely declaratory of the common law. See

Reg. v. Rand, *post*, ch. 15, s. 1.

(q) Olliet v. Bessey, 2 W. Jones, 214.

(r) Gwynn v. Poole, Lutw. App. 1566.

Calder v. Halkett, 3 Moore, P. C. C. 77.

Taaffe v. Dewnes, Id. 36, n.

¹ In this country, the rule adopted by the English courts in reference to the liability of judges and judicial officers, has generally been adopted, and the rule can not be said to be of doubtful policy. Individual instances now and then occur when it would seem that the ends of justice would be well served if some hot-headed or wrong-headed judge, who has, by an arbitrary exercise of the duties of his office, involved a party in proceedings before him in a position of great hardship, could be made to respond in damages therefor; but, while this might be the case in special instances, yet these individual cases pale into insignificance before the general disaster and disorder that would result if a judge were to be constantly involved in litigation because of his judicial action. If such were the rule, very few lawyers would have the temerity to accept judicial positions, and, as was well said by Lord STAIR, in *La Caux v. Eden*, Doug. 594, "nobody but fools or knaves could be found to accept the office of judge." No instance is to be found in which, in the courts of this country, a judge or judicial officer has been held amenable for

Where the facts of the case before a county court judge, although subsequently found to be false, were such as, if true, would have given the judge jurisdiction, the judge was held not to be responsible for his judgment and order in the matter, but where the facts showed that he had no jurisdiction, and the judge mistook the law as applied to those facts, and wrongfully ordered a party to be committed, it was held that he was responsible in damages for the imprisonment. (*s*)

If an action is brought in a court of limited jurisdiction, and the defendant pleads to the jurisdiction, the court must decide whether they have jurisdiction or not; and if they decide that they have jurisdiction in a case where they clearly have no pretense for it, and give judgment against the defendant, all the members of the court present, and taking part in the judgment, may render themselves liable to an action. (*t*)

A county court judge is not ousted of his jurisdiction by a notice of a bona fide claim of title in those cases to which his jurisdiction to try cases of title does not extend. (*u*) It is his duty to inquire into the claim, and determine whether there really is a question of title involved in the issue before him. If, in a controversy between landlord and tenant, it

(*s*) *Houlden v. Smith*, 14 Q. B. 852. the land, &c., in dispute exceeds £20;

(*t*) *Wingate v. Waite*, 6 M. & W. 746. 30 & 31 Vict. c. 142, ss. 11, 12.

(*u*) *I. e.*, where the rent or the value of

an erroneous judgment or act in a case over which he had jurisdiction. Whether, if a judge acts *maliciously* and *corruptly*, an action would lie, may perhaps be an open question; *Randall v. Brigham*, 7 Wall. (U. S.) 253; but I imagine that even if the rule was to be relaxed to *that* extent, that the proof of malice or corruption would have to be direct and positive, and not left to inference or presumption. The remedy against a judicial officer for malfeasance in office, is by impeachment, and the remedy against his oppressive acts is found by appeal. *Morrison v. McDonald*, 21 Me. 550; *Brodie v. Rutledge*, 2 Bay. (S. C.) 69; *Yates v. Lansing*, 5 Johns. (N. Y.) 282; *Ambler v. Church*, 1 Root (Conn.) 211; *Upshaw v. Oliver*, *Dudley* (Ga.) 241; *Rap v. Rittenhouse*, 2 Dall. (U. S.) 160; *Moor v. Ames*, 3 Caine's Cas. (N. Y.) 170; *Wood v. Ruland*, 10 Mo. 143; *Hamilton v. Williams*, 26 Ala. 527; *Way v. Townsend*, 4 Allen (Mass.) 114; *Little v. Moore*, 4 N. J. 74; *Taylor v. Doremus*, 16 Id. 473; *Phelps v. Sill*, 1 Day (Conn.) 315; *Tompkins v. Sands*, 8 Wend. (N. Y.) 468; *Ely v. Thompson*, 3 A. K. Marsh. (Ky.) 76; *Evans v. Foster*, 1 N. H. 374; *Carter v. Dow*, 16 Wis. 298; *Lenox v. Grant*, 8 Mo. 254; *Stone v. Graves*, 8 Id. 148; *Maguire v. Hughes*, 13 La. Ann. 281; *Burnham v. Stevens*, 33 N. H. 247; *Vanderheyden v. Young*, 11 Johns. (N. Y.) 150; *Bailey v. Wiggins*, 5 Harr. (Del.) 462; *Reid v. Hood*, 2 N. & M. (S. C.) 168; *Young v. Herbert*, 2 Id.; *Gluecke v. Tijiriner*, 24 Tex. 663.

appears that the tenant has been actually turned out of possession by a third party, claiming by title paramount, a question of title arises; but this is not the case if it appears that the tenant voluntarily gave up possession to such third party. (x)

887. *Orders of commitment by county court judges.*—If a county court judge makes an illegal order of commitment in respect of a matter over which he has jurisdiction, he is not himself responsible for his erroneous judgment. (y) But if he had no jurisdiction in the matter, and the order or warrant of commitment is put in force, he is liable to an action for false imprisonment, if the facts depriving him of his jurisdiction were brought to his knowledge.

888. *Commitments for contempt.* (z)—A court of record has power to punish, by commitment for contempt, a libel upon the court, published when the court is not sitting as well as when it is sitting, and the question whether the particular publication be libellous or contemptuous is a question for the court which commits. Any publication tending to influence the result of a pending suit, or to prejudice the minds of the public with regard to it, is a contempt of court, (a) *e. g.*, the publication of a petition for winding up a public company before the hearing. (b)

When the committal is by way of punishment, it ought to be certain as a sentence, and the term of imprisonment should be specified. (c) The court can not for contempt suspend a barrister from practising, if the contempt be not in his character as barrister, but as suitor, for the proper punishment for contempt of court is fine and imprisonment. (d) The court can not delegate to a single judge the power of issuing a warrant for the apprehension and committal of the person in contempt. (e) A superior court may adjudge a man to be

(x) *Emery v. Barnett*, 4 C. B., N. S. 431; 27 Law J., C. P. 216.

(y) *Hamond v. Howell*, 1 Mod. 184.

(z) See *post*, ch. 15, s. 1. As to commitments by legislative assemblies, see *Doyle v. Falconer*, L. R., 1 P. C. Ca. 328. *The Speaker of the Legislative Assembly of Victoria v. Glass*, L. R., 3 P. C. Ca. 560. *Attorney-General of New South Wales v. Macpherson*, L. R.,

3 P. C. Ca. 268.

(a) *Daw v. Eley*, L. R., 7 Eq. Ca. 49.

(b) *Re Cheltenham, &c., Carriage and Waggon Co.*, 38 Law J., Ch. 330; L. R. 8 Eq. Ca. 580.

(c) *Crawford's Case*, 13 Q. B. 629. *Rex v. James*, 5 B. & Ald. 891.

(d) *Re Wallace*, L. R., 1 P. C. Ca. 283. See *Re Ramsay*, L. R., 3 P. C. Ca. 427.

(e) *Van Sandau v. Turner*, 6 Q. B. 785

guilty of a contempt, and may imprison him for a certain time for such contempt, without setting forth on the face of the warrant the grounds upon which its adjudication proceeded. (*f*) The County Courts Act, 9 & 10 Vict. c. 95, s. 113, gives the judge power to commit for any insults willfully offered to him or his officers, or for any willful interruption of the proceedings of the court, or any other misbehavior in court; and it has been held that the judge has jurisdiction to decide conclusively whether any particular act did amount to an insult, or interruption, or misbehavior, and that it is unnecessary for a judge to say more in the warrant of commitment than that he had been willfully insulted. (*g*)

889. *Statutory forms of commitment by county court judges.*—The 19 & 20 Vict. c. 108, s. 59, enacts that every warrant of commitment issuing from a county court shall, on whatever day it may issue, bear date on the day on which the order for commitment was made, and shall continue in force for one year from such date, and no longer; but no order for commitment shall be drawn up or served; and that any warrant of commitment in respect of an unsatisfied judgment or order of a county court may be in the form, or to the effect, given in the schedule of the Act, and that all such warrants shall be deemed sufficient to justify proceedings under them, without any further statement of facts to show jurisdiction. The power of the county court judge to imprison judgment debtors has been considerably curtailed by the statute 32 & 33 Vict. c. 62. They are now, however, the judges in bankruptcies elsewhere than in London. (*h*)

890. *Who are judges and judicial officers.*—The steward of a court baron is a judicial officer, and can not, therefore, be made responsible for the mistakes and irregularities of the bailiffs and ministerial officers of the court. (*i*) So also was the sheriff when presiding in the county court as anciently constituted. (*j*) The vice-chancellors of the Universities of Oxford and Cambridge are also judges of a court of record, and so are all persons who have power to fine and im-
 prison.

(*f*) Fernandez, *Ex parte*, 10 C. B., N. S. 25; 30 Law J., C. P. 321.

(*g*) Levy v. Moylan, 10 C. B. 211.

(*h*) See 32 & 33 Vict. c. 71, ss. 77, 86. As to commitments by commissioners of Bankrupts under the old law, and their

liability for such, see Doswell v. Impey, 1 B. & C. 169.

(*i*) Holroyd v. Breare, 2 B. & Ald. 473.

(*j*) Tunno v. Morris, 2 C. M. & R. 298.

son (*k*) Wherever power is given to examine, hear, and punish, it is a judicial power, and they in whom it is reposed act as judges, and persons who are made judges shall not be liable to have their judgments examined in actions brought against them. (*l*)¹

891. *Delegation of judicial functions.*—Judicial functions can not be delegated, and if it has been the practice of a particular court to delegate to its clerk the performance of judicial acts, the practice is illegal, and the clerk who thus takes upon himself the office of judge is responsible for the orders he gives. If he takes upon himself to issue a warrant, without the order or direction of the judge, he is liable for the trespasses occasioned by its execution. Where commissioners of a court for the recovery of small debts were empowered by statute to order payment of judgment debts by installments, and, in case of default in payment of the installments, the commissioners present in court, at the instance of the plaintiff, and upon due proof of the default, were empowered to award execution against the judgment debtor, with such costs as to them should seem just, and it was shown to be the practice of the court for the commissioners, at the time they gave judgment for the plaintiff, to direct the debt to be paid by monthly installments or execution to issue, it was held that the commissioners had no power to make such a practice or such an order at the time of the judgment, because, if made then prospectively, it dispensed with that proof of non-payment which the statute required, and with the exercise of any discretion on their part as to the execution of further costs; that the direction, therefore, for issuing execution, engrafted on the original judgment, and made part of it, was not merely irregular, but a nullity; that the clerk had issued the warrant without authority, and was consequently liable for the imprisonment occasioned by its execution. (*m*)

(*k*) *Kemp v. Neville*, 31 Law J., C. P. 467.
158.

(*m*) *Andrews v. Marris*, 1 Q. B. 3.
(*l*) *Groenvelt v. Burwell*, 1 Ld. Raym. *Whitelegg v. Richards*, 2 B. & C. 45.

¹ Any person who by law is vested with certain powers, and is also vested with a discretion as to when and how they shall be exercised, is a judicial officer, and exempt from liability for the exercise of the functions of his office, so far as he keeps within the scope of his powers, and is not chargeable with malice or corruption.

892. Removal of the proceedings of inferior courts for revision by a superior tribunal.—The remedy by certiorari is available in all cases to remove the judgments, orders, and proceedings of courts of inferior jurisdiction, for the purpose of being examined by the Court of Queen's Bench, and quashed on the ground of want of jurisdiction or excess of jurisdiction, although the writ of certiorari is expressly taken away by statute. If it distinctly appears from the proceedings of the inferior court that the court has taken upon itself to decide on a matter over which it had no jurisdiction, the statutory prohibition of a certiorari does not apply, and the inherent jurisdiction of the Court of Queen's Bench is not restrained. (*n*) And if there is nothing on the record to show that there was any excess of jurisdiction, the fact may, nevertheless, be established by affidavits. (*o*) A bill of certiorari may also be filed in a court of equity, to remove a cause from an inferior court to the Court of Chancery, where it appears that the inferior court is acting without jurisdiction. (*p*)

The writ of certiorari is also not taken away by statutory prohibition, when it is moved for on behalf of the crown. Thus the words in the County Courts Act, 9 & 10 Vict. c. 95, s. 90, enacting "that no plaint entered in any court holden under that Act shall be removed or removable from the said court into any of Her Majesty's superior courts of record by any writ or process, unless the debt or damage claimed shall exceed five pounds," does not take away the prerogative right of the crown to remove into the Court of Exchequer causes affecting the crown revenue. Therefore, where an officer of the crown distrained some of the sheep of the plaintiff damage feasant in a royal forest, and the plaintiff sought to recover in the county court one pound damages from the officer for an illegal distress, the cause was removed into the superior court, notwithstanding the statutory prohibition. (*q*)¹

(*n*) Reg. v. South Wales Rail. Co., 13 Q. B. 993.

Rail. Co., 8 Ad. & E. 417.

(*o*) *Re Penny*, 7 Ell. & Bl. 660; 26 Law J., Q. B. 225. Reg. v. Manch., &c.,

(*p*) *Tracy v. Open Stock Exchange*, L. R., 11 Eq. Ca. 556.

(*q*) *Mountjoy v. Wood*, 1 H. & N. 58.

¹ At common law a writ of certiorari was the proper remedy upon which to correct the errors of all inferior tribunals, where they have exceeded their jurisdiction or proceeded illegally, and there was no appeal or other mode of reviewing or correcting their proceedings; *Chicago, &c. R. R. Co. v. Whipple*, 22 Ill. 105.

The validity of a commitment by a judge of an inferior court may be tested by habeas corpus. (r)

893. *Proceedings against county court judges to compel them to*

(r) Boyce, *In re*, 22 Law J., Q. B. 393.

Swan v. Mayor of Cumberland, 8 Gill. (Md.) 150; Phillips v. Phillips, 8 N. J. 123; Com. v. Ellis, 11 Mass. 466; Matthews v. Matthews, 4 Ired. (N. C.) 155; Ruhlman v. Com., 5 Binn. (Penn.) 27; Brooklyn v. Patchin, 8 Wend. (N. Y.) 47; State v. Stewart, 5 Strob. (S. C.) 29; People v. Turner, 1 Cal. 152; and it may issue in any stage of the proceedings, when the action of the court or the boards whose proceedings are complained of is contrary to law; Walpole v. Ink, 8 Ohio, 142; Bath Bridge Co. v. McGoun; Triggs v. Boyce, 4 Hayw. (Tenn.) 100; Bibb v. State, 2 Yerg. (Tenn.) 173; Com. v. West Boston Bridge, 13 Pick. (Mass.) 195; or is palpably unjust or oppressive, even though the result ensues from the exercise of its discretion, as where an adjournment is refused, and a decision made without giving a party a fair hearing; Fonda v. Canal Appraisers, 1 Wend. (N. Y.) 288; Duggen v. McGrudger, 1 Miss. 112; but if there is a full and adequate remedy by appeal, certiorari does not lie; Witowski v. Skalowski, 46 Ga. 41; Peacock v. Leonard, 8 Nev. 84; or if there is an ample remedy by writ of error; Petty v. Jones, 1 Ired. (N. C.) 408; but the mere fact that an appeal lies, does not necessarily deprive a party of the remedy. If an appeal has been unlawfully denied, or if the party by fraud, accident, or mistake has been deprived of his appeal, certiorari is the proper remedy. State v. Washington, 2 Murph. (N. C.) 100; McLeran v. Melvin, 3 Jones (N. C.) 195; *Ex parte* George T. U. P. Chault (Ga.) 38; Street v. Clark, 1 Taylor (N. C.) 15; Davis v. Horne, 4 Greene (Iowa) 94. The granting of the writ is not a matter of right, but rests in the sound discretion of the court; People v. Mayor 2 Hill (N. Y.) 9; Rockingham v. Westminster, 24 Vt. 288; and if the party by any laches on his part, or on the part of his attorney, has neglected to avail himself of an appeal or other adequate remedy, the writ will be denied; Beck v. Knabb, 1 Overton (Tenn.) 59; Erwin v. Erwin, 3 Dev. (N. C.) 528; Bannister v. Allen, 1 Blackf. (Ind.) 414; or if substantial justice has been done, or if ruinous consequences would ensue, and the parties can not be placed in *statu quo*, the writ will not be granted for mere informalities in the proceedings; but, if the record shows want of jurisdiction, or a serious error of law, the rule is otherwise. Rutland v. The Co. Comm'rs of Worcester, 20 Pick. (Mass.) 71. The court is bound to act upon strict legal principles, and if any error, however unimportant or foreign to the merits of the case, appears, it is bound to quash the proceedings. But in the exercise of its discretion it will examine all the circumstances, and if it finds that substantial justice has been done without violating any important rules of proceeding, the writ will not be granted, although some formal or technical errors may appear, and extrinsic evidence is receivable upon this inquiry, not to contradict the records, but to show that there was a more perfect compliance with the rules of law than the record shows. But if the record itself shows *affirmative defects*, they are incurable, and the proceedings will be set aside, but, where there are no affirmative defects, extrinsic evidence is admissible to show that substantial justice has been done. Gleason v. Sloper, 24 Pick. (Mass.) 184; Adams' Petitioner, 4 Id. 32; Cobb v. Lucas, 15 Id. 3; Freetown v. Bristol, 9 Id. 50; *Ex Parte* Baring, 8 Me. 137; Matter of Highway, 3 N. J. 1026. The office of the writ at common law is confined to the correction of the errors of inferior tribunals of every descrip-

act in particular cases.—The 19 & 20 Vict. c. 108, s. 43, enacts that no writ of mandamus shall henceforth issue to a judge or an officer of the county court for refusing to do any act relating

tion, whether courts or public boards, where their action directly affects the rights of others, in cases where they exceed their jurisdiction, or act illegally in respect to a substantive matter. But where the error is as to the *facts*, the writ does not lie. The record must show illegality; *Walpole v. Ink*, 8 Ohio, 142; but, where the *discretion* of a court or board has been unjustly exercised, and the injustice is palpable, and contrary to the settled principles of law; *Duggen v. McGrudder*, 1 Miss. 112; or when an adjournment is unjustly denied, so that a party is deprived of a fair hearing, *certiorari* is the proper remedy; *Brooklyn v. Patchen*, 8 Wend. (N. Y.) 47; or if he has been unjustly deprived of an appeal; *Mera v. Scales*, 2 Hawks (N. C.) 364; *Perkins v. Hadley*, 4 Hayw. (Tenn.) 143; *Baker v. Halstead*, 1 Bush. (N. C.) 41; or if his appeal has been dismissed improperly; *Garrett v. Parryman*, 2 Overton (Penn.) 108. It lies to correct proceedings in cases of foreign attachment; *Hathorn v. Wilson*, 2 Ohio, 27; *Learned v. Duval*, 3 Johns. (N. Y.) 141; *Bronsen v. Shinn*, 13 N. J. 250; *Conard v. Conard*, 17 N. J. 104; or to take up the proceedings of an inferior tribunal when an appeal does not lie; *Burt v. Davidson*, 5 Humph. (Tenn.) 425; *Dugan v. Arnold*, 4 Dev. (N. C.) 99; *Philadelphia Co. v. Spring Garden*, 6 S. & R. (Penn.) 524; or where there is irregularity in proceedings for forcible entry and detainer; *Thorn v. Reed*, 1 Ark. 480; *Russell v. Wheeler*, 1 Hempst. (Tenn.) 3; or where the action of an inferior tribunal is contrary to law as relates to its method of procedure; *Comm'rs v. Law, R. M. Chault* (Ga.) 208; *Ex Parte*, *Tarlton*, 2 Ala. 35; *Flanagan v. Pierce*, 27 Tex. 78; or where proceedings are taken against a party without notice; *Com. v. Peters*, 3 Mass. 229; *Com. v. Claus*, 15 Johns. (N. Y.) 557; *State v. Bearing*, 8 Me. 135; to review the proceedings of surrogates, judges of probate, or of orphans' courts; *Paul v. Armstrong*, 1 Nev. 82; *Fowler v. Treivett*, 10 Ala. 622; *Van Pelt v. Veyhte*, 14 N. J. 207; *Bradford v. Richardson*, 3 H. & M. (Md.) 348; of justices' courts; *West v. Williamson*, 1 Swan. (Tenn.) 277; *Lacock v. White*, 19 Penn. St. 495; *Clark v. Ostrander*, 1 Cow. (N. Y.) 437; of commissioners of highways; *Adams v. Newfour*, 8 Vt. 271; *Com. v. Hall*, 8 Pick. (Mass.) 440; *Parks v. Boston*, 8 Id. 218; of municipal boards; *Macon v. Shaw*, 16 Ga. 172; *Parks v. Boston*, *ante*; of county commissioners, *Gibbs v. Hampden*, 19 Pick. (Mass.) 298; or any body that acts in a judicial capacity, to correct *judicial* acts, but not where the matters complained of are purely ministerial; *People v. Mayor*, 5 Barb. (N. Y.) 43; *People v. Van Slyck*, 4 Cow. (N. Y.) 297; *Robins v. Lexington*, 8 Cūsh. (Mass.) 292; *Matter of 80th St.*, 16 Abb. Pr. (N. Y.) 169. Generally, the court will not look beyond the records, except to ascertain whether substantial justice has been done, when the only matter complained of is informality in proceedings; *People v. Wheeler*, 21 N. Y. 82; *Gervais v. Powers*, 1 Minn. 45; *Kirkpatrick v. Casson*, 30 N. J. 331; *Whitney v. Bd. of Delegates*, 14 Cal. 479; nor will it examine into the *merits* of the case; *People v. Board of Police*, 15 Abb. Pr. (N. Y.) 167; *State v. Green*, 18 N. J. 179; nor inquire as to conclusions of fact; *Race v. Dehart*, 24 N. J. 37; *People v. Butler*, 3 Wend. (N. Y.) 342; or the decision of the court thereon; *Wood v. Fithian*, 24 N. J. 838; *Boston v. Morri.*, 25 Id. 173; *Shenango v. Wayne*, 34 Penn. St. 184; *Bromley v. People*, 7 Mich. 172; but is confined exclusively to such irregularities, and errors as appear upon the face of the record, and if none appear, the writ will be denied; *People v. New York*, 29 Barb.

to the duties of his office; but any party requiring such act to be done may apply to any superior court or judge thereof, upon an affidavit of the facts, for a rule or summons calling upon such judge or officer, and also the party to be affected by the act, to show cause why such act should not be done; and it, after the service of such rule or summons, good cause shall not be shown, the superior court or judge thereof may, by rule or order, direct the act to be done, and the judge or officer of the county court, upon being served with such rule or order, shall obey the same on pain of attachment; and in any event the superior court or the judge thereof, may make such order with respect to costs (*i. e.*, the costs of the application for the rule, not the costs in the county court) (*s*) as to such court or judge shall seem fit. (*t*)

894. *Proceedings of courts-martial*.—Where the civil rights of a person in the military service are affected by the judgment or sentence of a military tribunal, if that military tribunal is exceeding its jurisdiction, or is acting without jurisdiction, the Court of Queen's Bench will interfere to protect the civil rights of the individual; but where the military status of the applicant only is concerned, the court has no jurisdiction in the matter, as that status is a matter depending entirely upon the will and pleasure of the crown. (*u*)

SECTION II.

OF THE DUTIES AND RESPONSIBILITIES OF MINISTERIAL OFFICERS OF COURTS OF JUSTICE.

895. *Illegal assumption of the judicial office by ministerial officers*.—As judicial functions can not be delegated, it follows

(*s*) Churchward v. Coleman, L. R., 2 Q. B. 18. But see Whitehead v. Procter, 3 H. & N. 533.

(*t*) Fulber, *Ex parte*, 27 Law J., Exch. 3.

(*u*) Mansergh, *In re*, 30 Law J., Q. B. 296.

(N. Y.) 122; Miller v. Bush, 21 Wend. (N. Y.) 651; *Ex Parte* Vermilyea, 6 Cow. (N. Y.) 555; and the court may award the writ in the first instance, or issue an order to show cause. In addition to the common-law remedy by certiorari, provision is made by statute in most of the states, for remedies thereby in addition to the common-law causes for which it will issue, but for such instances, reference must be had to the several statutes, as it would be impracticable to enumerate or review them here.

that if the mere ministerial officer of the court takes upon himself the responsibility of issuing orders purporting on the face of them to be the orders of the court, but which are issued without its authority, and which are consequently in form only and not in fact the orders of the court, the officer so misconducting himself is responsible for all trespasses that may be committed in carrying into effect the orders so issued. But if the order has been made in a cause in court over which the judge has a general jurisdiction, the mere ministerial officer who receives the warrant or order from the clerk to execute, and has no knowledge that it was issued without the authority of the court, is not responsible for things done under it, (x) and the clerk of the court, so long as he confines himself to the mere ministerial duties of his office, and does not take upon himself the exercise of the office of judge, is not responsible for things done under the orders that are signed and issued by him in the discharge of the duties of his office, unless there is a total absence of jurisdiction on the part of the judge. (y)

896. *Neglect of duty by ministerial officers of courts of justice.*—Every ministerial officer of a court of justice is liable to an action for neglecting the duties of his office. Thus, an action lies against the chief clerk of a court for not entering a judgment on the roll when it is his duty so to do. (z) An action also lies against the clerk of the court at the suit of a judgment creditor for unlawfully, without the sanction or authority of the court, taking upon himself to issue an order, purporting to be the order of the court, for the discharge of the judgment debtor, whereby the plaintiff lost the fruits of his judgment. It is no part of the duty of the clerk of the county court to prepare notices of judgments or orders of court for the payment of money, and no action, therefore, lies against him for omitting to prepare such a notice, or for negligently preparing it, whereby a party was misled as to the times of payment of certain installments ordered by the judge to be paid, and had his goods taken in execution. (a)

897. *Duties and responsibilities of the sheriff and his officers*—*Execution of writs.*—It is the duty of the sheriff, as soon as a writ of execution has been lodged in his hands, to make

(x) Andrews v. Marris, 1 Q. B. 3.

(y) Dews v. Riley, 11 C. B. 434.

(z) Douglas v. Yallop, 2 Burr. 722.

(a) Robinson v. Gell, 12 C. B. 191.

careful and diligent inquiry concerning the execution debtor or his property, and to execute the writ without any unnecessary delay. If he refuses to execute a writ when he has the opportunity, and is required to do it, and nothing occurs to prevent him, he will be responsible in damages to the execution creditor for his negligence. (b)¹ On receiving a writ of

(b) *Mason v. Paynter*, 1 Q. B. 981. *Brown v. Jarvis*, 1 M. & W. 704.

¹ *Bond v. Ward*, 7 Mass. 123; *Abbott v. Jacobs*, 49 Me. 319; *Ranlett v. Blodgett*, 17 N. H. 298; *Gale v. Ward*, 14 Mass. 352. He may require indemnity where there is a reasonable doubt as to the ownership of the property, but, if he neglects to require indemnity, he is liable if he neglects to attach property, whereby the plaintiff loses his debt; *Ranlett v. Blodgett*, *ante*; *Gale v. Ward*, *ante*; *Erwin v. Scott*, 15 Rich. (S. C.) 12; *Phillips v. Ronald*, 3 Bush. (Ky.) 244; and where the property is really attached, but not removed, he is not liable unless the attaching creditor really sustains loss thereby, consequently in defense to an action against him for neglect to remove, he may show that the property belonged to a third person. *West v. Meserve*, 17 N. H. 432. But when a sheriff attaches property belonging to the debtor, he is bound to keep it at all hazards, and, if he leaves it in the custody of the debtor, and it is sold by the debtor, or if it is attached at the suit of another person, or if by any lack of care on his part it is damaged or lost, he is liable therefor to the attaching creditor to the extent of the judgment obtained by him, and to the debtor, for the balance of its value. He is bound to take such steps to insure the safety of the property, as a careful, prudent man would take of his own, in view of the kind, character and situation of the property, and for any failure in this respect, he is liable both to the attaching creditor and the debtor. *Moore v. Westervelt*, 27 N. Y. 234; *Hartlieb v. McLane*, 44 Penn. St. 510; *Jenner v. Jolliffe*, 9 Johns. (N. Y.) 381; *Conover v. Gatewood*, 2 A. K. Marsh. (Ky.) 568. And the fact that a statute provides that the property may be attached by leaving a copy in the town clerk's office, does not exonerate him for its loss. He is bound to keep the property, even though its attachment is allowed to be made without an actual removal. *Fay v. Munson*, 40 Vt. 468; *Whitney v. Farrar*, 51 Me. 418.

Thus, if goods in the process of manufacture are attached, which will be seriously injured or impaired in value if not manufactured at once, he is bound to have their manufacture completed. So if grain in the straw is attached, if necessary to its preservation, he is bound to have it threshed. *Briggs v. Taylor*, 35 Vt. 57. And he is entitled to charge these expenses to the attaching creditor, and to deduct them from the amount received for the property on final sale. *Twombly v. Hunnewell*, 2 Me. 221. So far as the attaching creditor is concerned, the sheriff is bound to keep the property at all hazards except against the act of God or the king's enemies, so as to have it forthcoming on the execution, and in a case where the sheriff levied upon goods sufficient to pay the plaintiff's debt, and a part of them were stolen between the levy and sale so that there was a deficiency, he was held liable therefor. *Hartlieb v. McLane*, *ante*. So, if the goods are lost by fire, he is liable, and it is his duty to insure them for his own protection, and the protection of the creditor, and he can charge the expense of insurance to the plaintiff. *White v. Madison*, 26 N. Y. 117. The sheriff, when a process is left in his hands calling for the arrest of the debtor, is bound to use reasonable diligence to secure his arrest. He is

fi. fa. he must endeavor to ascertain what goods the execution debtor possesses within his bailiwick and seize them, (c) and sell them to the best advantage. (d) If he sells goods for much less than they ought to have been sold for, or does not take due and proper care in selling to the best advantage, or if he seizes or sells goods of much greater value than would suffice to satisfy the execution, poundage, and expenses, he will be responsible in damages to the party damnified. (e)

(c) See *post*.

(d) *Pitcher v. King*, 5 Q. B. 767.

(e) *Gawler v. Chaplin*, 2 Exch. 506.

Mullet v. Challis, 16 Q. B. 239.

not liable absolutely for a failure to arrest, although the defendant was in his jurisdiction at the time, if he used reasonable diligence in that respect, but failed to find the debtor. Thus, in a case where a bail process was left with the sheriff, and he went out with it to find the debtor, and while he was gone the debtor came to his office, and not finding the sheriff, took the cars and left, it was held that the sheriff could not be charged with negligence, and was not liable for a failure to arrest; *Erwin v. Scott*, 15 Rich. (S. C.) 12; but when a writ is placed in the sheriff's hands against the body of a defendant, whether at night-fall or at any other time, and he is told that the defendant is in a certain place and intends to abscond, he is liable if he neglects to make a reasonable search for the defendant, whereby he escapes arrest. *Phillips v. Ronald*, 3 Bush (Ky.) 244. So, when he has arrested the debtor, he is bound to keep him safely, and if he suffers him to go at large and he escapes, he is liable absolutely for the debt, and he can not set up the insolvency of the debtor in defense, nor can he set up irregularity in the process or judgment. *Bensel v. Lynch*, 44 N. Y. 162. A sheriff is bound to serve a process left with him, and can not refuse to do so because in his opinion it is irregular. *Roth v. Duvall*, 1 Idaho Ter. 167.

¹ A sheriff is bound to exercise due diligence in levying upon the property of an execution debtor, and if, after the execution is placed in his hands, by reason of his neglect or delay in making a levy, the debt is lost, he is liable therefor. *Lowe v. Ownley*, 49 Mo. 71; *Kimbro v. Edmonson*, 46 Ga. 130; *French v. Snyder*, 30 Ill. 339; *White v. Wilcox*, 1 Conn. 347; *Murray v. Troutman*, 5 Jones (N. C.) 379; *Noble v. Whetstone*, 45 Ala. 361; *Blivens v. Johnson*, 40 Ga. 297. And he is bound to levy upon enough property to satisfy the execution, if the debtor has it, and for a failure to do so, he can not show that he had reasonable grounds to believe, or that he actually did believe, that he had seized enough. He is bound in this respect to exercise such diligence as prudent men use in the management of their own affairs, and should make proper allowance for the depreciation of property, and the expense of keeping it between the time of levy and the sale. *French v. Snyder*, *ante*. The bankruptcy of an execution debtor will not excuse the sheriff from making a levy; *Noble v. Whetstone*, 45 Ala. 361; *Holmes v. Dunn*, 13 La. Ann. 153; nor the fact that he believed the property to be exempt from attachment. If he has a reasonable doubt as to the title to the property or its liability to levy, he may demand indemnity, and if he fails to do so, he will be liable unless he can show that in fact the property was exempt from levy, or that it belonged to another person. *Ronnell v. Bowman*, 53 Ill. 460. A sheriff is only bound to exercise due diligence to find the debtor's property. Even though the debtor has property, and the sheriff fails to find it, yet if he has exercised reasonable diligence to find it and has failed to do so, he will not be liable, and the

There is no duty or obligation on the part of the judgment creditor to give the sheriff any information or assistance to enable him to execute the writ. (f)¹

The law has always held the sheriff strictly, and with much jealousy, to the performance of his duty in the execution of writs, both from the danger there is of fraud and collusion with defendants, and also because it is a disgrace to the crown and the administration of justice if the king's writ remain unexecuted, as appears by the statute of Westminster the 2nd, c. 39. (g) The law is tender also of the liberties and interests of the subject, and requires the presence of the

(f) Dyke v. Duke, 4 B. N. C. 203. (g) Howden v. Standish, 6 C. B. 520.

question as to whether he has exercised due diligence, is for the jury. *Lowe v. Ownley*, 49 Mo. 71. The creditor is not bound to give any instructions to the sheriff, but if he does, and the sheriff follows them, he is relieved from liability. But in order to have that effect, the instructions must be followed substantially; if there is any material deviation therefrom, they will not operate as a protection. *Ross v. Cave*, 49 Mo. 129; *Hammond v. Root*, 15 Gray (Mass.) 516, *Abbott v. Jacobs*, 49 Me. 319; *Ranlett v. Blodgett*, 17 N. H. 298; *Bacon v. Fitch*, Kirby (Conn.) 373; *Barnard v. Ward*, 91 Mass. 269. If the creditor intermeddles with the execution, or undertakes to give instructions to the officer, the officer is relieved from liability. Thus, where a creditor directed the sheriff to conduct in the most advantageous manner possible, and with as little expense, and he could not make service before the return day expired, it was held that he was not liable for not returning the execution within its life. *Bacon v. Fitch*, *ante*; *Shannon v. Clark*, 3 Dana (Ky.) 152. So, where he was directed to do the best he could, if no damage actually results. *Walker v. Haskett*, 11 Mass. 177. A sheriff is bound to return an execution within its life, and upon failure to do so, the law presumes the debt to be lost, and *prima facie* the execution creditor is entitled to recover of him the full amount of the debt, and the burden is upon the sheriff to show that the debtor *had no property* upon which the execution could have been levied. *Dunphy v. Whipple*, 25 Mich. 10. And the fact that the execution was returned within a few days after it expired, is no defense. *Brookfield v. Remsen*, 1 Abb. (N. Y. Ct. App.) 210. And, whether the money could have been made upon the execution or not, the sheriff is liable for nominal damages. *Keith v. Com.*, 5 J. J. Marsh. (Ky.) 359; *Lafin v. Willard*, 16 Pick. (Mass.) 64; *Runlett v. Bell*, 5 N. H. 433. And the burden is upon the sheriff to show that the debtor had no property upon which a levy could be made. *Dunphy v. Whipple*, *ante*. And he can not screen himself from liability upon the ground that the execution debtor and creditor had agreed to suspend the levy, unless the execution creditor notifies him of the fact. *Derby Bank v. London*, 2 Conn. 417. Nor can he question the regularity of the execution. *Ford v. Treasurer*, 1 N. & M. (S. C.) 234; *Adams v. Balch*, 5 Me. 188. But if the process is void on its face, he will be excused from serving it. *Baal v. King*, 6 Ham. (Ohio) 11.

¹ *Ross v. Cave*, 49 Mo. 129; *Barnard v. Ward*, 9 Mass. 269; *Abbott v. Jacobs*, 49 Me. 319; *Runlett v. Blodgett*, 17 N. H. 298.

responsible officer to control the execution of the writ. If, therefore, an arrest is made under a ca. sa. by a bailiff to to whom the warrant is not addressed, in the absence of the officer to whom it is addressed, the arrest is irregular, and the defendant will be entitled to be discharged out of custody, and may maintain an action for wrongful imprisonment against the bailiff and the sheriff, unless the court has imposed upon him terms prohibiting him from bringing an action. (*h*) Where a gentleman who had obtained a warrant directed to a sheriff's officer to arrest his debtor, struck out the officer's name and inserted his own in its stead, and the gentleman was shot by the debtor whilst he was endeavoring to arrest him, it was held to be no murder, as the arrest was illegal, not having been effected by the officer named in the warrant. (*i*)

898. *Priority of writs of execution.*—The sheriff, as between himself and different execution creditors, is bound to execute that writ which is first delivered to him to be executed, and is responsible to the first creditor who so delivered his writ if he does not, unless the execution of the writ is countermanded; in which case the writ, whilst the countermand continues, must be considered as not delivered at all to be executed, because the sheriff can not act upon it. If, after the sheriff has been desired to suspend the execution of a writ, he receives an order to execute it, this order will not relate back, so as to give the execution of the writ any priority over writs which have been placed in the hands of the sheriff during the period of the suspended execution. The countermand of the execution of the writ is equivalent to its withdrawal, and it is not until the sheriff receives notice of withdrawal of the countermand, and an order to proceed, that the writ is considered to have been again delivered to him to be executed. (*k*)¹

(*h*) *Rhodes v. Hull*, 26 Law J., Exch. 265. *Gregory v. Cotterell*, 5 Ell. & Bl. 571.

(*i*) *Kenyon, C.J., Housin v. Barrow*, 6 T. R. 123.

(*k*) *Hunt v. Hooper*, 12 M. & W. 672.

¹ When two or more executions are delivered to a sheriff at the same time, each is to share *pro rata* the avails of the levy, in the absence of any instructions or agreement to the contrary. But when several executions against the same party are given to the sheriff at different times, the executions *first* received are to be first satisfied, in the order in which they are received. *Jones v. Edmunds*, 3 Murph.

Where goods have been seized under a former writ, founded on a judgment fraudulent against a creditor seeking to enforce a subsequent execution, and such goods remain in the hands of the sheriff, or are capable of being seized, the sheriff is bound to seize and sell the goods under the subsequent execution. (1) ¹

899. *Trespasses by the sheriff and his officers.*—The high-sheriff may be responsible for the acts of the under-sheriff in the execution of the duties of his office, as he is the general officer of the sheriff; but the bailiff is not the general officer of the sheriff. The bailiff gives a bond to the sheriff to execute such warrants as shall be directed to him, and when a warrant is granted him he becomes the special officer of the sheriff for the execution of the particular warrant, and the sheriff is re-

(1) *Imray v. Magnay*, 11 M. & W. 275.

(N. C.) 43; *Rogers v. Edmunds*, 6 N. H. 70; *Ex parte Stagg*, 1 N. & M. (S. C.) 405; *Brown v. Clark*, 4 How. (U. S.) 4; *Ulrich v. Dreyer*, 2 Watts (Penn.) 303; *Childs v. Dilworth*, 44 Penn. St. 123; *Arberry v. Noland*, 2 J. J. Marsh. (Ky.) 421; unless there has been an attachment of the same property upon *mesne* process, in which case the executions are to be satisfied according to the order of the attachments, if they were regularly issued within the time prescribed by law, so as to preserve the lien created by attachment. *State Bank v. Etter*, 15 Ark. 268; *Bliss v. Stevens*, 4 Vt. 88; *Cary v. Gregg*, 3 Stew. (Ala.) 433; *Bayley v. French*, 2 Pick. (Mass.) 586. But in those states where, by virtue of special statutes, a judgment operates as a lien upon the judgment debtor's property, the precedence is given to the oldest judgment. *McFee v. Harris*, 25 Penn. St. 102; *Jennings v. Dennis*, 14 Miss. 379. Otherwise, as between the execution creditors, the precedence is given to the execution under which levy is first made. *Arberry v. Noland*, 2 J. J. Marsh. (Ky.) 421; *McCall v. Trenor*, 4 Blackf. (Ind.) 496; *Lash v. Gibson*, 1 Murph. (N. C.) 266. But the sheriff will be liable to the creditor in the execution first received, if he levies under a later execution and pays over the avails to the creditor in such execution; *Rogers v. Edmunds*, *ante*; except where executions against a partnership and executions against individual members of the firm are levied upon partnership property, in which case, the executions against the firm are to be first paid, without any reference to the time when they were received by him. *Coover's Appeal*, 29 Penn. St. 1.

¹ The withdrawal of a prior execution from the hands of a sheriff, or its satisfaction by payment, removes the lien created by it upon the goods levied upon under it, and the next execution in order attaches and takes the benefit of the lien so removed. *Leach v. Pine*, 41 Ill. 66. And the same rule prevails where for any cause the prior execution is set aside, unless the action upon which it was predicated is still pending, and a lien upon the property had been acquired by attachment upon the original writ, in which case the lien is not lost by the setting aside of the execution, unless the action itself is abated. *Benjamin v. Smith*, 12 Wend. (N. Y.) 404; *Steiber v. Haye*, 1 Cranch (U. S. C. C.) 40; *Parker v. Dennie*, 6 Pick. (Mass.) 227; *Wilson v. Hensley*, 4 Ired. (N. C.) 66.

sponsible for what he does in the execution thereof, but he is not responsible when the act done by the officer is not done in the execution of a warrant. (*m*)¹ The liability of the sheriff, in case of mistake or misconduct on the part of his officer, is confined to cases where there is a misdoing of something which the sheriff commands him to do. If the sheriff is sued for a misfeasance of the officer, it is no answer for him to say that his command was not obeyed; he is still liable, provided the thing done be something which, by the command, or under the authority of the sheriff, the officer was bound to do. (*n*)² If a sheriff acting under a *fi. fa.* issues his warrant to his officer, directing him to levy a certain sum on the goods and chattels of the debtor in the usual form, and the officer arrests the debtor instead of levying on the goods, the sheriff will be responsible in damages for the mistake, although the sheriff never directed or authorized him to make the arrest, (*o*) the case of a sheriff differing in this respect from the liability of an ordinary principal for the acts of an agent who does not pursue the authority committed to him.³

(*m*) *Littledale, J., Crowder v. Long*, 8 B. & C. 605. *Drake v. Sykes*, 7 T. R. 116.

(*n*) *Smith v. Pritchard*, 8 C. B. 588.

(*o*) *Smart v. Hutton*, 8 Ad. & E. 568, n. *Raphael v. Goodman*, Id. 565. *Gregory v. Cotterell*, 5 Ell. & Bl. 586; 25 Law J., Q. B. 38.

¹ The sheriff is the principal, and his deputies are his agents for the discharge of the duties of his office committed to them, and as such he is liable for all their *laches*, defaults, or miscarriages. And, if the sheriff dies, the powers of his deputies die with him, and they cease to be deputies from that time. *Jackson v. Collins*, 3 Cow. (N. Y.) 89; *Paddock v. Cameron*, 8 Id. 212; unless provision is made by statute for a continuance of their powers. *Paddock v. Cameron, ante*.

² The sheriff is liable for *all* misdoings of his deputy that pertain to the discharge of the duties of his office, and in law, is treated as having directed the doing of all acts done, that pertain to the discharge of such duties. *Seaver v. Pierce*, 42 Vt. 325; *Norton v. Nye*, 56 Me. 211; *Morse v. Betton*, 2 N. H. 184; *Smith v. Joiner*, D. Chipp. (Vt.) 62; *Tobey v. Leonard*, 15 Mass. 200; *Knowlton v. Bartlett*, 1 Pick. (Mass.) 271; *Stinson v. Pierce*, 42 Vt. 334. But not for personal torts, although committed in the discharge of his duties. *Smith v. Joiner, ante*. Nor for contracts made by his deputy as such. *Whetherbee v. Foster*, 5 Vt. 136.

³ In law, the sheriff and his deputy are treated as one person, and the principal is liable *civiliter* for all the acts of his deputies that come strictly within their powers as such. *Campbell v. Phelps*, 17 Mass. 244. And the act of the deputy, is treated as the act of the sheriff himself, therefore trespass *vi et armis* lies against the sheriff for an act done by his deputy for which trespass would have lain if the act had been done by the sheriff himself. *Com. v. Kennard*, 8 Pick. (Mass.) 133; *Campbell v. Phelps, ante*; *James v. McCubbin* 2 Call (Va.) 273. So case for

But if the officer derives his authority for what he does from some third party, and not from the sheriff, (*p*) or if he is not acting in the execution of any process directed to him by the sheriff to be executed, the sheriff is no party to his acts, and is not responsible for what he does. Thus, if an execution debtor arrested under a ca. sa. pays the debt and costs to the sheriff's officer to obtain his discharge, and the sheriff's officer fails to pay over the money to the execution creditor, in consequence whereof the debtor is a second time arrested under a fresh writ upon the same judgment, the sheriff is not liable to the debtor for the default of his officer in not paying over the money, as it is no part of the duty of the sheriff or his officer to receive the money. Such a transaction is in the nature of a private arrangement between the debtor and the officer, and the debtor must resort to the officer, who is responsible to him for the non-payment of the money, like any other person who has received a sum of money to be paid to another, and has made default in so doing. (*q*)¹

900. Execution of writs by special bailiffs.—If the sheriff, at the request of the person suing out the writ, or his attorney, appoints a special bailiff for the execution of it, the sheriff is not then liable for the acts of the officer so appointed. (*r*) When, however, the execution of the writ is not expressly taken out of the hands of the sheriff, if there is a mere request that a particular officer may be employed in the execution of it, this does not constitute that officer a special bailiff of the person making the request. (*s*) So if the debtor interfere

(*p*) Cook v. Palmer, 6 B. & C. 742.

Doe v. Trye, 7 Sc. 704; 5 B. N. C. 573.

(*q*) Woods v. Finnis, 7 Exch. 372.

(*s*) Alderson v. Davenport, 13 M. & W.

(*r*) Ford v. Leche, 6 Ad. & E. 706.

42. Corbet v. Brown, 6 Dowl. 794.

negligence, or misfeasance, or malfeasance on the part of the deputy. Green v. Lowell, 3 Me. 373; Williams College v. Balch, 8 Me. 74; Waterhouse v. Waite, 11 Mass. 207; but only so far as they pertain to the ordinary course of his official duty. He is not responsible for a departure from the ordinary powers incident to the office. Gorham v. Gale, 7 Cow. (N. Y.) 739.

¹ But if the officer, in the discharge of his duty as such, is entitled to receive the money thereon, the sheriff is liable to the execution creditor therefor; Williams College v. Balch, 9 Me. 74; Evans v. Hayes, 1 Miss. 697; Walden v. Davison, 15 Wend. (N. Y.) 575; but in order to charge the sheriff, the relations of the deputy to the process must be such that a payment of the money to him, operates as a discharge of the cause of action, and estops the plaintiff from pursuing the debtor therefor further. Boyce v. Young, 3 H. & M. (Md.) 84.

with the officer, although he will thus relieve the sheriff from responsibility as to those matters in which he has interfered, the sheriff will not therefore be relieved from responsibility as to matters in which the debtor has not interfered. (t)¹

901. *Trespasses in dwelling-houses by sheriffs and their officers under color of the execution of legal process.*—If a sheriff by lifting the latch of the outer door of a dwelling-house, or opening the outer door in the way in which it is ordinarily opened by persons going into the house, enters the house of the execution debtor himself for the purpose of arresting him, or taking his goods, he is justified, if he has reasonable ground to believe that he is there, or that his goods are there; but if he enters the house of a stranger to make the arrest or the seizure, he is justified only in the event of his finding the execution debtor or his goods in the house. (u) If it turn out that the latter is not in the house, or had no property there, the sheriff is a trespasser, (x) unless the house was entered in hot pursuit after an escape. The house in which the execution debtor resides, *i.e.*, where he sleeps, may be considered to be his own house, although he is not the proprietor thereof, but only a lodger or visitor. “I see no difference,” observes LORD LOUGHBOROUGH, “between a house of which the execution debtor is solely possessed, and a house in which he resides by the consent of another.” (y)

902. *Of the breaking open the outer door of a dwelling-house in the execution of legal process.*—In Semayne’s case (z) it was resolved—“1. That the house of every man is to him as his castle and fortress, as well for his defense against injury and violence as for his repose.

“2. That when any house is recovered by any real action, or by ejectment, the sheriff may break the house, and deliver the seizin or possession to the demandant or plaintiff, for the words of the writ are ‘habere facias seisinam’ or ‘pos-

(t) Wright v. Child. L. R., 1 Exch. 358.

(u) Morrish v. Murray, 13 M. & W. 57.

(x) Ratcliffe v. Burton, 3 B. & P. 229, Johnson v. Leigh, 6 Taunt. 245.

(y) Sheers v. Brooks, 2 H. Bl. 122.
(z) 5 Co. 91.

¹ Stephenson v. Hillhouse, Harper (S. C.) 23; Allen v. Smith, 7 Halst. (N. J.) 159. If the sheriff at the request of the plaintiff specially deposes a person to serve it, he will be relieved from all liability. But if he, for his own convenience, gives it to a special deputy, he will be liable for all laches or miscarriages, the same as though he had served the process himself.

sessionem ; ' and, after judgment, it is not the house in right and judgment of law of the tenant or defendant.

"3. That in all cases when the king is party, the sheriff, if the doors be not open, may break the party's house, either to arrest him or to do other execution of the king's process, if otherwise he can not enter. But before he breaks it he ought to signify the cause of his coming, and to make request to open the doors.

"4. That in all cases when the door is open, the sheriff may enter the house and do execution, at the suit of any subject, either of the body or the goods ; but that it is not lawful for the sheriff (after request made to open the door and denial made), at the suit of a common person, to break the defendant's house, if the door be not opened, to execute any process at the suit of any subject.

"5. That the house of anyone is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house to prevent a lawful execution, and to escape the ordinary process of law ; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there ; and therefore, in such cases, after denial on request made, the sheriff may break the house." (a)

The principle that every man's house is his castle does not extend to a barn or outhouse, not connected with a dwelling-house. Therefore the sheriff may break open the door of a barn in order to levy an execution. (b)

If the officer, after he has peaceably obtained entrance through the outer door, and before he can make an actual arrest, is forcibly expelled from the house, and the outer door fastened against him, he may then break open the outer door and make the arrest. (c) And when he has once lawfully got inside the house, he is justified in breaking open the outer door to get out again, if the door is locked and there is no one within who will open the door. (d)

(a) *Semayne's Case*, 1 *Smith's L. C.*, 6th ed., p. 88.

(b) *Fenton v. Browne*, 1 *Sid.* 186.

(c) *Aga Kurboolie Mahomed*, 4 *Moore P. C. C.* 239.

(d) *Pugh v. Griffith*, 7 *Ad. & E.* 827.

If the window of a house be open, or a pane of glass broken, and the bailiff put his hand in and touch one for whom he has a warrant, he is thereby his prisoner, and the bailiff may break open the door of the house to come at him, (e) or break through the window. (f) And if, after the officer has effected an arrest, the debtor breaks loose and escapes into a house, the sheriff, or his officer, may break open the house to retake him, whether the house be the debtor's own house or the house of a stranger, provided he has given notice of the object of his coming, and has demanded and been refused admission. (g)¹

(e) Anon., 7 Mod. 8. Sandon v. Jervis, E. B. & E. 935 ; 28 Law J., Exch. 156.

(f) Lloyd v. Sandilands, 8 Taunt. 250.

(g) Anon., Lofft, 390.

¹ It will be seen by the cases referred to by the author, that the dwelling-house of a person is so far "his castle," that an officer with a warrant for the apprehension of the owner or any member of his family, or to attach or levy upon his goods, has no right to enter the house by force. At the same time, it will be seen that the occupant must not expose himself to arrest by the sheriff, by placing himself in a position where he can be so actually arrested by him without an actual breaking of the house, or an invasion of its privileges as a castle. But, the question arises whether, if the door be closed, and the debtor is not within reach of the officer although within sight, and the window be open, the sheriff would be justified in entering by the window to arrest him? The cases referred to by the author, of an actual manual arrest through an open window, without an actual entry, have carried the rule further than seems to be warranted by principle. The doctrine of those cases seems to proceed upon the ground that, if the occupant of the house places himself in a position where he can be arrested by the sheriff from the outside, without an actual entry into the house, the sheriff may then, if necessary, break into the house, unless the debtor will go out to the sheriff, or open the door after demand made, upon the ground that his refusal to go operates as an escape. But in view of some American cases, it is perhaps doubtful whether this doctrine would be held by our courts. There can be no doubt that the sheriff may lawfully enter the house by the ordinary and usual modes of entry, if he can do so peaceably, without force, strategy, or fraud, but he can not enter by any other mode, even though an opportunity is presented. The mere fact that a window-pane is broken, or the window itself is left open, does not amount to a license to any person to enter the house by that mode, and such an entry would be unlawful, and a trespass. If, then, the sheriff can not lawfully enter the house through the window in the first instance, how can he lawfully make an arrest by putting his hand through it? Is not the one, in law, as much a trespass as the other? If so, he could not lawfully pursue the arrest by breaking into the house, for the arrest was unlawful and void, for an arrest or an attachment of goods made by a forcible or unlawful entry into one's dwelling house, is void. This question was directly passed upon in the case of *Ilseley v. Nichols*, 12 Pick. (Mass.) 269. In that case the defendant Nichols, who was a deputy sheriff, broke the outer door of the plaintiff's house, against his will and contrary to his express prohibition, and attached certain goods of the plaintiff

903. *What amounts to a breaking of the outer door.*—If the sheriff, or his officer, opens the outer door of a house by lifting the latch, or drawing back a sliding bar, in the ordinary

found there. It appeared that the plaintiff had failed, and shut himself up in his dwelling-house with the goods, intending to dispose of them as he should think just, among his creditors. The plaintiff, insisting that the attachment was invalid, and that the sheriff's possession of them obtained in that way was unlawful, brought an action of trespass against him for the breaking of his dwelling and the carrying away of the goods. The supreme court, in passing upon the question, held that the entry being illegal, no valid attachment of the goods could be made by the defendant, and that the plaintiff, in addition to the damages for the wrongful breaking of the house, was entitled to recover *the value of the goods taken*. Chief Justice SHAW in delivering the opinion of the court, among other things said, "It is remarkable that, upon a question of such frequent recurrence in practice, and of so much importance in the service of civil process and the powers and duties of officers therein, no direct judicial authority is to be found. The circumstances to be taken into consideration are, that the goods were in a dwelling-house, and were attached in consequence of the house being broken open by forcing the outer door; that the direct and avowed purpose of breaking open the house, was to make an attachment, and that this was done against the will, and contrary to the express prohibition of the plaintiff.

"It is clear from all the authorities, and wholly undisputed as a rule of law, *that the act of thus breaking the outer door of a dwelling-house is unlawful*. The goods were attached in pursuance of a previous design, and through the medium of this unlawful act, and could not have been otherwise attached, and the question is, whether the attachment was valid, and constituted a legal lien upon the goods. Were it not for some very respectable authorities, it would seem from a mere statement of the question, that it must be decided in the negative. In Bacon's Abr., and by other respectable compilers, it is stated that, on a *capias* or *fi. fa.* the sheriff is not authorized to break the outer door of a dwelling-house, *though the execution would be good*" (Bac. Abr. *Sheriff*, n. 3), and the learned judge proceeds to review the cases in which the same *dicta* appeared, viz.: *Year Book*, 18 Ed. 4, f. 4; *Semayne's case*, 5 Coke, 93; *Lee v. Gansell*, 1 Cowp. 1; *Heminway v. Saxton*, 3 Mass. 222, and *Widgery v. Haskell*, 5 Mass. 155; and he adds, "From a review of the cases it seems never to have been judicially determined, that an attachment on *mesne* process or *fieri facias*, where the possession is obtained by unlawful means, would be valid and effectual to give the sheriff or the creditor a legal right to hold the property. But on the other hand there are many cases, quite analogous in principle, which seem strongly to support the contrary doctrine. There are many cases where arrests on civil process are held to be unlawful and void, in consequence of the unlawful means used to place the party in a situation to be arrested, or where he has been unlawfully detained until he could be lawfully arrested, or other unlawful means used to obtain the custody of the person. These authorities go directly to support the broad position laid down by LORD HOLT who, after stating that if a man is wrongfully brought into a jurisdiction and there lawfully arrested, he ought to be discharged, adds, "*for no lawful thing, founded upon a wrongful act, can be supported.*" *Suttin v. Bevin*, 1 Mod. 50.

"A distinction was taken at the bar, between an arrest made by means of breaking a man's castle, and an attachment of goods made by the same means,

way in which persons going into the house open the door, this is not a breaking of the door. "As to the passage," observes POLLOCK, C. B., "in Comyn's Digest, 'Execution,' that the sheriff may not open a latch, there is no reference to any authority in support of it. The cases do not support that proposition." (*h*)¹

(*h*) Ryan v. Shilcock, 7 Exch. 77; 21 Law J., Exch. 58.

upon the ground that the privilege of inviolability given by law to the dwelling-house, is designed exclusively for his person and that of his family and inmates." The learned judge proceeded to combat this doctrine, and show by a number of authorities, that an arrest unlawfully effected is void. He then proceeds: "The cases seem to establish the general principle, that a valid and lawful act can not be accomplished by any unlawful means; and whenever such unlawful means are used, the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by these unlawful means, to his rights." See also *Boggs v. Vandyke*, 3 Harr. (Del.) 288; *Curtis v. Hubbard*, 4 Hill (N. Y.) 437; *Oystead v. Shed*, 13 Mass. 522. The bare raising of the latch of the door, is treated as such force as renders the entry unlawful; *Curtis v. Hubbard*, *ante*; or the use of artifice or fraud, whereby an entry is effected. In *Park v. Evans*, Hob. 62a, the defendant was an under sheriff, and having a civil process against one Porter, who lay in the house of the plaintiffs, he went to the plaintiffs' door and knocked, and the wife of one of the plaintiffs opened it a little to see who was there, when the defendant and his assistants at once rushed into the house and broke open the chamber door where Porter was. The entry was held unlawful, and the defendants were fined £200 each, upon the ground that it was effected by craft, and was forcible.

In *Higgins v. Andrews*, 2 Rolle, 55, an entry through an open door, without the license or consent of the owner, was held unlawful. In *Taylor v. Fisher*, Cro. Eliz. 246, an entry through the open door of the plaintiff's dwelling to take away the defendant's property, although done with the consent of the plaintiff's wife, was held a trespass. Indeed it may be said that *any entry into the house of another, without a license from the occupant, express or implied, is a trespass*. *Brown v. Perkins*, 1 Allen (Mass.) 89; *Adams v. Freeman*, 12 Johns. (N. Y.) 408; *Bro. Tresp.* pl. 430; *Nichols v. Sanford*, 13 Mass. 286; *Oystead v. Shed*, 13 Id. 520; *Stedman v. Crane*, 11 Met. (Mass.) 295; *Hooker v. Smith*, 19 Vt. 151; *State v. Patterson*, 45 Vt. 308; *People v. Hubbard*, 24 Wend. (N. Y.) 369; and it would seem, that an arrest effected by an officer by putting his hand through a broken window-pane, or by an entry through an open window, is unlawful, and, upon principle, void. It is clearly an entry into the dwelling of another, without a license, express or implied, and according to the doctrine announced in *Ilsey v. Nichols*, *ante*, is clearly void. Arrests have been held unlawful, as well as the service of process, when effected by unlawful means. Thus where a person by strategy or fraud has been inveigled from another jurisdiction; *Goulpil v. Simonson*, 3 Abb. (N. Y.) Pr. 474, or has been confined to enable a party to get out a writ; *Barlow v. Hall*, 2 Ansthr. 42; or has been arrested upon a void process and held until a valid one could be issued; *Loveridge v. Plaistow*, 2 H. Bl. 29; *Ex Parte Wilson*, 1 Atk. 152; or has been detained by force until an officer could be obtained; *Burch v. Prodger*, 4 B. & P. 135; *Lyford v. Tyrell*, 2 Ansthr. 85; *Wells v. Gurney*, 8 B. & C. 769.

¹ The rule is otherwise in this country, and the raising of a latch, or any entry

904. *Of the breaking open of inner doors in the execution of a writ.*—If the sheriff or his officer, gains peaceable entrance at the outer door of a dwelling-house, he may break open an inner door of the house, either to seize the person or the goods of the owner of the house, or of a lodger therein, (i) and having entered at the open outer door of the house, he need not demand to have the inner doors opened to him before he breaks them in order to take goods under a *fi. fa.* (k) Any resistance to the bailiff after he has once entered at the open outer door will be punishable, although the entry may have been obtained by fraud and deceit. (l)¹

(i) *Lee v. Gansell*, 1 Cowp. 1; *Lofft*, *Lloyd v. Sandilands*, 2 Moore, 210
374. (j) *Rex v. Backhouse*, *Lofft*, 61.

(k) *Hutchison v. Birch*, 4 Taunt. 618.

which does not have relation to a license, express or implied, is unlawful. *Brown v. Perkins*, 1 Allen (Mass.) 89; *Curtis v. Hubbard*, 1 Hill (N. Y.) 336.

In *Curtis v. Hubbard*, *ante*, COWEN, J., in delivering the opinion of the court, said: "The point is made, that the mere lifting of the latch is not such a forcible breaking as the law forbids to a sheriff who holds civil process. . . . *The rule is clearly otherwise.* It is enough that the outer door be shut; then, merely opening it, is a breaking within the meaning of the law." *Haggerty v. Wilber*, 16 Johns. 288; *Penton v. Brown*, Keb. 698; *Seymour v. Gresham*, Cro. Eliz. 908; *Ratcliffe v. Burton*, 5 B. & P. 223; *Buckingham v. Francis*, 11 Moore, 40.

¹ It often becomes important to know what constitutes an *outer* or an *inner* door within the meaning of the rule. It may be said that where a building is occupied by one family, which has the general charge and supervision of the whole house although some of the rooms are let out to lodgers, the doors of the rooms of the lodgers, as well as those to rooms occupied by members of the family, are *inner* doors; *Lee v. Gansell*, 1 Cowp. 1; but when the *same* house is let to *different* families, although they have a common entrance, and a common outer door, yet if they each occupy a distinct part of the house, and distinct rooms, and each has *exclusive* control over the part of the house so occupied by him, an entry through the common outer door, will not justify a breaking of the doors of the rooms occupied by either family; *Stedman v. Crane*, 11 Met. (Mass.) 295; *Swain v. Minzer*, 8 Gray (Mass.) 182. They are treated as *outer* doors, unless the control is joint. *Stedman v. Crane*, *ante*. NELSON, C. J., in *Swain v. Minzer*, *ante*, laid down the rule, in his charge to the jury, thus, "that if the plaintiff had proved to their entire satisfaction that he had the *rightful and exclusive control and possession of a portion* of the house, and had also forbidden and endeavored to prevent the entrance of the defendant, then the defendant would have no right violently to break and enter against the plaintiff's will, although he was an officer, and had a legal process which he was endeavoring to serve, and although he had, without the knowledge of the plaintiff, and without breaking, got an entrance through the *outer* door of this common house or building. The whole question turns upon the question whether each family holds by separate title, and has full and exclusive jurisdiction and control over the part of the building occupied by it. See *Lee v. Gansell*, 1

905. *Illegality of an arrest or seizure of goods effected through the medium of an act of trespass.*—If the original entry into a dwelling-house by a sheriff or his officers was unlawful and an act of trespass, their continuance in the house is unlawful, and they can not avail themselves of an entry or possession unlawfully gained to execute a ca. sa. (*m*) If the sheriff, in making his entry, “has been guilty either of a breach of a positive statute, or of an offense against the common law, such violation of the law in making the entry causes the possession thereby obtained to be illegal.” (*n*) And if advantage is taken of the unlawful entry to effect an arrest of a judgment debtor, the court will order the prisoner to be discharged. (*o*)

To break and enter a man's house for the purpose of executing a ca. sa. “is really,” observes PARKE, B., “not an abuse of the authority of the writ, but it is executing the authority where the sheriff has none; like going out of the jurisdiction to execute the writ. The door being open is a condition precedent to executing the writ in the dwelling-house.” (*p*) As regards the seizure of goods, however, after an unlawful breaking into the house, a different doctrine has prevailed, on the authority of the following case in the Year Book, 18 Edw. 4, 4a :—“Catesby comes to the bar, and asks whether a sheriff and his officers breaking into a dwelling-house to execute a fi. fa. do a wrong or not; the judges answer that the defendants may bring trespass against them, notwithstanding the fi. fa., for that will not excuse them for breaking the house, but ‘del prisel des biens tantum.’” “This case,” observes COLERIDGE, J., “is cited in Semayne's case, (*q*) as establishing that if the sheriff breaks the dwelling-house by force of a fi. fa., he is a trespasser by the breaking, and yet the execution which he then doth is good. But it may be doubted whether the judges meant anything more in the Year Book than to state

(*m*) Hooper v. Lane, 6 H. L. C. 535.

(*n*) Tindal, C. J., Newton v. Harland,
1 M. & Gr. 658.

(*o*) Hodgson v. Towing, 5 Dowl. 410.

(*p*) Kerbey v. Denby, 1 M. & W. 341.
(*q*) 5 Co. 92a, 92b.

Cowp. 1; The King v. Rogers, Leach Cr. Ca. 89; The King v. Trapshaw, Id. 427; The King v. Carrell, Id. 237; 1 Hale's P. C. 557; Tracy v. Talbut, 6 Mod. 214. But see Williams v. Spencer, 5 Johns. (N. Y.) *contra*; also Fitch v. Loveland Kirby (Conn.) 386.

generally what a fi. fa. authorized a sheriff to do ; but assuming that they did, still the dictum there, and that in Semayne's case, are both purely extra-judicial. (r) ¹

(r) Hooper v. Lane, 12 H. L. C. 542.

¹ *Ilsley v. Nichols*, 12 Pick. 269. See note 1, *ante*. It seems now to be generally conceded that an arrest or an attachment made by an unlawful entry into the dwelling of another, is void, and this rule is predicated upon a sound public policy. The law regards it as essential to the peace and security of families that their dwellings shall not be open to invasion by any person against their will, even though thereby the service of civil process is delayed, or even defeated, and that no valid arrest or right to property can be acquired through a violation of this right. Chief Justice SHAW, in *Ilsley v. Nichols*, *ante*, comments upon the claim that an arrest or attachment made in such a manner would be legal. "Such a decision," says he, "would afford a direct encouragement to a rash and turbulent creditor to violate the rules of law, and do that which might lead to an open breach of the peace, by giving legal effect to his attachment, if he can procure force enough to procure one by unlawful and violent means. It is to be recollected that an officer, while acting within the scope of his authority, and in conformity to the rules of law, is not only entitled to the protection of the law, but has also the power to command the protection of all other citizens ; and the law extends the like protection to them. But it would be placing the officer and his assistants in a most critical and questionable predicament if they could be employed in making a lawful attachment by unlawful means. . . . And as it is a well-settled rule of law, established upon considerations of policy, that the doors of a dwelling-house can not lawfully be forced for the service of civil process, *we think it follows*, as a necessary legal consequence, *that no valid attachment can be thereby made.*" But this privilege only extends to dwelling-houses, and does not extend to out-buildings, or buildings occupied for other purposes, as stores, shops, &c. *Platt v. Brown*, 16 Pick. (Mass.) 553 ; *Newton v. Adams*, 4 Vt. 437 ; *Fullerton v. Mack*, 2 Aik. (Vt.) 415 ; *Fullam v. Stearns*, 30 Vt. 443. But if there is any person having the custody of the building, to be found, a demand for admission should be first made. *Id.* It becomes important to know what persons are entitled to the benefit of this privilege. In *Foster's Crown Law*, 320, 1 Hale, 459, 2 *Id.* 117, and in *Seymour's Case*, 5 Coke, 93, the doctrine is clearly announced, that "the outer doors or windows of a house shall not be forced by an officer in the execution of a civil process against the occupier, or any of his family, who have their domicile or ordinary residence there ; but that the house shall not be a sanctuary for any other person. So that if a stranger, whose ordinary residence is elsewhere, upon a pursuit, takes refuge there, the house is not his castle ; and the officer may break open the doors or windows in order to execute his process ; and if one, after arrest, flee into his own house, it shall not protect him." Thus it would seem that all persons who actually reside in the house, including the owner or occupant, his wife, children, domestics, boarders, and all persons whose residence is there, are entitled to the privilege. *Oystead v. Shed*, 13 Mass. 522 ; but the outer doors of the rooms occupied by any of these persons, when an entrance is lawfully obtained through the outer door, may be broken. But if the entrance is unlawful, the breaking of doors, or the arrest of persons or attachment of property, may be resisted, with as much force as is necessary to prevent its consummation. *Ilsley v. Nichols*, 12 Pick. (Mass.) 267 ; *Closson v. Morrison*, 47 N. H. 474.

906. *When the sheriff becomes a trespasser by remaining on premises an unreasonable time.*—The writ of *fi. fa.* authorizes the sheriff, who has entered upon premises for the purpose of making a levy under it, to remain there for such time as is reasonably necessary for the execution of the writ; but if he remains more than a reasonable time he abuses the legal authority conferred upon him by the Queen's writ, and becomes a trespasser, and in the position of a man who has walked into another person's house without any authority. The reasonableness of the time is a question for the jury. (s) ¹

(s) *Ash v. Dawney*, 8 Exch. 243. *Play-fair v. Musgrove*, 14 M. & W. 239.

See *Hubbard v. Mack*, 17 Johns. (N. Y.) 127, as to an entry made through an open door; also *White v. Whiteshire*, Palm. 184; *Ratcliffe v. Burton*, 3 B. & P. 223. That, when an entrance is lawfully obtained through an outer door, all inner doors may be broken; see *Kelsey v. Wright*, 1 Root (Conn.) 83; *Barnard v. Bartlett*, 10 Cush. (Mass.) 501; *Bell v. Clapp*, 10 Johns. (N. Y.) 263; *State v. Smith*, 1 N. H. 346; but a demand to open them should first be made, if possible. *White v. Whiteshire*, Palm. 184.

¹ This is upon the principle that an officer who abuses his process, becomes a trespasser *ab initio*. The doctrine was advanced in *The Six Carpenters' Case*, 8 Coke, 146a, "that when an entry, authority, or license is given to any one by the law, and he abuses it, he shall be a trespasser *ab initio*; but where an entry, authority, or license is given by the party, and he abuses it, then he must be punished for his abuse, but shall not be a trespasser *ab initio*. And the reason of this difference is," says the learned reporter, "that in the case of a general authority or license of law, the law adjudges by the subsequent act, *quo animo*, or to what intent he entered; for *acta exteriora indicant interiora secreta*. But when the party gives an authority or license himself to do anything, he can not for any subsequent cause punish that which is done by his own authority or license."

In *Melville v. Brown*, 15 Mass. 82, the defendant seized the property of two tenants in common upon the debt of one of them, and he was held a trespasser *ab initio*.

So in *Frisbee v. Langworthy*, 11 Wis. 375, for a sale upon execution of the entire chattel mortgaged, instead of the mortgagor's interest therein.

So in *Malcolm v. Spoor*, 12 Met. 279, the defendant having seized property upon an attachment, in a dwelling-house, placed a man, who was intoxicated, in the house, to keep the property for him, and the court held that this was such an abuse of his process as made him a trespasser *ab initio*, SHAW, C. J., saying, "An officer can not legally stay in another's building to keep attached goods therein, nor authorize any other person to remain therein as keeper, for a longer time than is reasonably necessary to enable him to remove the goods, unless he has the consent, express or implied, of the owner of the building." See also *Rowley v. Rice*, 11 Met. 337. So, where goods are sold under a void process, or before or after the time prescribed by law; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356; or where the

907. *Seizure of the goods of the wrong person.*—A sheriff or his officer seizing goods under a writ of execution is responsible in damages if he takes the goods of the wrong person. "If he takes the goods of a stranger, though the plaintiff assures him they are the defendant's goods, he is a trespasser; for he is obliged at his peril to take notice whose the goods are, and for that purpose may impanel a jury to inquire in whom the property in the goods is vested, (t) or compel rival claimants to interplead and establish their title." (u) Where, therefore, two persons, being father and son, both had the same name of baptism and surname, and both resided in the same house, and an action was brought against the son, who suffered judgment by default, and a writ of execution was issued against him, under which the sheriff, by mistake, took the goods of the father, it was held that the sheriff was responsible for the consequences of his mistake. (x)

The sheriff has no right to seize the goods of a stranger in the possession of the execution debtor as the ostensible owner. (y) If a woman, having furniture of her own, cohabits with the execution debtor, and assumes his name, and gives herself out as his wife, and permits him to appear to be the owner of her furniture, this does not give the sheriff any right to seize it under an execution against him. (z) And if the man and woman have actually gone through the form of marriage, and are supposed to be man and wife, and the goods have been seized and sold by the sheriff, as the goods of the husband, without any notice or objection, and it afterwards transpires that the marriage was void, and that the goods belonged to the supposed wife before the celebration of the void marriage, the sheriff will be responsible to her in damages for the unlawful seizure. (a) The acquiescence of the woman was held to be of no moment, the execution being a proceeding in invitum, she having no power to resist, and not having discovered the error.

(t) Bac. Abr. EXECUTION, n. 5. Roberts v. Thomas, 6 T. R. 88. Saunderson v. Baker, 3 Wils. 309.

(u) Post, s. 3. INTERPLEADER.

(x) Jarmain v. Hooper, 6 M. & Gr.

847; 7 Sc. N. R. 679.

(y) Dawson v. Wood, 3 Taunt. 250.

(z) Edwards v. Bridges, 2 Stark. 396.

(a) Glasspoole v. Young, 9 B. & C.

701.

provisions of the law are not complied with in the seizure or sale of the goods Wallis v. Truesdell, 6 Id. 455.

But where the woman takes an active part in misleading the sheriff, and asserts that she is the wife of the execution debtor, knowing the assertion to be untrue, she is then herself the cause of the injury of which she complains, and is estopped from disputing the accuracy of her representation. (*b*) And if the evidence shows that she had given the property to the man with whom she cohabited, and had made him the owner of it, the sheriff will then have a right to seize it. (*c*)

As one man's goods can not be seized by the sheriff to pay another man's debts, it follows that the goods of a testator in the hands of an executor can not be seized under an execution against the executor to satisfy a judgment debt due from the executor himself in his own right; (*d*) but if a devastavit has been committed by the executor, and the goods have been converted to his own use, the executor can not take advantage of his own wrong, and justify his own misconduct, by saying that the goods are not his, but his testator's. (*e*)

An illegal seizure of goods under void process does not prevent the sheriff from afterwards executing a legal warrant. The subsequent valid seizure is in nowise vitiated by the previous trespass, but a different rule prevails with respect to an illegal arrest. (*f*)

It is not sufficient for a sheriff to enter a house with a writ of *fi. fa.* in his hands, and to demand the debt and costs, together with the expenses of the levying. He must do some overt act to execute the writ. (*g*) But he need not actually seize anything. It is sufficient if he states to the persons left in charge of the property that he seizes everything there, and that nothing must be removed. (*h*) And when he has thus taken possession of the goods, his officer should continue in possession, in order to sustain the seizure against others afterwards coming under legal authority to seize the same

(*b*) *Langford v. Foot*, 2 M. & Sc. 349.

(*c*) *Edwards v. Farebrother*, 2 M. & P. 293. As to the seizure of goods let to hire to the execution debtor, see *Tancred v. Allgood*, *post*.

(*d*) *Farr v. Newman*, 4 T. R. 621.
Gaskell v. Marshall, 1 M. & Rob. 132.
Fenwick v. Laycock, 2 Q. B. 110.

(*e*) *Quick v. Staines*, 1 B. & P. 295.

(*f*) *Percival v. Stamp*, 9 Exch. 171.
Hooper v. Lane, 6 H. L. C. 443.

(*g*) *Nash v. Dickenson*, L. R., 2 C. P. 252.

(*h*) *Gladstone v. Padwick*, L. R. 6 Exch. 203.

goods. (i) If he give up possession without a lawful excuse, he will be liable to an action. (j)¹

908. *Seizure by sheriffs and their officers of privileged or protected goods.*—An action is not maintainable against a sheriff who has seized privileged or protected goods, in obedience to the commands of a writ, but the person injured must apply to the court for an order upon the sheriff to restore the goods. Thus, if the sheriff seizes the property of a person, who has obtained an order, from a court of competent jurisdiction of protection from process, the remedy is by application to the court for an order upon the sheriff to withdraw and not by action. (k)²

No writ of fi. fa. can be executed in any of the palaces belonging to the crown, which is either at that time the residence of the sovereign, or in which there is an intention, and present power on the part of the crown, to resume such residence; but if, although in one sense a royal palace, it has, for many years, been put to uses practically inconsistent with the personal residence of the sovereign, the exemption will cease. (l)

The Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 1, provides that the delivery of a writ of fi. fa. is not to

(i) *Blades v. Arundel*, 1 M. & S. 711. *Ackland v. Paynter*, 8 Pr. 95. As to the withdrawal of the sheriff under an interpleader order, see *Darby v. Waterlow*, *infra*.

(j) *Darby v. Waterlow*, L. R., 3 C. P. 453.

(k) *Rideal v. Fort*, 11 Exch. 847.

(l) *Att.-Gen. v. Dakin*, L. R., 2 Exch. 290; 3 Id. 288; 4 Engl. & Ir. App. 338.

¹ But if the property of a stranger is intermingled with the property of the debtor, if the stranger upon request of the sheriff refuses to separate it, the sheriff will not be a trespasser by its taking; *Bond v. Ward*, 7 Mass. 127; *Holbrook v. Hyde*, 1 Vt. 286; *Shumway v. Rutter*, 8 Pick. (Mass.) 443; *Slattery v. Stewart*, 45 Ill. 293; but if the property of B. is seized upon a debt against A., the sheriff will be liable, although he honestly believed the property to belong to A. and he can not avoid liability by returning the property or its proceeds to its real owner. *Duke v. Vincent*, 29 Iowa, 308; *Wellman v. English*, 38 Cal. 583; *Noble v. Kelly*, 40 N. Y. 415; *Woodbury v. Long*, 8 Pick. (Mass.) 543; *Jamison v. Hendricks*, 2 Blackf. (Ind.) 94; *Ewings v. Frier*, 2 A. K. Marsh. (Ky.) 268. And the fact that the property is in the debtor's possession is no justification, unless the possession is such as to constitute fraud in fact or in law. *Walcott v. Pomeroy*, 2 Pick. (Mass.) 121; *Campbell v. Phelps*, 17 Mass. 244.

² Property which by law is exempt from levy, can not be seized by the sheriff, and its seizure by him, subjects him to an action of trespass in favor of the owner hereof. *Spencer v. Long*, 39 Cal. 700; *Kennedy v. Bradbury*, 55 Me. 107; *Anthony v. Wade*, 1 Bush. (Ky.) 110.

affect any title to the goods seized acquired bona fide before the actual levy without notice. (*m*) The provisions of the Companies Act, 1862, ss. 87 and 163, have been cited. The words "put in force," there used, mean the taking of possession by, not the delivery of the writ to, the sheriff. Where, therefore, the execution creditor placed the writ in the hands of the sheriff three hours before a petition for winding up the company was presented, but possession was not taken till three hours afterwards, all further proceedings under the writ were stayed. (*n*) Under particular circumstances, however, *i. e.*, where the company have not acted fairly towards the judgment creditor, he will be allowed to complete his execution. (*o*) Where the creditor takes possession before the winding up, the Court of Chancery will not, under the provisions of the 87th section, restrain him, as a general rule, from reaping the benefit of his diligence. (*p*) And so, if the creditor would have been in possession but for the fact of the judgment debtor having prevented him by force. (*q*)

By the 30 & 31 Vict. c. 127, s. 4, continued by 34 & 35 Vict. c. 95, no execution can be levied on the rolling stock or plant of a railway company up to the 1st of September, 1872, and the end of the then next session, if the line is open for public traffic. (*r*) The seventh section of the first mentioned Act provides, that after the filing of a scheme of arrangement between the company and its creditors, under s. 6, the Court of Chancery may restrain any action against the company on such term as it thinks fit; and the ninth section provides, that after publication of a notice in the London Gazette, that the scheme has been filed, no execution, attachment, or other process against the property of the company shall be available without the leave of the court. Under these sections the court has only an interim power, between the filing and the enrollment of a scheme of arrangement, to allow an execution,

(*m*) See *Hobson v. Thelluson*, L. R. 2 Q. B. 642.

(*n*) *Re London and Devon Biscuit Co.*, L. R., 12 Eq. Ca. 190.

(*o*) *Re Bastow & Co.*, L. R., 4 Eq. Ca. 681.

(*p*) *Re Great Ship Co.*, 10 Jur. N. S. 3.

Plas-yn-Mhowys Mining Co., L. R., 4 Eq. Ca. 689.

(*q*) *Re London Cotton Co.*, L. R., 2 Eq. Ca. 53.

(*r*) See *Re Cambrian Railways Company's Scheme*, L. R., Ch. App. 278.

but after the enrollment any creditor bound by the scheme would, it seems, be prevented from issuing execution. (s)

909. *Power of the sheriff to compel rival claimants to interplead and establish their title.*—By 1 & 2 Wm. 4, c. 58, s. 6, reciting that difficulties arise in the execution of process against goods and chattels, by reason of claims made to such goods and chattels by persons not being the parties against whom the process has issued, whereby sheriffs and officers are exposed to actions, it is enacted, that “when any such claim shall be made to any goods or chattels taken, or intended to be taken, in execution, under any such process, or to the proceeds or value thereof,” it shall be lawful for the court from which such process issued, upon application of the sheriff or officer, made before or after the return of such process, and before or after any action brought, to call before them, by rule of court, as well the party issuing the process as the party making such claim, and thereupon to exercise, for the adjustment of such claims, and the relief and protection of the sheriff or officer, any of the powers conferred by the statute, and to make such rules and decisions as shall appear to be just. And the 1 & 2 Vict. c. 45, s. 2, enables any single judge of the superior courts to exercise the powers and authorities for the relief and protection of the sheriff or other officer given by virtue of 1 & 2 Wm. 4, c. 58, s. 6. Among the powers contained in the last-named Act is the power of making rules and orders (s. 1), calling upon the claimant to appear and state the nature and particulars of his claim, and maintain or relinquish his claim, and to stay proceedings in actions, and to order actions to be tried, and direct which of the parties are to be plaintiff or defendant in such actions.

These powers may be exercised, though the titles of the claimants have not a common origin, but are adverse to, and independent of, one another. (t) But they do not apply to claims for rent, unless the landlord claims the goods themselves, or the proceeds of them, as being his property. (u)

(s) *Re Potteries, Shrewsbury, & North Wales Rwy.*, L. R., 5 Ch. App. 67. *Potteries, Shrewsbury, & North Wales Rwy. v. Minor*, L. R., 6 Ch. App. 621.

(t) 23 & 24 Vict. c. 126, s. 12.

(u) *Bateman v. Farnsworth*, 29 Law J., Exch. 365.

It is not necessary that the sheriff should have made an actual seizure of the goods in order to be entitled to the benefit of the statute. It is sufficient if he intends to seize the goods, having the writ or process in his possession. (*v*)

The object of the Act is to give protection to the sheriff, wherever, by reason of claims to the property, he is in danger of actions by the execution creditor if he yields to the claim, or by the claimant if he executes the writ. But it is not intended to protect the sheriff, where the resistance is to the writ itself, *i.e.*, where the party in the cause objects to any execution on his own goods, for there the process itself, properly executed, would be the sheriff's defense; (*w*) nor does it apply where there has been an unlawful breaking open of the outer door of a dwelling-house by the sheriff in order to effect the seizure of the chattels, for this is a wrong quite independent of any question of ownership of the goods seized, and the court or a judge has no authority to stay proceedings in an action brought in respect thereof. The statute is altogether silent respecting such a subject-matter of complaint, and therefore affords the sheriff no protection in respect of it. "It is quite clear," observes MAULE, J., "that an action for unlawfully breaking and entering a house in the execution of process is no more within the contemplation of this Act than an assault and battery of the party would be. It can not be said that the damages in such an action are something as to which the sheriff doubts who is entitled to them. He is charged as a wrong-doer; there is nothing to interplead about; nobody but himself is interested in the result, or liable for the consequences." (*x*)

But when there has been no independent trespass when, the outer door of a dwelling has not been broken open, and the entry into the house would be lawful, and protected by the process, if the goods found therein should turn out to be the goods of the execution debtor, the entry into the house can not be separated from the seizure of the goods, but the whole cause of action may be stayed until the ownership of the goods has been determined by interpleader. (*y*) If that

(*v*) *Lea v. Rossi*, 11 Exch. 13; 24 Law J., Exch. 280. *Day v. Carr*, 7 Exch. 886.

(*w*) *Fenwick v. Laycock*, 2 Q. B. 110.

(*x*) *Hollier v. Laurie*, 3 C. B. 342.

(*y*) *Wiuter v. Bartholomew*, 11 Exch.

is determined in favor of the sheriff, all further proceedings against him will be stayed ; if it is decided against him, the action may be proceeded with for the recovery of damages for the trespass in the house as well as for the seizure of the goods. (z)

If the execution creditor has personally interfered in making the seizure, and directed the movements of the sheriff, so as to render himself liable to an action, the court or a judge has power to interfere for his protection, as well as for the protection of the sheriff, and to stay proceedings against him. (a)

The court will not lend its assistance to the sheriff where there have been delays, irregularities, or sinister dealings on the part of his officers charged with the execution of the process. If a sheriff delays to make application for relief at the request, and for the interest, of one of the rival claimants, he places himself out of the protection of the statute. (b) To enable him to have the benefit of the course open to him by the statute, it is essential that he should come promptly to the court, without exercising any discretion of his own upon the matters in controversy. (c) But if, after he has seized but before he has sold, he receives notice of adjudication in bankruptcy, and subsequently an order of court is made directing him to make a return of *fi. fa.*, he may sell under the authority of such an order, and pay the money into court. (d) There are some old cases in which a great degree of strictness was exercised in admitting the sheriff to the benefit of the Act, and in which protection was denied under circumstances in which it would now be conceded. (e)

In an interpleader suit the execution creditor may claim property which the execution debtor has disabled himself from claiming, for an estoppel which would be binding against the execution debtor in a claim put forward by him, will not be binding upon the execution creditor or the sheriff, who are strangers to the acts of the execution debtor. (f)

(z) *Foster v. Pritchard*, 2 H. & N. 151.

(a) *Carpenter v. Pearce*, 27 Law J., Exch. 143.

(b) *Mutton v. Young*, 4 C. B. 375.

(c) *Crump v. Day*, Id. 764, *Tufton v. Harding*, 29 Law J., Ch. 225.

(d') *Child v. Mann*, L. R., 3 Eq. Ca. 806.

(e) *Holt v. Frost*, 3 H. & N. 821; 28 Law J., Exch. 55.

(f) *Richards v. Johnston*, 4 H. & N. 664.

§10. *Claims of landlords on sheriffs for rent in arrear.*—By 8 Anne, c. 14, s. 1, it is enacted, that no goods and chattels upon lands or tenements leased for life or lives, term of years at will, or otherwise, shall be liable to be taken by virtue of any execution, unless the party at whose suit the execution is sued out shall, before the removal of such goods from off the said premises, pay to the landlord or his bailiff all such sums as shall be due for rent at the time of the taking, not exceeding one year's arrears of such rent. (*g*) If the rent of the premises on which the levy is to be made is in arrear, there are no goods out of which the sheriff is bound to levy, until the arrear, not exceeding one year's rent, has been paid to the landlord. The sheriff is not called upon by law to advance the money to pay the rent, but such advance must be made by the execution creditor; and if he neglects to make it after notice of the rent being due, the sheriff can not be called upon to seize and sell the goods, let their value be what it may. (*h*) If a year's rent is in arrear, and the goods on the premises are not sufficient to satisfy a year's rent, the sheriff must withdraw, (*i*) and he may be restrained by injunction from selling the landlord's fixtures. (*j*)

If the landlord or his agent accepts an undertaking from the sheriff or his officer to pay the rent due, and consents to the removal of the goods, he waives the benefit of the statute, and can not afterwards sue thereon. His remedy in such a case is upon the undertaking. (*k*)

A trustee in whom the legal estate in reversion is vested may be the landlord within the meaning of the statute. (*l*) To entitle the landlord to the year's rent, there must be an existing tenancy at an ascertained rent at the time, (*m*) and the execution must not be an execution put in by, or at the instance of, the landlord himself. (*n*) The statute does not extend to a ground-rent due to the superior landlord, (*o*) nor to goods seized by the sheriff and conveyed by bill of sale to the execution creditor, but not removed from the demised prem-

(*g*) *Foster v. Cookson*, 1 Q. B. 419.

(*h*) *Cocker v. Musgrove*, 9 Q. 234.

(*i*) *Foster v. Hilton*, 1 Dowl. 35.

(*j*) *Richardson v. Ardley*, 38 L. J., ch. 508.

(*k*) *Rotherey v. Wood*, 3 Campb. 24.

(*l*) *Colyer v. Speer*, 4 Moore, 473.

(*m*) *Hodgson v. Gascoigne*, 5 B. & Ald. 88.

(*n*) *Taylor v. Lanyon*, 4 M. & P. 316; 6 Bing. 536. *Lee v. Lopes*, 15 East, 230.

(*o*) *Bennet's case* 2 Str. 786.

ises, the landlord's right to distrain such goods not being taken away. (*p*)

This right of a landlord to a year's rent is confined to executions upon judgments (*q*) and private extents, and does not extend to prerogative process, such as an extent in chief, or an extent in aid. (*r*)

911. Sale by sheriffs of goods taken in execution.—It is the duty of the sheriff to sell goods seized under a *fi. fa.* within a reasonable time after the seizure; and if he fails to do so, an action is maintainable against him by the judgment creditor. (*s*) If he sells more than sufficient to satisfy the judgment debt and costs, he will be responsible in damages to the execution debtor. (*t*) In selling goods seized under a writ of execution, he can convey no better title to the goods than the execution debtor himself possessed at the time of the sale, and he does not, when he sells, profess to do more than that, and does not warrant the title to the purchaser. (*u*) If the sheriff has sold goods which were in the possession of the execution debtor at the time of the sale as the ostensible owner, but which were in reality the goods of a plaintiff, who had let them to hire to such execution debtor, the sheriff is not liable to an action for the wrongful sale, unless it be proved that some actual damage has accrued therefrom to the plaintiff, (*x*) and that he has been prevented by the act of the sheriff from recovering possession of his goods. (*x*)¹

(*p*) *Smallman v. Pollard*, 7 Sc. N. R. 413. *Bates v. Wingfield*, 2 N. & M. 911; 6 M. & Gr. 1001. *White v. Bin-* 831.
stead, 13 C. B. 304.

(*q*) *Brandling v. Barrington*, 9 D. & R. 617. (*t*) *Batchelor v. Vyse*, 4 M. & Sc. 552.
(*u*) *Chapman v. Speller*, 14 Q. B. 621.

(*x*) *Rex v. Southerby*, Bunb. 5. 444; 28 Law J., Exch. 362.

(*s*) *Jacobs v. Humphrey*, 2 Cr. & M.

¹ In the levy of an execution a sheriff is bound to exercise reasonable prudence as to the quantity of goods to be taken. On the one hand he is bound, if there is enough, to seize sufficient to discharge the execution and all expenses; *French v. Snyder*, 30 Ill. 339; and upon the other hand he is bound not to make an excessive levy. But the mere fact that the property seized, sells for a few dollars more than enough to satisfy the writ, does not render him a trespasser, nor liable to an action in favor of the debtor, if he exercised reasonable prudence in its seizure and sale. It can not be expected that an officer can judge with absolute certainty what certain property will bring at a public sale, and necessarily for the protection of the public, as well as for the protection of the officer, he is vested with a reasonable discretion in this respect, and is not liable except for its abuse. *Lowe v. Ownby*.

Mo. 71; Kimbro v. Emonson, 46 Ga. 130.

912. *Capture of the wrong person.*—If the sheriff's officer has, by mistake or through false information, arrested the wrong party under a ca. sa., the sheriff is responsible for the mistake, unless the person arrested was himself instrumental in giving false information to the sheriff, or brought about his imprisonment by his own misrepresentation. (y) And it does not lie in the sheriff's mouth to say that he arrested A, sued under the name of B, although A was in fact served with the writ of summons issued against B, upon which service the action had proceeded to judgment. (z) ¹

913. *Arrest of the right person under a wrong name.*—If there is no mistake as to the person of the debtor, if his identity is established, but there is a misnomer, either from the debtor's having himself given a wrong name, or from his having suffered judgment to be obtained against him in the wrong name, he will be deemed to be known as well by his assumed name as by his real name, and he will have no ground to object to the proceedings against him. (a) If he has been sued by a wrong name, and suffers judgment to go against him without attempting to rectify the mistake, he can not afterwards, when execution has been issued against him in the wrong name, contend that he is not the person whom the sheriff or his officer is directed to arrest. (b) Whenever a defendant omits to plead a misnomer he may be taken in execution in the wrong name. (c)

914. *Illegal arrest on Sundays.*—The 29 Car. 2, c. 7, s. 6, prohibits the service or execution on Sunday of any writ, process, warrant, order, judgment, or decree, except in cases of treason, felony, and breach of the peace, (d) and the 9 Geo. 4, c. 31, s. 23, makes it a misdemeanor to arrest any clergy-

(y) *Davies v. Jenkins*, *ante*. *Dunston v. Patterson*, *ante*.

(z) *Kelly v. Lawrence*, 33 L. J., Exch. 197.

(a) *Price v. Harwood*, 3 Campb. 108.

Walker v. Willoughby, 6 Taunt. 530.

(b) *Fisher v. Magnay*, 6 Sc. N. R. 599; 5 M. & Gr. 779.

(c) *Crawford v. Satchwell*, 2 Str. 1218.

(d) *Wells v. Gurney*, 8 B. & C. 769.

¹ The arrest of the wrong person upon a warrant or writ, stands upon the same ground as the seizure of the property of another. If the sheriff does not know the person to be arrested, he is bound at his peril, to make no mistake, and if he does, nothing but the acts of the party arrested, which estop him from pursuing the sheriff by reason of his own misrepresentation in reference to the matter, will absolve him from liability. *Scott v. Ely*, 4 Wend. (N. Y.) 555.

officer receives notice from the attorney that the action is settled, or that the execution is withdrawn, that is a notice not to make the arrest. (*n*) If a writ is left at the sheriff's office, with orders not to execute it, and the sheriff arrests under it, he is a wrong-doer: if it is to be returned *non est inventus*, it must lie, and the sheriff ought not to issue a warrant or arrest; but if the defendant is brought in, or chooses to come in and surrender, then the sheriff must arrest. (*o*)

Under a writ of *fi. fa.*, which directs the sheriff to make a certain specified sum out of the goods and chattels of the defendant, and have the money at the return of the writ, the sheriff or his officer may receive the money in discharge of the execution, and withdraw the levy and liberate the defendant's goods on payment of the money; but under the writ of *ca. sa.*, which commands the sheriff to have the body of the debtor at the return of the writ to satisfy the plaintiff and not the money to pay the debt, the sheriff has no right to receive the money and discharge the debtor, and substitute his own responsibility for that of the debtor, whose body the creditor has a right by law to keep until he has been paid the debt. If, therefore, a sheriff's officer, charged with the execution of a writ of *ca. sa.*, allows the debtor, whom he has arrested under it to go at large on paying to him the sum mentioned in the writ, the sheriff will be responsible for an escape, for it is a neglect of duty on the part of the officer for which the sheriff is answerable. (*p*)

918. *Liability of the sheriff for an escape.*—If a defendant, after having been taken in execution, is seen at large for ever so short a time, either before or after the return of the writ under which he has been arrested, the sheriff is responsible for an escape, as the writ commands him to take the defendant, and him, safely keep, so that he may have him ready to satisfy the plaintiff. (*q*) It is the duty of the sheriff to carry his prisoner to the county jail after he has been arrested under a *ca. sa.*, and when once in jail, the debtor must be kept there, and can not be allowed to go out, though with a

(*n*) *Futcher v. Hinder*, 28 Law J., Exch. 28. *Withers v. Parker*, 4 H. & N. 524.
 (*o*) *Hooper v. Lane*, 6 H. L. C. 522.
Magnay v. Monger, 4 Q. B. 817.
 (*p*) *Woods v. Finnis*, 7 Exch. 372.
 (*q*) *Hawkins v. Plomer*, 2 W. Bl. 1048.
Moore v. Moore, 27 Law J., Ch. 387.

keeper or sheriff's officer. If, therefore, he is seen without the walls of the prison, the sheriff is responsible for an escape. (r) If the sheriff, after he has arrested the debtor, receives from the latter the amount of the debt and costs, he will be responsible to the judgment creditor for an escape, if he sets his prisoner at large contrary to the exigency of the writ, before the judgment creditor has been satisfied his demand; for the duty of the sheriff is to pursue the direction of the writ, and be ready at the day, not with the money, but with the body of the debtor, unless the person himself who sued out the writ interfere and agree to the liberation of the prisoner upon receipt of the money which has been paid to the sheriff. (s)

It is the duty of an officer going to make an arrest in the execution of legal process to choose his opportunity, and go with a force sufficient to repel opposition, and enable him to execute the process entrusted to him. If he fails to make an arrest, or if, having got the debtor into his custody, he fails to keep him for want of sufficient force, he will be responsible for a breach of duty. (t) But if the prison take fire, or be broken open by the king's enemies of another kingdom, and the prisoner escapes, this will excuse the sheriff; but it is otherwise if the prison be broken open by traitors and rebels. (u) And if the escape has been brought about by misrepresentation or misconduct on the part of the plaintiff, the latter has no cause of complaint against the sheriff. (x)

By 8 & 9 Wm. 3, c. 27, s. 8, it is enacted, that, if the keeper of any prison shall, after one day's notice in writing, given for that purpose, refuse to show any prisoner, committed in execution, to the creditor at whose suit he was committed, or to his attorney, every such refusal shall be adjudged an escape in law.

919. *Recapture upon fresh pursuit.*—The sheriff may retake the debtor upon fresh pursuit in any county without an escape-warrant; and plead the recapture in bar of an action for damages.¹

(r) Williams v. Mostyn, 4 M. & W.

(t) Nicholl v. Darley, 2 Y. & J. 403.

152.

(u) Southcote's case, 4 Co. 84a.

(s) Slackford v. Austen, 14 East, 473.

(x) Hiscocks v. Jones. M. & M. 269.

Woods v. Finnis, 7 Exch. 372.

¹ When a person has once been arrested by, and is in the custody of, a sheriff

920. *Discharge of debtors taken in execution.*—By 15 and 16 Vict. c. 76, s. 126, it is enacted, as we have seen, that a written order, under the hand of the attorney in the cause, by whom

upon a valid process, without bail, he is bound to keep him at all hazards, except against the acts of God or public enemies; *Jones v. Coak*, 1 Cow. (N. Y.) 309, *State v. Halford*, 6 Rich. (S. C.) 58; *Fairchild v. Case*, 24 Wend. (N. Y.) 381; *Rainey v. Dunning*, 2 Murph. (N. C.) 386; *Zoll v. Alvord*, 64 Barb. (N. Y.) 568; and a failure to do so is an escape, for which the sheriff is amenable in damages to the party at whose suit the person was arrested; *McMichael v. Rapelye*, 4 Ala. 383; *Bartlett v. Willis*, 3 Mass. 86; and criminally, if the escape is willful; *State v. Hederick*, 35 Tex. 485. There are two classes of escapes, voluntary and negligent. Voluntary, where the sheriff permits the prisoner to go at large; *Olmstead v. Raymond*, 6 Johns. (N. Y.) 62; *Wheeler v. Bailey*, 13 Johns. (N. Y.) 366; as where the prisoner is discharged upon a forged bail bond, although the sheriff believed it genuine; *Lownds v. Remsen*, 7 Wend. (N. Y.) 35; *Congers v. Rhame*, 11 Rich. (S. C.) 60; or upon an order of court that is irregular and void; *Van Slyck v. Taylor*, 9 Johns. (N. Y.) 146; or to permit a prisoner to go outside the jail, when he has not been admitted to the limits although he immediately returns; *Mall v. State*, 34 Ala. 262; *Freeman v. Davis*, 7 Mass. 200; *Clapp v. Cofran*, 7 Id. 98, *Burroughs v. Lader*, 8 Id. 373; indeed every liberty given to a prisoner *that is not warranted by law*, is an escape for which the sheriff is responsible. *Lowrey v. Barney*, 2 D. Cliep. (Vt.) 11; *Colby v. Sampson*, 5 Mass. 310. Thus where a prisoner was discharged from prison upon the certificate of two magistrates without the proper oath having been administered to him, it was held an escape; *Little v. Hasey*, 12 Mass. 319; so where a prisoner was discharged upon an order of a justice, which was void for want of authority; *Van Slyck v. Taylor*, 9 Johns. (N. Y.) 146; *Bush v. Pettibone*, 5 Barb. (N. Y.) 273; so where a prisoner confined upon an execution which the sheriff *knows* has not been satisfied, discharges him upon the order of the plaintiff's attorney who acts upon his general authority as such, it is an escape. *Killogg v. Gibson*, 10 Johns. (N. Y.) 220.

A *negligent* escape, is an escape of the prisoner without the consent and against the will of the sheriff as, where a prisoner admitted to the liberties of the jail limits goes beyond them, though only for a step, and immediately returns; *Bissell v. Kip*, 5 Johns. (N. Y.) 89; *Warner v. Evens*, 2 Tyler (Vt.) 121; *Briggs v. Cramer*, 5 N. J. 498; *Jones v. Abbe*, 1 Roat. (Conn.) 106; *Lyle v. Stevenson*, 6 Call. (Va.) 54; even though the jail limits are not defined; *Bissell v. Kip*, 5 Johns. (N. Y.) 89; *Call v. Hoggar*, 8 Miss. 423; so where a prisoner is released by a mob; *Cangill v. Taylor*, 10 Mass. 206; but in order to constitute a going beyond the jail limits an escape, it must have been voluntary, and unnecessary, and not by the procurement of the creditor. *Baxter v. Taber*, 4 Mass. 361; *Drake v. Chester*, 2 Conn. 473. An officer is not liable for an escape upon *mesne* process, if he has the prisoner in court on the return day. *Stone v. Wood*, 5 Johns. (N. Y.) 182; *Cady v. Huntington*, 1 N. H. 138; *Coak v. Irving*, 5 Strob. (S. C.) 204; but otherwise where the prisoner is taken upon execution. *Koons v. Maddox*, 2 H. & G. (Md.) 206. Where an escape is voluntary, the sheriff can not retake the prisoner; *Butter v. Washburn*, 25 N. H. 251; *Jackson v. Hampton*, 6 Ired. (N. C.) 34; unless authorized by the creditor. Id. but when the escape is negligent, the sheriff may retake him upon fresh pursuit, and absolve himself from liability; *Lockwood v. Mercereau*, 6 Abb. Pr. (N. Y.) 206; *Whitehead v. Keyes*, 1 Allen (Mass.) 350; and in a criminal case he may

any writ of ca. sa. has been issued, shall justify the sheriff, or person in whose custody the party may be, under such writ, in discharging such party, unless the person for whom such attorney professes to act shall have given written notice to the contrary. The sheriff is not bound to discharge a debtor from his custody immediately on receiving an order for his discharge. He is entitled to a reasonable time to search his office, to ascertain whether there any other writs lodged against him. (y)

921. *Arrest of the person and seizure of goods under void or irregular process.*—In depriving a man of his liberty and seizing his goods, the sheriff and his officers act at their peril, so that if the process is feigned, forged, or simulated, and is not the process or order of the court, it is a mere nullity, and the sheriff can derive no protection from the piece of waste paper. (z) But if the sheriff has acted under a genuine writ, issued from one of the superior courts, he and his officers acting under him are protected by it, although it be on the face of it irregular, as a *capias* against a peeress, (a) or void in form,

(y) *Samuel v. Buller*, 1 Exch. 440.

(a) *Countess of Rutland's case*, 6 Rep.

(z) *Hooper v. Lane*, 10 Q. B. 561; 6

54a. *Cotes v. Michill*, 3 Lev. 20.

H. L. C. 443.

retake the prisoner whether the escape was voluntary or negligent. *Clark v. Cleveland*, 6 Hill (N. Y.) 344.

The measure of damages for an escape, except in those cases where *debt* will lie, is not necessarily the amount of the debt for which the prisoner was committed, *prima facie* this would be the rule, the law presuming every person to be solvent and able to respond to his debts, but in all actions on the case, the damages are confined to the *actual* loss sustained, hence the sheriff may show in mitigation of damages that the prisoner had no means with which to pay the debts, in which case the damages would be merely nominal. Or that he had but a small amount of property, and not nearly sufficient to pay the entire debt, in which case the damages would be the amount which might probably have been realized from the prisoner's confinement. The burden of proving these matters in mitigation is, however, upon the sheriff; *Brooks v. Hoyt*, 6 Pick. (Mass.) 468; *Simmons v. Bradford*, 15 Mass. 82; *Colby v. Sampson*, 5 Mass. 311; *Nye v. Smith*, 11 Mass. 188; *Burrell v. Lithgow*, 2 Id. 526; *Buller's Nisi Prius*, 69; and he may also show that the process upon which the prisoner was confined was invalid; *Kidder v. Barber*, 18 Vt. 454; *Tuttle v. Wilson*, 24 Ill. 553; or that his arrest was procured by unlawful means; *Griffin v. Bowen*, 2 Pick. (Mass.) 304; or that the escape was connived at by the creditor; *Drake v. Chester*, 2 Conn. 473; or that he was liberated by order of court; *Bender v. Graham*, Minor (Ala.) 269; or on *habeas corpus*; *Wiles v. Brown*, 3 Barb (N. Y.) 37; or that the judgment was obtained by fraud, or that the court had no jurisdiction; *Sampson v. Lundon*, 5 Day (Conn.) 506; *Austin v. Fitch*, 1 Root. (Conn.) 288.

as a *ca. sa.* not made properly returnable; for the officers ought not to examine the judicial act of the court, nor exercise their judgment touching the validity of the process in point of law, but are bound to execute it, and are therefore protected by it. (*a*) But the persons who have issued the void or irregular process are, as we have seen, responsible for all damage and injury done in the execution of it after the process has been set aside by the court or a judge unless it has been set aside for error, (*b*) or on the terms that no action shall be brought, (*c*) and they will be responsible, in an action for false imprisonment, although the writ has not been set aside, if it has been issued in defiance of the express provisions of a statute. (*d*)

Generally speaking, however, so long as the process has not been set aside, it is a protection to the attorney who has issued it, and to the client by whose commands it was issued; (*e*) and though when it has been set aside it is no longer a justification to them, yet it always remains a justification to the sheriff and his officers, who had no option but to obey it. (*f*) A writ of execution, therefore, may, at the same time, be both a good writ and a bad writ; that is to say, a writ set aside for irregularity may be good as to the sheriff and all persons acting under him, and bad as to the persons who sued it out. (*g*)

If the sheriff, by force of a *fi. fa.*, sells goods, and afterwards the judgment is reversed by writ of error, the defendant shall not have restitution of his goods, but the value of them, for which they were sold; and there are two reasons for this:—1. If the sale of the sheriff, by force of a *fieri facias*, should be avoided by subsequent reversal of the judgment, there would be no buyer, and by consequence no execution done. 2. In the case of a *fieri facias*, the sheriff is compellable to make and levy the debt of the goods, &c., of the defendant, and therefore there is reason that it should stand. (*h*)

(*a*) Countess of Rutland's case, 6 Rep.

54*a*. Cotes v. Michill, 3 Lev. 20.

(*b*) Williams v. Smith, *ante*.

(*c*) Parsons v. Lloyd, 3 Wils. 341.

(*d*) Brooks v. Hodgkinson, 4 H. & N. 712. By the 32 & 33 Vict. c. 62, imprisonment for debt is abolished, with a few exceptions.

(*e*) Riddell v. Pakeman, 2 C. M. & R.

33. Blanchenay v. Burton, 4 Q. B. 707.

(*f*) Jones v. Williams, 8 M. & W.

356. Best, J., in Woolley v. Clark, 5 B.

& Ald. 746. Turner v. Felgate, 1 Lev.

95.

(*g*) Parke, B., in Jones v. Williams, 9

Dowl. 710. Doe v. Thorn, 1 M. & S.

427.

(*h*) Hoe's case, 5 Co. 90*b*.

922. *Exemption of sheriffs and others from responsibility when the injury has been brought about by the misrepresentation of the plaintiff.*—Every person who by misrepresentation or misstatement, causes an officer charged with the execution of legal process to make a mistake and arrest the wrong person, or seize his goods, can not complain of the wrong which he has himself occasioned. If by misrepresentation he causes himself to be arrested, he is the author of his own misfortune, and has no right to charge it upon the officer. (*i*) If the plaintiff has represented himself to be the person against whom the process has been issued, and is arrested in consequence of that representation, he is estopped, as regards that imprisonment, from denying that he was the right person; but, after he has given notice of the real state of facts to the officers, and given them a fair opportunity of inquiry, the detention would be unlawful. (*j*)

923. *False returns to writs of execution.*—If the sheriff makes a false return to a writ of execution, he is responsible in damages to the execution creditor if any actual damage has resulted to him from the false return, (*k*) but not otherwise; nor is he estopped by his false return from showing that there were in fact no goods of the execution debtor, on which he could levy, and so that no damage was suffered by the execution creditor. (*l*) A return of nulla bona to a writ of fi. fa. means, that there are no goods applicable to the execution of the plaintiff's writ, not that there are no goods at all belonging to the execution debtor. If, therefore, the payment of prior claims, such as rent due to the landlord, or sums leviable under prior writs of execution, has exhausted the fruits of the levy, the sheriff has no goods out of which the damages can be levied, and a return of nulla bona is a good return. (*m*) If the sheriff returns that he has seized certain goods and chattels, he ought to specify their value, and not return that their value is to him unknown. (*n*) A reasonable degree of certainty in the language of the return is sufficient.

The sheriff would not be allowed, in an action against him for a false return, to defend himself by putting a construction

Fisher v. Magnay, 5 M. & Gr. 778.

Dunston v. Patterson, 2 C. B., N.

26 Law J., C. P. 268.

lie v. Birch, 4 Q. B. 566.

son v. Farnham, L. R., 7 Q.

B. 175.

(*m*) Shattock v. Carden, 6 Exch. 725.

Wintle v. Freeman, 11 Ad. & E. 547.

Heeman v. Evans, 4 Sc. N. R. 2.

(*n*) Barton v. Gill, 12 M. & W. 315.

on his own return which, although making it true in fact would make it bad in law, when it admits of another construction which will make it good. (o)

924. *Extortion by sheriffs and their officers.*—By 29 Eliz. c. 4, s. 1, it is enacted, that it shall not be lawful for any sheriff, under-sheriff, bailiff, &c., nor for any of their officers, deputies, &c., by reason or color of their offices, to receive or take for the serving or executing any extent or execution, more consideration or recompense than is by that Act limited and appointed, upon pain that every sheriff, under-sheriff, &c., their officers, &c., who shall directly or indirectly do the contrary, shall forfeit to the party grieved treble damages, and pay a penalty as therein mentioned, but the Act is not to extend to fees taken for executions within any city or town corporate. The 7 Wm. 4 & 1 Vict. c. 55, further enacts, that it shall be lawful for sheriffs and their officers to receive such fees and no more, as shall be allowed by the taxing officers of the courts of Westminster, under the sanction of the judges, and that any sheriff or officer receiving any fee or gratuity greater than is allowed, shall be guilty of a contempt of court, and punishable accordingly. And by 5 & 6 Vict. c. 98, s. 31, it is enacted, that no poundage shall be payable to sheriffs, bailiffs, and others, for taking the body of any person in execution; (p) but there shall be payable to the sheriff, or other person having the return of writs, upon every such execution against the body, such fees only as shall be allowed to be taken under the 7 Wm. 4 and 1 Vict. c. 55. The sheriff still continues entitled to his poundage under the statute of Elizabeth, on an execution against the goods of the debtor, and also to any additional fee that may be allowed by the judges under 7 Wm. 4 and 1 Vict., and no more. If his officer takes more the sheriff is guilty of extortion, and is liable to an action for treble damages. (q)

925. *Duties and responsibilities of the high bailiff, bailiffs, and registrars, of the county court.*—By 9 & 10 Vict. c. 95, s. 33, the high bailiff of the county court is made responsible for all the acts and defaults of himself and the bailiffs appointed to assist

(o) Reynolds v. Barford, 8 Sc. N. R. 239.

(p) Hayley v. Racket, 5 M. & W. 620.

(q) Wrightup v. Greenacre, 10 Q. B.

12. Pilkington v. Cooke, 16 M. & W. 615.
155. Woodgate v. Knatchbull, 2 T. R.

him, in like manner as the sheriff of any county in England is responsible for the acts and defaults of himself and his officers. His liability is co-extensive with that of the sheriff, (r) but he is not responsible for acts done by his bailiffs under color of some special power or authority supposed to be given to them under the County Courts Act, and not done under the authority or in execution of a warrant. (s) The 29 & 30 Vict. c. 14, s. 11, provides for the appointment of the registrars of county courts to succeed to the duties and liabilities of high bailiffs, as vacancies shall occur.

926. *Liability of ministerial officers where the court has no jurisdiction and no authority to issue process.*—At the common law, a grievous responsibility was thrown upon ministerial officers of courts of inferior and limited jurisdiction, where the court had made orders and directed the issue of process, without jurisdiction in the matter, or where it had exceeded its jurisdiction. It was held, that when the court had not jurisdiction of the cause, then, the whole proceeding being *coram non judice*, actions would lie against the person who sued out, and against the officer or minister of the court who executed, the precept or process of the court, without any regard to such precept or process; “for the officer is not bound to obey him who is not judge of the cause any more than he is bound to obey the mere precept or order of a stranger, for the rule is, *judicium a non suo judice datum nullius est momenti*.” (t) Therefore, where an officer acting under a warrant of a commissioner of bankrupts took and detained a person in custody under it, and it appeared that the commissioner had no jurisdiction to make the warrant, it was held that an action of trespass was maintainable against the officer. (u) But the mischiefs arising from this unreasonable state of the law have to a great extent been remedied by the legislature. (v)

927. *Duty of bailiffs of the county court to satisfy the landlord's claim for rent.*—By the 19 & 20 Vict. c. 108, s. 75, it is enacted, that the 8 Anne, c. 14, shall not apply to goods taken in execution under the warrant of a county court; but

(r) *Burton v. Le Gros*, 34 Law J., Q. B. 91.

(s) *Smith v. Pritchard*, 8 C. B. 588.

(t) *Marshalsea case*, 10 Co. 76a.

(u) *Watson v. Bodell*, 14 M. & W. 57

(v) *Post*, ch. 15.

the landlord may, within five days of the taking, or before the removal of the goods, make a claim in writing for rent, signed by himself or his agent, stating the amount of rent in arrear, and the time for which it is due; and if such claim be made, the officer making the levy is to distrain for the rent so claimed, and the costs of the distress, but he is not to sell within five days, unless the goods be of a perishable nature, or upon the request in writing of the person whose goods have been taken. After the five days the bailiff is to sell such of the goods as will satisfy, first the costs of the sale, next the claim of the landlord, not exceeding the rent for four weeks where the tenement is let by the week, the rent for two terms of payment where the tenement is let for any other term less than a year, and the rent for one year in any other case, and lastly, the amount for which the warrant issued. If any replevin be made, the bailiff is notwithstanding, to sell such portion of the things taken as will satisfy the costs of the sale under the execution, and the amount for which the warrant issued. Any overplus of the sale or residue of the goods is to be returned to the defendant.

The county court bailiff can not under this statute, distrain the goods of a stranger on the demised premises for the purpose of satisfying the landlord's rent. (*w*)

928. *Liabilities of jailers.*—A jailer who receives a prisoner under a warrant is not responsible in damages if the warrant has been irregularly issued; but if the wrong man has been arrested and brought to him, or the warrant is altogether void and a mere nullity, he will be responsible for the detention. Where the plaintiff had been delivered into the custody of the jailer of a liberty under a good warrant for arrest, though the execution of it was illegal, inasmuch as the plaintiff, under a warrant to the bailiff of the liberty, had been arrested without the liberty, and afterwards carried into the liberty and delivered to the jailer, it was held that an action could not be maintained against the jailer, who was not bound to inquire whether the original arrest was tortious or not. "And it was said by the court, that if he had been informed of the tortious taking (without being of the covin or practic-

(*w* *Beard v. Knight*, 8 Ell. & Bl. 865; 27 Law J., Q. B. 359 *Foulger v. Taylor*, 5 H. & N. 202.

ing therein), he ought, nevertheless, to detain the prisoner, he being delivered to him with a good warrant of arrest, though the execution of it was illegal; for if such information had been false, and the jailer had set the prisoner at large, he had been liable for an escape. And the plaintiff was not without remedy, for he had a good action against wrong-doers." (x) But if a sheriff's officer arrests the wrong man and hands him over to a jailer there, as the arrest is altogether unjustifiable, and the warrant no protection, the jailer who receives and detains the wrong man is responsible for the wrongful imprisonment, and can not justify under the warrant, though he had no means of ascertaining the identity of the party brought to him with the person named in the warrant, and could not consistently with his duty, have refused to receive and detain him. (y) But if the person thus wrongfully arrested does not, when brought to the jailer, complain of the wrongful arrest, or give the jailer any means of ascertaining that he is not the person named in the warrant, nominal damages only would be recoverable.

A jailer is bound to discharge a prisoner, committed for contempt of court in not answering a bill in Chancery, at the end of thirty days, if the plaintiff in the cause does not bring the prisoner to the bar of the court within that period. (z)

929. *Liability of the messenger of the Court of Bankruptcy.*—By the 31 & 32 Vict. c. 71, s. 99, power is given to the Court of Bankruptcy, where there is reason to believe that property of a bankrupt is concealed in any house or place not belonging to him, to grant a search-warrant to any constable or prescribed officer of the court, who may execute the same according to the tenor thereof, and may also break open any house, building, or room of the bankrupt where the bankrupt is supposed to be, or any building or receptacle of the bankrupt, where any of his property is supposed to be. (a)

(x) *Olliet v. Bessey*, T. Jones, 214.

(y) *Aaron v. Alexander*, 3 Campb. 34. *Griffin v. Coleman*, 4 H. & N. 265; 28 Law J., Exch. 134; Bro. Abr. TRESPASS, pl. 133, 256, 265.

(z) 11 Geo. 4 & 1 W. 4. c. 36, s. 15. *Moone v. Rose*, L. R., 4 Q. B. 486; 38 L. J., Q. B. 236.

(a) See *Edge v. Parker*, 8 B. & C. 700. Under the 12 & 13 Vict. c. 106, s. 106, the messenger of the Court of Bankruptcy was entitled to the same protection as is allowed by law in the execution of a search warrant for property reputed to be stolen or concealed.

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(*w* *Beard v. Knight*, 8 Eil. & Bl. 865; 27 Law J., Q. B. 359 *Foulger v. Taylor*, 5 H. & N. 202.

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SECTION III.

OF ACTIONS AGAINST JUDGES, SHERIFFS, MINISTERIAL OFFICERS AND THEIR ASSISTANTS, (b) AND PARTIES SETTING THEM IN MOTION.

930. *Actions against county court judges—Notice of action.*—Provision is made by the County Courts Act (19 & 20 Vict. c. 108, s. 19) for the prosecution of actions in the county court against judges of the county court in the court of a district adjoining the district in which the defendant is judge. By 9 & 10 Vict. c. 95, s. 138, notice of action is required, as we have seen, to be given to all persons acting in execution of the County Courts Act. If, therefore, a county court judge, in making an order of commitment, acts under the bona fide belief that his duty as judge of the county court renders it incumbent on him to do so, notwithstanding a prohibition has been issued, the act done by him must be considered as done in pursuance of the County Courts Act, and he is entitled to notice of action. (c)

All judges of courts of inferior jurisdiction acting under the authority of an act of Parliament, are in general entitled to notice of action, and to an opportunity of tendering amends and paying^a money into court, and the action against them must in general be brought within a certain limited period.

931. *Remedies against sheriffs and officers for an escape.*—Formerly the 13 Edw. 1, c. 11, (d) and 1 Ric. 2, c. 12, gave the party who suffered by an escape of his debtor the same remedy against a sheriff or jailer guilty of the escape that he had against the debtor, and enabled him to recover from such sheriff or jailer the whole debt and costs in an action of debt; but it has been enacted by 5 & 6 Vict. c. 98, s. 31, that if any debtor in execution shall escape out of legal custody, the sheriff, bailiff, or other person having the custody of such debtor, shall be liable only to an action upon the case for damages sustained by the person at whose suit such

(b) See 30 & 31 Vict. c. 142, s. 10.

(c) Booth v. Clive, 10 C. B. 835.

(d) This Act is repealed by the 32 & 33 Vict. c. 83.

debtor was imprisoned, and shall not be liable to any action of debt in consequence of such escape.

932. *Actions to recover money in the hands of the sheriff.*—After a return to a fi. fa. that the money is levied, the sheriff may be liable to an action for money had and received without any demand of payment. (e)

933. *Actions against high bailiffs of county courts (f) and their assistants.*—By the County Courts Amendment Act, 19 & 20 Vict. c. 108, s. 21, it is enacted that if an action be brought in the county court against an officer of the county court, the summons may issue in the district of which he is an officer, or in an adjoining district (although in a different county, (g)), the judge of which is not the judge of a court of which the defendant is an officer; and it has been held that this section, by virtue of the operation of the 28 & 29 Vict. c. 99, s. 21, extends to suits in equity. (h) By the County Courts Act, 9 & 10 Vict. c. 95, s. 138, notice of action is, as we have seen, required to be given to all persons acting in execution of that Act. (i) If the bailiff of a county court, under a warrant against the goods of A, by mistake takes those of B, this is an act done in pursuance of the County Courts Act, which entitles the bailiff to notice of action. (k)

934. *Statutory protection to high bailiffs, (f) and persons acting by their order, or in their aid, in the execution of county court warrants.*—By 13 & 14 Vict. c. 61, s. 19, it is enacted, that no action shall be brought against any high bailiff or bailiff, or any person acting by his order, or in his aid, for anything done in obedience to any warrant under the hand of the clerk of the county court and the seal of the said court, until demand hath been made, or left at the office of such high bailiff, by the party intending to bring such action, or by his attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of the warrant, and the

(e) Dale v. Birch, 3 Campb. 347. See *ante*, as to the sheriff retaining in certain cases to the proceeds of a levy for fourteen days.

(f) See 29 & 30 Vict. c. 14, s. 11.

(g) Partridge v. Elkinton, L. R., 6 Q. B. 82.

(h) Linford v. Gudgeon, L. R., Ch. 6

App. 359.

(i) As to the form of notice, see Burton v. Le Gros, 34 Law J., Q. B. 91.

(k) Burling v. Harley, 3 H. & N. 271; 27 Law J., Exch. 258. As to parties interfering in the execution of the process, see Cronshaw v. Chapman, 31 Law J. Exch. 277.

same hath been refused or neglected for the space of six days after the demand; and in case, after demand and compliance therewith, by showing the warrant, and permitting a copy to be taken, any action shall be brought against the high bailiff, bailiff, or other person acting in his aid, for any such cause as aforesaid, without making the clerk of the court who signed or sealed the warrant defendant, then, on producing or proving the warrant at the trial of the action, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction or other irregularity in the warrant; and if the action be brought jointly against the clerk and high bailiff, or bailiff, or person acting in his aid, then, on proof of the warrant, the jury shall find for the high bailiff, or bailiff, or person so acting as aforesaid, notwithstanding such defect or irregularity.

And by 19 & 20 Vict. c. 108, s. 60, it is further enacted, that no officer of a county court, in executing a warrant of a county court, and no person at whose instance any such warrant shall be executed, shall be deemed a trespasser by reason of any irregularity or informality in any proceeding on the validity of which such warrant depends, or in the form of such warrant, or in the mode of executing it, but the party aggrieved may bring an action for any special damage which he may have sustained by reason of such irregularity or informality against the party guilty thereof, and in such action he shall recover no costs, unless the damages awarded shall exceed forty shillings. Also (s. 55), that any warrant to a high bailiff, to give possession of a tenement under that statute, shall justify the bailiff named in the warrant in entering upon the premises named therein, with such assistants as he shall deem necessary, and in giving possession; but the entry must be made between the hours of nine in the morning and four in the afternoon, and the warrant must be executed within three months from the day it bears date (s. 56).

935. *Of the staying of proceedings in actions against high bailiffs and officers of the county court.*—The 30 & 31 Vict. c. 142, s. 31, enacts, that if any claim shall be made to goods or chattels taken in execution under the process of a county court, or to the proceeds or value thereof by any person, it it shall be lawful for the registrar of the court, upon applica-

tion of the high bailiff, as well before as after any action brought against him, to issue a summons, calling before the court as well the party issuing the process as the party making the claim, and thereupon any action which may have been brought in any court in respect of such claim, or of any damage arising out of the execution of such process, shall be stayed; and the judge of the county court is to adjudicate upon the claim, and make such order in respect thereof and of the costs as to him shall seem fit. He is also to adjudicate between the parties or either of them and the high bailiff with respect to "any damage arising or capable of arising out of the execution of such process," and the costs of the proceedings: which order is to be enforced like any other order of the county court, and is to be final and conclusive between such parties and the high bailiff, unless the decision of the court be appealed from.

The above section is in substitution of the 118th section of the 9 & 10 Vict. c. 95, which is repealed, and under which it was held that if the county court judge decided in favor of the bailiff, the superior court in which an action had been brought against him would stay all further proceedings against him in the action, unless there was some substantive cause of complaint beyond that of entering the house to make the seizure, (*l*) but that if it was decided against the bailiff, and it was found that he had entered the house and seized the goods of the wrong person, and had committed a trespass by entering the house as well as by seizing the goods, damages might in such a case be recovered against him for the unlawful entry into the house, as well as for the seizure of the goods. (*m*) It was further held under that section that if the action was brought for an unlawful breaking and entering of the outer door, of a dwelling-house, as well as for an unlawful seizure of the goods, the judge had no power to stay the proceedings, as no damages could have been awarded to the plaintiff for the trespass to the house on the hearing of the interpleader summons as to the goods before the county court. (*n*) The first-mentioned sec-

(*l*) *Jessop v. Crawley*, 15 Q. B. 212.

(*n*) *Cater v. Orrell*, 15 Q. B. 219.

(*m*) *Foster v. Pritchard*, 2 H. & N. 151; *Hollier v. Laurie*, 3 C. B. 339.

25 Law S., Exch. 215.

tion, however, now provides that the county court judge "shall" adjudicate on any claim "capable of arising out of the execution of the process." The claimant, therefore, can not subsequently sue in a superior court, for any special damages arising out of the execution, although he omitted to claim them in the county court. (*o*)

936. *Plaintiffs in actions against sheriffs.*—To entitle a person to sue a sheriff or his officer for neglecting the duties of his office, he must show that he had sued out some process which entitled him to the performance of some duty at the hands of the sheriff which the latter has neglected or negligently executed, or he must show that he has been damnified either in his person or his property by some act of trespass, or wrongful and unauthorized proceeding, on the part of the sheriff; or if he sues upon an Act of Parliament giving damages to the party grieved, he must show that he is the party grieved within the meaning of the statute. (*p*)

937. *Of the defendants in actions for wrongs done under color of legal process.*—The sheriff and his officer, who, by inadvertence or mistake, have entered the house and seized the goods of the wrong person, or have arrested a wrong party, in the execution of legal process, are responsible for the trespass, "although the taking be by the showing of the party to the suit;" (*q*) and so are all persons, whether plaintiffs, attorneys in the action, or strangers, who interfere in any way, by giving directions or assistance, or officiously volunteering information to the officers; for every person who procures or directs the commission of an act of trespass is as much responsible for the injury as the person who actually commits it; but a simple intimation or direction to the officer that he is not to be prevented by an adverse claim from seizing goods found in the dwelling-house of the execution debtor, will not render the person, interfering to such an extent only, responsible for a wrongful seizure by the bailiff. (*r*)

Sheriffs' officers executing a writ of *ca. sa.* are not the

(*o*) See *Death v. Harrison*, L. R. 6 Exch. 15.

(*p*) *Woodgate v. Knatchbull*, 2 T. R. 158. *Boyce v. Higgins*, 14 C. B. 14. *Hollis v. Marshall*, 2 H. & N. 755.

(*q*) 2 Roll. Abr. 552. *Jarman v. Hooper*, 7 Sc. N. R. 663; 13 Law J., C. P. 63; 6 M. & Gr. 848.

(*r*) *Cronshaw v. Chapman*, 7 H. & N. 911; 31 Law J., Exch. 277.

agents or bailiffs of the plaintiff for whose benefit the writ is issued; and if they arrest a wrong person, the plaintiff in the action is not responsible for their misconduct, unless either he or his attorney have personally interfered, and have superintended or directed the movements of the sheriff or his officers. (s) If the plaintiff in an action, or his attorney, does no more than set the court in motion, he is no trespasser, notwithstanding that such court should, on his motion, do an act of trespass by its officers, unless by special plea he admits and undertakes to justify his concurrence in the act, in which case he can only make out his justification by showing a legal authority under which he acted; (t) and an attorney who merely delivers a writ of execution to the sheriff, and does not take upon himself to give wrong directions, and does not, by word or act, induce the officer to seize the wrong person, is not responsible for the mistakes of the officer and for a trespass committed by the latter in seizing the goods of such person, or seizing beyond the limits of his bailiwick, although he believes that the officer is about to go wrong and to exceed his duty. (u) It has been held, however, that if the attorney gives wrong directions to the sheriff or his officers, and thereby causes them to seize the goods of the wrong person, the client is responsible for the act of the attorney. (x)

If goods which have been let to hire to an execution debtor have been seized and sold by a sheriff under the writ of execution, the sheriff can not, as we have seen, be sued, unless it be proved that the owner of the goods has sustained some actual damage by the act of the sheriff; (y) but the purchaser who takes away the goods without any right or title so to do, may be made responsible in damages for the conversion of the property. If acts of trespass have been committed under color of legal process, which has been set aside as irregular, both the client who commands the attorney and the attorney who sues out the process are, as we have already seen,

(s) *Wilson v. Tummon*, 6 M. & Gr. 244, 6 Sc. N. R. 906. *Walley v. M'Connell*, 13 Q. B. 911. *Woollen v. Wright*, 1 H. & C. 554; 31 Law J., Exch. 513. *Whitmore v. Greene*, 13 M. & W. 104.

(t) *Kinning v. Buchanan*, 8 C. B. 291. *Abley v. Dale*, 10 C. B. 62. *Painter v. Liv. Gas. Co.*, 3 Ad. & E. 433.

(u) *Sowell v. Champion*, 6 Ad. & E. 417.

(x) *Jarmain v. Hooper*, 6 M. & Gr. 850; 7 Sc. N. R. 681. *Collett v. Foster*, 2 H. & N. 361. *Brooks v. Hodgkinson*, 4 Ib. 712.

(y) *Tancred v. Allgood*, 4 H. & N. 438; 28 Law J., Exch. 362.

responsible as principal in the commission of the acts of trespass done by their procurement and commandment. (z) They are in the same situation after the process has been set aside as if they had themselves, orally or by writing, desired the sheriff or his officer to make the seizure; (a) but it is otherwise if the issue of the process is a judicial act, and the process is afterwards set aside, not for irregularity, but for error. (b)

938. *Declarations against a sheriff for not executing the Queen's writ, or for an escape.*—The principle on which an action is maintainable against a sheriff for a neglect of duty in not arresting or in not making a levy in obedience to the Queen's writ directed to him, or for permitting an escape, is not simply because the plaintiff has sued out a writ and delivered it to the sheriff and the sheriff has not obeyed it, but because in mesne process he has a cause of action, in final process he has a judgment, against the defendant, which gives him an interest in the writ, and creates a duty in the sheriff towards him. (c) There is no duty due from the sheriff to the person suing out a writ, unless he be entitled to do so. It is essential, therefore, in an action against a sheriff for disobeying a ca. sa. or a fi. fa., that the party should show that he had a judgment in his favor, or was entitled to the due execution of a writ of ca. sa., under the sixth section of the 32 & 33 Vict. c. 62, &c.

939. *Declarations against sheriffs for removing goods taken in execution without paying rent due to the landlord*, should show that a messuage, lands or tenements, had been demised by the plaintiff to a named tenant for a certain term, at a specified rent, payable half-yearly; that a certain sum of money, being half a year's or a year's rent of the messuage, &c., as the case may be, became due to the plaintiff, and that during the existence of the tenancy, and whilst the rent was in arrear, the defendant then being sheriff, seized certain goods and chattels of the tenant, then being upon the demised messuage, lands or tenements, &c., under a writ of execution against the tenant; that the defendant at the time of the

(z) *Codrington v. Lloyd*, 8 Ad. & E. 449. *Barker v. Braham*, 3 Wils. 376. *Bates v. Pilling*, 6 B. & C. 39.

(a) *Tindal, C. J., Wilson v. Tummon*,

6 Sc. N. R. 905; 6 M. & Gr. 236. *Green v. Elgie*, 5 Q. B. 114.

(b) *Williams v. Smith*, *ante*.

(c) *Jones v. Pope*, 1 Saund. 38b.

siezure, and before the removal of the goods from the premises, had notice of the half-year's (or year's) rent so being due and in arrear, (*d*) and that he nevertheless wrongfully removed the goods before the plaintiff had been paid the said arrears of rent, contrary to the statute in that behalf made. (*e*)

940. *Declaration against sheriffs for treble damages for extortion* should set forth the recovery of the judgment; the issue of a writ of fi. fa. to the sheriff; the indorsement on the writ; the delivery of the writ to the defendant as sheriff of some specified county; the seizure by the defendant as sheriff; the amount of the levy; and that the defendant, by reason and color of his office wrongfully received and took from the plaintiff, for the serving and executing the said execution, a certain specified sum, (*f*) averring it to be a larger consideration and recompense than is limited and appointed to be taken in that behalf. (*g*) When the action is brought against the sheriff's officer, the declaration should set forth the warrant made and delivered by the sheriff to the defendant, as one of his bailiffs, to be executed, and the levy made thereunder by the defendant, and the extortionate charges then made by him. (*h*) When the declaration is for extortionate charges on the execution of several writs, the declaration should show what sum ought to have been taken, and what was the extortionate charge on each writ. (*i*) It is not necessary to recite the statute; it is enough to state that the thing was done contrary to the form of the statute in such case made and provided. (*k*)

941. *The plea of not guilty* in actions against a sheriff or his officers for an escape, operates as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings. (*l*) All matters of inducement set forth in the declaration, if intended to be denied and put in issue by the defendant, should be specially

(*d*) *Andrews v. Dixon*, 3 B. & Ald. 645.

(*e*) 8 Anne, c. 14, s. 1. *Smallman v. Pollard*, 6 M. & Gr. 1009. *Riseley v. Ryle*, 11 M. & W. 16. *Thurgood v. Richardson*, 7 Bing. 428.

(*f*) *Ashby v. Harris*, 2 M. & W. 673.

(*g*) *Pilkington v. Cooke*, 16 M. & W. 615.

(*h*) *Wrightup v. Greenacre*, 10 Q. B. 3.

(*i*) *Burton v. Lawrence*, 5 Exch. 816.

(*k*) *Holmes v. Sparkes*, 12 C. B. 251.

(*l*) Reg. Gen. Hil. Term, 16 Vict. R. 16; 1 Ell. & Bl. App. lxxxii. *Hodges v. Paterson*, 26 Law J., Exch. 223.

traversed; (*m*) and all matters of justification and excuse must, as we have seen, be specially pleaded, and can not be given in evidence under the general issue. (*n*)

942. *Pleas of justification* must confess the assault or trespass, and set forth the facts and circumstances which justified it. A good justification for an assault and imprisonment is disclosed by a plea alleging, that at the time when the trespass was committed the defendant was sheriff of a certain specified county, and in that character was presiding at an election of knights of the shire to serve for the county in parliament; that the plaintiff made a great noise and disturbance at the election, and molested and obstructed him in the execution of his duty, upon which he ordered a constable to take the plaintiff into custody, and to carry him before a justice of the peace, to be dealt with according to law. (*o*)

943. *Justification in the execution of legal process*.—A sheriff who justifies an act of trespass in the execution of a writ, does enough if he sets forth the writ of execution in obedience to which he acted, unless, by taking an indemnity, he has so identified himself with the judgment creditor as to place himself in the same position as the latter, in which case he must set forth and rely upon the judgment as well as upon the writ. If the plaintiff in the action, however, is not the execution debtor, but some third party suing the sheriff, the latter must then show not only the writ of execution, but the judgment. Therefore, where the sheriff or his bailiff sets up a claim against a plaintiff, to goods taken in execution under a writ against a third person, the sheriff must show a judgment against such third person, and his production of the writ of execution alone is not sufficient; (*p*) and the reason for this seems to be, because the party against whom the judgment has passed might have applied to set it aside if there were error attending it; and if he omit to do so, it is presumed, from his acquiescence, that the judgment is right. (*q*) A plea of justification by a private person, who

(*m*) *Post*, ch. 21, s. 1. Traverse of the whole or part of a declaration.

(*n*) *Howden v. Standish*, 6 C. B. 518. *Lewis v. Alcock*, 3 M. & W. 188. *Wright v. Lainson*, 2 Id. 739.

(*o*) *Spilsbury v. Micklethwaite* 1 Taunt. 146.

(*p*) *White v. Morris*, 11 C. B. 1015; 21 Law J., C. P. 185.

(*q*) *Bayley, J., Doe v. Murless*, 6 M. & S. 114.

has gone with the sheriff's officer to make an arrest, or who has personally interfered in aid of the sheriff, must show the judgment as well as the writ; the officer need show the writ and warrant only, unless he joins the other party in pleading,^(r) in which case he foregoes the benefit of his warrant. (r) The stranger must set out the proceedings at length if he justifies under them, and if he does not, the plea of the officers who join with him in his justification is bad. (s) A plea of justification by a sheriff's officer should set forth the warrant under which he acted. (t)

944. *Replications*.—Where a man has abused an authority or license which the law gives him, by which he becomes a trespasser ab initio, if the defendant pleads such license or authority, the plaintiff must reply the abuse. (u) Replications to pleas justifying under process which has been set aside, usually allege that the writ under which the defendant attempts to justify was irregularly sued out of the said court of, &c., and that afterwards, by a certain order made by, &c., one of the judges, &c., bearing date, &c., and which order was afterwards made a rule of court, it was upon hearing, &c., and reading, &c., ordered that the said writ should be set aside for irregularity. (x) The replication should show that the process was set aside under such circumstances as prevent it from being a justification to the defendant. (y)

945. *Evidence at the trial—Proof on the part of the plaintiff*.—In actions against sheriffs for not arresting under a ca. sa., or for not making a levy under a fi. fa., or for permitting an escape, the plaintiff must, as we have seen, prove a judgment in his favor, (z) the issue of a writ thereon, and the delivery of the writ to the sheriff to be executed, if those facts are traversed and put in issue by the pleadings. If it appears that the plaintiff has sued out void process, or that the judgment on which the process is founded is a void judgment, the plaintiff has no cause of action against the sheriff for neglecting to execute it, or for discharging a prisoner taken under

(r) *Andrews v. Marris*, 1 Q. B. 17.
Turner v. Felgate, 1 Lev. 95.

(s) *Morse v. James, Willes*, 128.

(t) *Hewitt v. Macquire*, 7 Exch. 80.
Cotes v. Michill, 3 Lev. 20.

(u) 1 Wms. Saund. 300h.

(x) *Codrington v. Lloyd*, 8 Ad. & E. 449.
Jones v. Williams, 8 M. & W. 357.
Rankin v. De Medina, 2 D. & L. 813.

(y) *Prentice v. Harrison*, 4 Q. B. 852.

(z) *Jones v. Pope*, *ante*.

it; but if the judgment is erroneous only, the sheriff can not take advantage of the error. (a)

946. *Proof of judgments, writs, and process from the superior courts.*—The usual mode of proving a judgment of a superior court is by an examined copy. The witness who produces the copy should prove that he examined it with the original record, and that the latter came from the proper custody. (b) Writs and warrants, before they have been returned and have become matter of record, must be proved by the actual production of the instrument itself. Notice to produce the original writ, therefore, must in general be given to the sheriff, in an action against him for a breach of duty in neglecting to obey it.

947. *Delivery of the writ to the sheriff to be executed.*—If a writ which has been delivered to the sheriff to be executed has been returned, and has become matter of record, the writ and its delivery to the sheriff, may be proved by an examined copy of the record, without the production of the writ itself. (c)

Proof that a person has acted as sheriff is prima facie evidence of his being sheriff, without proof of his appointment. (d)

948. *Proof of the sheriff's having directed or authorized the commission of the wrongful act.*—In order to charge the sheriff with the act of the bailiff, it is not enough, as we have seen, to show that the person committing the wrongful act was a sheriff's officer duly appointed, and apparently acting as the sheriff's officer, and that he had given a bond of indemnity to the sheriff. It must be shown that he had a special authority from the sheriff to do the particular act of which the plaintiff complains. For this purpose the officer should be called upon a subpoena duces tecum, to produce the original warrant under which he acted, which being the best evidence of the fact no other can be admitted, unless it is improperly withheld after notice to produce it; in which case secondary evidence may be given of its contents. (e) If the warrant has

(a) Gold v. Strobe, Carth. 148. Shirley S. 565.

v. Wright, Cro. Jac. 775; Bull, N. P. 66.

(b) Reid v. Margison, 1 Campb, 469; post, ch. 20.

(c) Ramsbottom v. Buckhurst 2 M. &

(d) Bunbury v. Matthews, 1 C. & K. 380.

(e) Drake v. Sikes, 7 T. R. 113. Minshull v. Lloyd, 2 M. & W. 458.

been returned by the officer to the under-sheriff, notice should be given to the latter, or to the attorney of the sheriff, to produce it, if the sheriff is still in office. (*f*) If the defendant has gone out of office, and the warrant has been sent to the persons who acted as his London agents whilst he was in office, and who are also his attorneys on the record, notice to them to produce the warrant is sufficient to entitle the plaintiff to give secondary evidence of its contents. (*g*)

On production of the warrant bearing the sheriff's seal of office, it is right to presume that the seal was properly affixed unless evidence to the contrary is adduced; and on production of the sealed warrant the plaintiff establishes a prima facie case against the sheriff; and if the under-sheriff improperly issued it without having received a writ upon which it purports to be founded, the fact must be proved by the defendant as an answer to the plaintiff's case. (*h*)

But the production of the warrant is not the only mode by which the privity of the sheriff with the act of the bailiff may be established. If the sheriff takes the fruits of an arrest made, or execution levied, by the officer, and ratifies and adopts the acts of the latter, he will have recognized him as his authorized agent in the particular transaction, and will be responsible accordingly. (*i*) If it be proved that by the ordinary course of business in the under-sheriff's office the name of the officer who is to execute the writ is endorsed on the process, and the writ so endorsed is returned and filed, and the plaintiff offers in evidence a writ with the name of the bailiff indorsed upon it, and proves that the indorsement was made at the under-sheriff's office, or was made before it got there, and was afterwards adopted there, it will be prima facie evidence that the person named in the endorsement was the person authorized by the sheriff to execute the writ, for if the warrant be granted to a different officer, the sheriff has the means of proving it. (*k*) But the mere production of the writ and indorsement, without proof that the indorsement was

(*f*) *Taplin v. Atty*, 3 Bing, 166.

(*g*) *Suter v. Burrell*, 2 H. & N. 867.

(*h*) *Gibbins v. Phillips*, 7 B. & C. 535,
note.

(*i*) *Martin v. Bell*, 1 Stark. 416. *Jones*

v. Wood, 3 Camp. 228. *Woodgate v. Knatchbull*, 2 T. R. 155.

(*k*) *Scott v. Marshall*, 2 Cr. & Jerv. 242. *Tealby v. Gascoigne*, 2 Stark. 202.

made in the sheriff's office, or adopted by the sheriff, will not be sufficient to implicate the sheriff. (*l*)

If upon the pleadings the defendant, as sheriff, admits his participation in the act of the officer it is of course unnecessary to produce and prove the warrant. (*m*).

949. *Proof of false return to a writ.*—If it be proved that a debtor whom the sheriff ought to have arrested in obedience to a writ lodged in his hands, did not abscond, but continued in the daily exercise of his usual occupation, or appeared publicly as usual, or was to be found at his home or his usual haunts, and the sheriff neglected to arrest him, and returned non est inventus to the writ, there will be abundant evidence of a false return. (*n*)

950. *When admissions by an under-sheriff and bailiffs are evidence against the sheriff.*—The statements and declarations of an under-sheriff are no evidence to charge the sheriff, unless they accompany some official act, or unless they tend to charge himself, he being in truth the real party in the cause. (*o*) What a bailiff says in a general conversation with any indifferent person, certainly is not evidence against the sheriff; but declarations made by him in the course of the execution of a writ to parties interested in making the inquiry, are evidence against the sheriff in the particular matter to which they relate. (*p*)

951. *Proof of the removal of goods taken in execution without paying the landlord's rent.*—If the material facts of the tenancy, the rent in arrear, the seizure of the goods, the defendant's knowledge of the rent being in arrear, and the removal of the goods without payment of it, as set forth in the plaintiff's declaration, are traversed by the pleadings, the plaintiff must establish them in evidence by production and proof of a written demise, where the tenant holds under a writing, (*q*) and by showing that a certain ascertained rent was payable and in arrear at the time of the levy, knowledge thereof on the part of the sheriff or his officer, (*r*) and an

(*l*) Hill v. Sheriff of Middlesex, 7 Taunt. 8.

(*m*) Reed v. Thoyts, 6 M. & W. 415.

(*n*) Beckford v. Montague, 2 Esp. 476.

Brown v. Jarvis, 1 M. & W. 704. Randall v. Wheble, 10 Ad. & E. 719.

(*o*) Snowball v. Goodricke, 4 B. & Ad.

(*p*) North v. Miles, 1 Campb. 390. Jacobs v. Humphrey, 2 Cr. & M. 414.

(*q*) Augustien v. Challis, 1 Exch. 279.

(*r*) Risely v. Ryle, 11 M. & W. 16.

Hoskins v. Knight, 1 M. & S. 245. Saunders v. Musgrave, 6 B. & C. 524. Andrews v. Dixon, 3 B. & Ald. 645.

actual removal of the goods without payment of the rent. (s)

952. *Evidence of the process under which the sheriff acted.*—When the existence of the authority under which the sheriff acted is put in issue by the pleadings, it is in general enough, as we have seen, to prove the writ under which he acted. If the plaintiff, in order to prove his case against the sheriff, puts in evidence the warrant from the sheriff to his officer, he does not thereby make the recital of the writ in the warrant to the sheriff evidence for the latter of the writ, and dispense with the necessity of proof of it by the sheriff. (t)

953. *Evidence for the defense—Proof of rent being in arrear at the time of the levy.*—If the sheriff, in order to support a return of nulla bona, or to defend himself against an action for negligence in not levying under a writ of fi. fa., is driven to show that rent was due to the landlord, the lease itself must be produced if it appear that there was a written demise. (u) In an action against a sheriff for neglecting to levy under a fi. fa., it is not enough for the sheriff to show that the landlord made a claim for a year's rent, which exceeded the value of the goods. The sheriff must prove that the rent was actually due. Where the sheriff relied upon an actual payment by him of rent claimed to be due to the landlord, Lord ELLENBOROUGH held, that if he had before him reasonable evidence of the rent being in arrear, and a sight of the lease, where the debtor held under a lease, there would be a prima facie case in favor of the sheriff, and it would be for the plaintiff to show that the rent was not due. (x) If the sheriff has given notice to the execution creditor of the claim of rent, and the latter assents to the proceedings of the sheriff in respect thereof, he can not of course afterwards turn around and complain of what he has himself sanctioned, although both he and the sheriff may have been deceived, or have acted under a misapprehension, or taken some erroneous view of the matter. (y)

(s) *Smallman v. Pollard*, 6 M. & Gr. 166.

1001. *Wharton v. Naylor*, 12 Q. B. 679.

(t) *White v. Morris*, 11 C. B. 1033.

overruling *Bessey v. Windham*, 6 Q. B. 310.

(u) *Augustien v. Challis*, 1 Exch. 279

(x) *Keightley v. Birch*, 3 Camph. 523

(y) *Stuart v. Whittaker*, Ry. & M

954. *Proof of proceedings in the county court.*—The 9 & 10 Vict. c. 95, s. 111, requires the clerk of every county court to cause a note of all plaints, judgments, orders, and proceedings in the court, to be fairly entered in a book to be kept at the office of the court, and the entries in this book, or a copy thereof, bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, are to be admitted in all courts as evidence of such entries, and of the proceedings, and of the regularity thereof, without any further proof.

955. *Damages recoverable in actions against sheriffs and officers—Negligence and breach of duty.*—Whenever it has been proved that the sheriff owed a duty to the plaintiff, and that there has been a breach of that duty, nominal damages are recoverable, although there is no proof of any actual pecuniary damage having been sustained by the plaintiff. When a debtor has been taken in execution and lodged in jail, the execution creditor has a right to have him kept in jail; if, therefore, the sheriff allows the debtor to go beyond the limits of the prison for ever so short a period, there is an infringement of the legal right of the execution creditor, in respect of which damages are recoverable by him, though no actual damage be proved. (z) So if a sheriff, having had a writ of ca. sa. put into his hands, unnecessarily delays putting it in force, and there is no proof of actual pecuniary damage from the delay, nominal damages are recoverable, for the plaintiff's right to have the body of his debtor detained has been invaded through the breach of duty by the sheriff. If actual loss has been sustained, the plaintiff will be entitled to recover the amount of such loss. (a) However, the above rule does not apply to writs of fi. fa., and in such cases, although prima facie the measure of damages is the value of the goods which might have been taken, yet it is for the jury to say under all the circumstances, whether, if the execution had been levied, the plaintiff would have derived any benefit from it; as, for instance, if the other creditors of the execution debtor were in a position to make him bank-

(z) Williams v. Mostyn, 4 M. & W. Moore, P. C. Ca. 39.

153. See Haines v. East India Co., 11

(a) Clifton v. Hooper, 6 Q. B. 474.

rupt. (b) Nor will the plaintiff in such a case be entitled to nominal damages. (b)

If the sheriff has improperly delayed the execution of a writ, and the plaintiff has been put to expense in trying to have the writ executed, he may be entitled to recover these expenses as part of the damages. (c) In an action against a sheriff for not selling the execution debtor's share in chattels, in which he was jointly interested with another person, Lord ELLENBOROUGH said to the jury, "I can not lay down any measure for your assessment of damages short of half the value. In giving any other you will take a leap in the dark. Some purchasers might think the value depreciated by the co-partnership, other smight not regard the circumstance." (d)

In an action against a sheriff or his officer for the wrongful taking of goods, the plaintiff, if he recovers a verdict, is entitled to the full value of the goods. It is not competent for the sheriff to say as to part of it, "I have paid rent," for, being a wrong-doer, he had no right to take upon himself to apply the proceeds of the wrongful sale. (e) So, in an action against a sheriff for taking the plaintiff's goods under process upon a regular judgment, but in a place to which the process did not extend, the plaintiff is entitled to recover the whole value of the goods and not merely the damage he has sustained by their being taken in a wrong place. (f) Whenever a public officer has wrongfully seized and detained goods from the owner, the latter is entitled to recover all the loss resulting from the wrongful act, so that if the property detained has fallen in value in the market, the plaintiff is entitled to add the amount of that to the other damage he has sustained. (g) But if a sheriff takes goods in execution after an act of bankruptcy, and sells them, the jury may, in an action by the trustee in bankruptcy for the unlawful taking, allow to the sheriff the expenses of the sale, if they think the trustee must have sold the goods if they had not been sold by the sheriff. (h)

- (b) *Hobson v. Thelluson*, L. R. 2 Q. 22 Law J., C. P. 115.
 B. 642. (f) *Sowell v. Champion*, 6 A. & E.
 (c) *Mayson v. Paynter*, 1 Q. B. 974. 407.
 (d) *Tyler v. Leeds* (Duke of), 2 Stark. (g) *Barrow v. Arnaud*, 8 Q. B. 609.
 222. (h) *Clark v. Nicholson*, 6 C. & P. 712,
 (e) *White v. Binstead*, 13 C. B. 308; 1 C. M. & R. 724. See *ante*.

If a sheriff or his officer threatens to make a levy on goods which belong to the plaintiff, and the latter, in order to prevent his goods from being seized and sold, pays a sum of money to such sheriff or officer, he is entitled to recover back the money on proving that the sheriff had no right to make the levy or seize the goods he threatened to seize. (i)

In actions for unlawfully removing goods without paying rent due to the landlord, the damages recoverable by the latter are not limited to the amount realized by the sheriff on the sale of the goods, but the landlord may recover the actual damage sustained by him by the sheriff's neglect of duty, whatever that may be. (k)

956. *Assessment of damages in actions for an escape.*—"The true measure of damages," observes JERVIS, C. J., "in actions against a sheriff for an escape, is the value of the custody of the debtor at the moment of the escape, and no deduction can be made therefrom on account of anything which the plaintiff might have obtained by diligence after the escape. If the laches of the plaintiff could be used to mitigate the damages against the sheriff, the plaintiff would be compelled in every case to issue a fresh writ, and incur expense, to relieve himself to some extent from the consequence of the sheriff's negligence. It must not, however, be understood that the plaintiff's conduct can, under no circumstance, have a material bearing upon the damages. If he has done anything to aggravate the loss occasioned by the sheriff's neglect, or has prevented the sheriff from retaking the debtor, the damages would be materially affected by such conduct." (l)

"The damages to be paid by the sheriff must be assessed according to the circumstances of each particular case. If the execution debtor had not the means of satisfying the judgment at the moment of the escape, the plaintiff will have lost only the security of the debtor's body, and the damages may be small." But the jury may take into consideration the fact that the debtor, though insolvent, is the only son of a wealthy and aged father, and that the debtor's solicitor had before the arrest offered a composition of six shillings in the pound; in other words, the chance that the debt or some part

(i) Valpy v. Manley, 1 C. B. 602.

(k) Foster v. Hilton, 1 Dowl. P. C. 38.

Calvert v. Joliffe, 2 B. & Ad. 421.

(l) Arden v. Goodacre, 11 C. B. 375.

of it might be recovered by the pressure put upon the debtor. (*m*)

957. *Special damages*.—All special and extraordinary damage, which is the natural and direct result of the wrongful act of which the plaintiff complains, is recoverable by him if it is set forth and claimed in the declaration. (*n*) The cost of setting aside a judgment for irregularity, however, can not be made the subject of special damage in an action against the plaintiff or his attorney for seizing the plaintiff's goods under color of the irregular judgment, if such costs have been applied for, and refused by the court on motion. (*o*)

958. *Exemplary damages*.—Where trespasses of a serious nature have been committed by officers of the law under color of legal process, exemplary damages are recoverable. Violent and illegal conduct on the part of officers charged with the execution of legal process "is calculated to lead to dangerous conflicts; and when it is proved to the satisfaction of a jury to have taken place, the proper amount of damages to be awarded must depend so much upon the general circumstances that it is very difficult to discover any standard by which to measure the amount;" (*p*) and the court will not interfere, on behalf of the sheriff or his officers, with the constitutional functions of the jury in assessing the damages, although it may do so, if the defendant making the application, and who was jointly sued with the sheriff, was not implicated in the aggravations justifying the amount of damages as against the sheriff. (*q*)

959. *Recovery of treble damages for extortion*.—If the plaintiff, in an action against a sheriff for extortion, frames his declaration on the statute of Elizabeth for the recovery of treble damages, the jury should be asked to assess the actual damage sustained, and the finding should be entered upon the record as the actual damage, so as to entitle the plaintiff to judgment for treble the amount found by the jury. (*r*)

(*m*) Macrae v. Clark, L. R. 1 C. P. 8 C. B. 331.

403.

(*n*) Post, ch. 22.

(*o*) Loton v. Devereux, 3 B. & Ad.

345.

(*p*) Brunswick (Duke of) v. Slowman

(*q*) Gregory v. Cottrell, 1 Ell. & Bl. 369; 22 Law J., Q. B. 217.

(*r*) Post, ch. 21, s. 1, DOUBLE AND TREBLE DAMAGES. Buckle v. Bewes, 4 B. & C. 154.

CHAPTER XV.

OF TRESPASSES AND INJURIES COMMITTED IN EXECUTION OF
WARRANTS AND ORDERS OF JUSTICES—RESPONSIBILITY
OF MAGISTRATES, CONSTABLES, THEIR ASSISTANTS,
AND PERSONS SETTING THEM IN MOTION—REME-
DIES FOR WRONGS DONE UNDER COLOR
OF CONVICTIONS AND WARRANTS OF
JUSTICES.

SECTION I.—*Of trespasses and injuries
committed in the execu-
tion of warrants and
orders of justices.*

- 960. Of the jurisdiction of justices of the peace.
- 961. Jurisdiction of justices residing or being out of the county of which they are justices.
- 962. Jurisdiction of borough justices under the municipal corpora-
tion act.
- 963. The power of summary conviction of offenders by justices without the intervention of a jury.
- 964. Liability of justices for misconduct in the exercise of their judicial functions.
- 965. Of the granting of search-warrants by magistrates.
- 966. Liability of justices for acts done by them without jurisdiction or in excess of their jurisdiction.
- 967. Exemption of justices from actions in cases where they had a *prima facie* jurisdiction, and no objection was taken to their jurisdiction until after they had adjudicated.
- 968. Wrongful proceedings by justices interested in the matter before them.
- 969. Wrongful commitment and imprisonment by justices.
- 970. Acts of a justice of the peace who has not duly qualified.
- 971. Of the form of commitment.
- 972. Commitment by justices of accused persons for trial—Examination of the witnesses.
- 973. Effect of the depositions being taken in the absence of the magistrate who acts upon them.
- 974. Convictions by magistrates on their own view.
- 975. Summary convictions founded upon informations.
- 976. Statutory provisions respecting summary convictions and orders of justices.
- 977. Requisites of the information or complaint.
- 978. Of the time within which the information or complaint must be laid.
- 979. Proceedings upon information or complaint.
- 980. Unlawful proceedings of justices when there is no information or complaint before them.
- 981. When a complaint once made can not be settled and withdrawn.
- 982. Convictions by justices in excess of their jurisdiction.
- 983. Ouster of the jurisdiction of

- justices by setting up a claim of title.
984. To what extent a justice of the peace is protected in the exercise of a discretionary power.
985. Wrongful ministerial acts by magistrates.
986. Convictions upon by-laws.
987. Of the drawing-up of convictions and orders.
988. Disclosure of the authority and jurisdiction of justices on the face of their proceedings.
989. Description of the offense or subject-matter of complaint.
990. Of singling out the offender.
991. Description of the locality of the offense.
992. Orders and adjudications by justices.
993. Statutory forms of convictions and orders.
994. Immateriality of mere surplusage.
995. Effect of the conviction.
996. Warrants of distress and commitment.
997. Exemption of justices from actions in respect of warrants of distress for poor-rate.
998. Warrants of distress and commitment in case of non-payment of costs by an informer or complainant.
999. Service of a copy of the minute of the order before the issue of a warrant of commitment or distress.
1000. The power of appeal to the court of quarter sessions against summary convictions and orders of justices.
1001. Excess of jurisdiction may be made a ground of appeal.
1002. Of the execution of convictions and orders after notice of appeal.
1003. Exemption of justices from liability where a defective conviction or order has been confirmed upon appeal.
1004. Statement of a case to the superior courts by way of appeal from decisions of justices.
1005. Of the quashing of convictions and orders — Removal of orders and convictions by certiorari.
1006. Decisions which are final, and can not be reviewed by certiorari or mandamus.
1007. Commitment for contempt.
1008. When the writ of certiorari is not taken away by express statutory prohibition.
1009. Proof by affidavit of the facts and circumstances calling for the interference of the superior court.
1010. Amendment of orders or judgments of justices on return to a certiorari.
1011. Of testing the legality of a commitment by writ of habeas corpus.
1012. Proceedings against justices to compel them to act in particular cases.
1013. Right of county justices to order the expense of county litigation to be defrayed out of the county funds.
1014. Of the power of justices to give costs.
- SECTION II.—*Exemption of constables and their assistants from liability when acting in the execution of warrants and orders of magistrates.*
1015. Exemption of constables, officers, and their assistants from liability for acts done by them in obedience to warrants of justices.
1016. Excess of authority on the part of constables and officers—Handcuffing unconvicted prisoners.
1017. Abuse of a search-warrant.
- SECTION III.—*Remedies for wrong.*

done under color of convictions and warrants of justices.

- 1018. Replevin of chattels distrained under warrant of justices.
- 1019. Of actions against justices.
- 1020. When the action is brought in respect of things done without jurisdiction, or in excess of jurisdiction.
- 1021. When the action is brought for a malicious conviction, commitment or distress, or a malicious abuse by a magistrate of the functions of his office.
- 1022. Effect of the existence of a power of appeal on the right to bring an action.
- 1023. Objections by justices to actions against them in the county court.
- 1024. Of setting aside certain actions brought against justices of the peace.
- 1025. Limitation of actions against justices of the peace.
- 1025. Of notice of action against justices.
- 1027. Statement of the cause of action on the face of the notice.
- 1028. Tender of amends before action.
- 1029. Of the computation of the month's notice, and of the time for tendering amends.

- 1030. Of the statutory protection to constables, officers, and their assistants from vexatious actions.
- 1031. Parties to be made defendants—Wrongful convictions and orders by one justice acted upon by another justice.
- 1032. Liability of persons who set justices and constables in motion.
- 1033. Evidence at the trial of actions against justices.
- 1034. Proof of malice and of the want of reasonable and probable cause.
- 1035. Evidence at the trial of actions against constables and officers—Proof of the injury having been done in execution of a warrant of justices.
- 1036. Proof of warrant of justices—Secondary evidence of the contents of a warrant.
- 1037. Proof by the plaintiff of his demand of the perusal and copy of the warrant.
- 1038. Proof by the defendant of the production of the warrant—Production and perusal of a copy of the warrant.
- 1039. Damages recoverable in actions against justices of the peace.

SECTION I.

OF TRESPASSES AND INJURIES COMMITTED IN THE EXECUTION OF WARRANTS AND ORDERS OF JUSTICES.

960. *Of the jurisdiction of justices of the peace.* (a)—The ancient conservators of the peace, the nature and extent of whose power and authority are now unknown, were formerly

(a) See *ante*.

elected by the freeholders of the county; but since the reign of Edward III. they have been appointed by the crown. By the 34 Edw. 3, c. 1, it is enacted that in every county of England there shall be assigned for the keeping of the peace one lord, and with him three or four of the most worthy of the county, with some learned in the law and they shall have power to restrain offenders, rioters, and all other barrators, and cause them to be imprisoned and duly punished according to the law and customs of the realm; and inform themselves of pillors and robbers who go wandering about and will not labor, and put them in prison, and take of all them that be not of good fame sufficient surety and mainprize of their good behavior, and duly punish others; and hear and determine, at the king's suit, all manner of felonies and trespasses done in their several counties, according to the laws and customs of the realm. From this statute, therefore, it appears that justices of the peace were to be appointed by commission from the crown; that they were to have authority to hold a court, and were to be judges of a court of record. Courts accordingly were holden by them for hearing and determining offenses within their cognizance; records were kept by them of their proceedings in these courts, and each justice named in the commission came to be called *custos rotulorum*, or keeper of the records and rolls of the county. (b)

The power "to hear and determine" gave justices of the peace authority only to hear and determine through the medium of the common-law method of inquisition, by the verdict of a jury, "for that is implied by law, and the court will adjudge as the law appoints, although it be not so expressed." (c)

Hence, justices were under the necessity of holding sessions and assembling juries for the trial of all offenses of which they had cognizance; and these sessions were by 36 Edw. 3, stat. 1, c. 12, commanded to be held at least four times a year. Special sessions were afterwards directed to be held for executing certain statutes which the justices were charged to execute, and they were enjoined the diligent

(b) Holt, C. J., *Harcourt v. Fox*, 1 Show. 507.

(c) See *Holland's case*, 4 Co. 74a, 74b.

perusal and study of these statutes at the Easter sessions in every year. (*d*)

Where a trial or other proceeding is commenced at one sessions, and is continued and concluded at another, the continuity of the proceeding and the jurisdiction of the court must be preserved by a formal adjournment, otherwise the proceeding is *coram non judice*, and will be a nullity. (*e*)

The form of the commission of the peace as it exists at present, is said to have been settled by the judges in the 33rd year of Queen Elizabeth's reign. (*f*) It assigns the several persons named in it, and every one of them jointly and severally, the queen's justices, to keep the peace in a particular county, and to cause to be kept all statutes made for the good of the peace and the quiet government of the people; and to punish all who offend against any of the said statutes; and to cause to come before them all who shall threaten any of the people as to their persons, or the burning of their houses, in order to compel them to find surety for the peace or good behavior; and if they shall refuse to find such surety, to cause them to be safely kept in prison till they shall find it: also to inquire, upon the oath of good and lawful men of the county, of all felonies, trespasses, and offenses, of which justices of the peace may lawfully inquire, &c. (*g*)

Besides the general authority confided to justices by the commission of the peace, they are clothed by various Acts of Parliament with a special and particular jurisdiction over particular offenses, which jurisdiction must be exercised sometimes by one justice and sometimes by two; sometimes in their sessions, and sometimes out of their sessions. Whenever these statutory powers are exercised by justices, care must be taken that the special authority is strictly pursued.

Every single justice has regularly a jurisdiction for the preservation of the peace through the whole county by virtue of his commission, but the power of hearing and determining offenses is by the commission given to two or more; and whenever a thing is required to be done by two justices, they must both be present at the execution of it. A justice has no power to do any judicial act out of his coun-

(*d*) 33 Hen. 8, c. 10.

(*e*) *Rex v. West Torrington*, Burr. S. C. 293. *Reg. v. Payn*, 34 Law J., Q. B.

59.

(*f*) 2 Hawk. P. C. c. 8, § 2.

(*g*) *Dalt. J. P. Ch.* 5.

ty, but he may do a merely ministerial act, such as the taking of an information. (*h*)

A justice of the peace has jurisdiction to require sureties for good behavior from persons charged with aggravated defamation, and with persisting in a continued course of libelling. Therefore, where a person persisted in writing libels upon a wall against a private individual, and was required to find sureties for his good behavior, and in default was committed to prison, it was held that the justice had acted in a matter over which he had jurisdiction. (*i*) If the charge be of an offense over which, if the offense charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction can not be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti*, nor can the jurisdiction be ever held to depend upon the value or credibility of the evidence. (*j*)

961. *Jurisdiction of justices residing or being out of the county of which they are justices.*—A justice of the peace for one county, riding, division, liberty, city, borough, or place, may act for the same whilst residing or being in an adjoining county, riding, &c., of which he is also a justice; and a justice of the peace for any county at large, riding, division, or liberty, may act as such within any city, town, or precinct next adjoining thereto, or surrounded thereby, being a county of itself, or otherwise having exclusive jurisdiction. (*k*)

962. *Jurisdiction of Borough justices under the Municipal Corporation Act.*—By s. 111 of 5 & 6 Wm. 4, c. 76, county justices have concurrent jurisdiction with borough justices in boroughs which have not received the grant of a separate court of quarter sessions.

All offenses committed within any borough against the provisions of any local Act of Parliament are cognizable by the justices of the borough, and such justices possess all the powers and jurisdiction with respect to such offenses which were formerly possessed by county justices. (*l*) These, and

(*h*) 2 Hale, P. C. 51.

(*i*) Haylock v. Sparke 22 Law J., M. C. 72.

(*j*) Cave v. Mountain, 1 M. & Gr

262.

(*k*) 11 & 12 Vict. c. 42; 11 & 12 Vict. c. 43, ss. 6, 35; 26 & 27 Vict. c. 77.

(*l*) 7 Wm. 4 & 1 Vict. c. 78, s. 31.

all other offenses punishable in boroughs upon summary conviction, must be prosecuted in conformity with the provisions of the statutes regulating the proceedings of justices; but the prosecution for the offense must be commenced within three calendar months, (*m*) and any person who thinks himself aggrieved by the summary conviction may appeal to the court of quarter sessions for the borough or the county. (*n*)¹

963. *The power of summary conviction* of offenders by justices, without the intervention of a jury, is entirely the creature of the statute law. No such power is accorded to them by the common law. "In very early times such a power appears to have been conferred upon them in two cases, which seemed in their nature to require a speedy interference; but even in these it was confined to their own view. These are the cases of forcible entries, 12 Ric. 2, c. 2, and of riots, 13 Hen. 4, c. 7; in the latter of which, it may be remarked, this extraordinary jurisdiction is carefully limited by the urgency of the occasion, by which alone, therefore, it was probably thought to be justified; for it is there directed, that if the rioters had departed before the arrival of the justices, so that the view could not be had, they are then to inquire of the matter, not by themselves, but by means of a jury, which they are specially directed in that case to summon. One other instance also occurs of a power to convict without jury, and that was on confession of the party, viz., by the Act of 2 Hen. 5, st. 1, c. 4, relating to laborers, which authorized them to examine laborers, &c., on their oath, and on their confession to punish them as if they were convicted by inquest. These two cases of view and confession seem to be the only clear instances in which justices of the peace were empowered in those early times to inflict punishment upon their own inquiry and judgment." (*o*)

"The earliest statute upon which a summary conviction

(*m*) 5 & 6 Wm. 4, c. 76, s. 127; 11 & 12 Vict. c. 43, s. 11.

(*o*) Paley on Summary Convictions, Introd., pp. 5, 6, 5th ed.

(*n*) 5 & 6 Wm. 4, c. 76, s. 131.

¹ In this country, the jurisdiction of justices of the peace is regulated by statute in the several states; hence no general idea as to their powers, generally applicable, can be given, but the statute in each state should be consulted, to ascertain the extent and limit of their powers. *Com. v. Leach*, 1 Mass. 59; *Bridge v. Ford*, 4 Id. 641.

by a justice is on record, or of which a precedent is found in the books, is that of 33 Hen. 8, c. 6, against the practice of carrying daggs or short guns. Lambard has given a precedent of a conviction upon this statute, (*p*) and there appears to have been one removed into the Court of Queen's Bench by certiorari as early as the 43rd year of Elizabeth, A. D. 1600; and this very case affords a proof of the objection, which, in the state of manners at that day, might well exist, against relaxing the jealousy of the common law by intrusting anything like arbitrary authority in private hands." (*q*)

Until recently justices of the peace had no power to convict summarily for felony, but by 18 & 19 Vict. c. 126, power is given to justices of the peace assembled at petty sessions to hear and determine charges of larceny in a summary way, without the intervention of a jury, where the value of the property stolen does not in the judgment of such justices exceed 5s., and the person charged consents to have the case heard and determined by such justices.

964. *Liability of justices for misconduct in the exercise of their judicial functions.*—A justice of the peace who acts corruptly in the discharge of the duties of his office, and uses the power of the law for the purpose of injuring and oppressing those over whom he has authority, and gratifying his own private animosity, is responsible in damage to the parties injured; but it must be proved that he has acted wrongfully from personal motives of spite or ill-will, or, in legal parlance, that he "has acted maliciously, and without reasonable and probable cause," for he can not be made responsible for an erroneous judgment, or for mere mistakes, or for ignorance, negligence, or misconduct, not amounting to an abuse of his authority. (*r*)¹

(*p*) Lambard's Justice, p. 298.

(*q*) Paley, *ut sup.*, pp. 10, 11.

(*r*) Pease v. Chaytor, 32 Law J., M. C. 121; *post*, s. 2.

¹ Reid v. Hood, ; Maguire v. Hughes, 13 La. Ann. 281; Garfield v. Douglass, 22 Ill. 100; Kennedy v. Terrill, Hard. (Ky.) 490; Terrail v. Tinney, 20 La. Ann. 444.

Justices of the peace and all judges of inferior tribunals are amenable in damages, as well as criminally, for all acts done by them in their official capacity, from corrupt motives, and that, too, whether the act complained of was judicial or purely ministerial. A distinction is made between judges of courts of general, and judges of courts of limited, jurisdiction. The former are never amenable in damages for

965. *Of the granting of search-warrants by magistrates.*—Upon a representation to a magistrate that a person has reason to suspect that his property has been stolen and is con-

any act done by them in an official capacity, even though corruptly done. *Groenvelt v. Burwell*, 1 Ld. Rayd. 468; *Thorp's Case*, Colton's Record's, 74-316; *Medgate's Case*, 28 Assize Book, pl. 21; *Floyd's Case*, 10 Coke, 23; *La Caux v. Eden*, Doug. 594; *Brodie v. Rutledge*, 69. In such cases the only remedy is by impeachment; *Yates v. Lansing*, 5 Johns. (N. Y.) 282; but justices of the peace, and judges of courts of limited jurisdiction, are liable for *judicial* acts even, when they are done corruptly or maliciously. *Mason v. Cook*, 2 N. & M. (S. C.) 379; *Shoemaker v. Nesbitt*, 2 Rawle (Penn.) 201; *Reed v. Hood*, 2 N. & M. (S. C.) 168; *Bullitt v. Clement*, 16 B. Mon. (Ky.) 237; *Bonard v. Hoffman*, 18 Md. 479; *Downing v. Herrick*, 47 Me. 462; *Little v. Moore*, 4 N. J. 74.

So, when any ministerial duty is annexed to the office, if it is wrongfully, negligently, or improperly exercised, whether the act proceeded from mistake or fraud, liability attaches therefor. *Taylor v. Doremus*, 16 N. J. 473; *Stone v. Graves*, 8 Mo. 148. So, where they have no jurisdiction over the matter, their acts are *coram non judice*, and actions will lie against them without any reference to the precept or process, unless the facts upon which the want of jurisdiction depended were peculiarly within the possession of the party aggrieved, and were not communicated to the court. But if the facts were such as the court was bound to know, liability attaches. *Pike v. Carter*, 3 Bingham, 78.

In *Lowther v. The Earl of Radnor*, 8 East, 113, the rule was laid down that a magistrate can not be made liable as a trespasser, if facts stated to him on oath by the complainant are such as show jurisdiction in him over the subject-matter, and nothing appears in the answer to contradict the first statement, or to show a want of jurisdiction.

In *Pike v. Carter*, *ante*, the court held that, before any action could be brought against a magistrate for anything done in the discharge of his duty, it must appear that his attention was called to all the facts necessary to enable him to form a judgment as to the course he ought to have pursued. But this is only the case when the facts are such as he is not bound to know, or as do not appear upon the face of the papers. If his want of jurisdiction is apparent, he is liable, whether the question of jurisdiction was raised before him or not; *Wise v. Withers*, 3 Cranch (U. S. C. C.) 331; *Wilkins v. Hemsworth*, 3 Nev. & P. 55; *West v. Small*, 3 M. & W. 418; but there must have been a *total* want of jurisdiction. If there was jurisdiction for any purpose, so that a valid judgment could be rendered, the fact that his jurisdiction has in some respects been exceeded, does not constitute a good ground of action, or render the judgment void. The rule seems to be that in order to create liability there must have been a *total* want of jurisdiction, so that any judgment rendered therein would have been absolutely void, and that in all cases where there was *partial* jurisdiction, so that the judgment is not void, but voidable only, no liability exists. *Burton v. Eyre*, Cro. Jac. 288; *Gold v. Strode*, Carth. 148; 3 Mod. 324; *Weaver v. Clifford*, Cro. Jac. 3; *Ognell v. Paston*, Cro. Eliz. 165; *Houlden v. Smith*, 19 L. J. (Q. B.) 170. But, even where the jurisdiction depends upon a peculiar state of facts which were not disclosed to the magistrate, so that no liability attaches for the acts done by him, yet if he afterwards seeks to enforce the judgment, he, and all persons aiding therein will be liable in trespass therefor. *Lowther v. Radnor*, *ante*; *Wicks v. Clutterbuck*, 2 Bing. 483.

cealed in some specified place, the magistrate may lawfully issue his warrant to search the place and to bring the occupier or owner before him. It need not be a positive and direct averment upon oath that the goods are stolen, in order to justify the magistrate in granting his warrant. If a warrant is issued without due authority on the part of the magistrate, and a house is entered and searched under it, that is a trespass on the part of the magistrate. And if a person goes before a magistrate and falsely and maliciously, and without reasonable and probable cause, makes such a representation to a magistrate as induces him to grant a search-warrant, the person so acting is responsible in damages in an action for malicious prosecution. (s) The power of a justice to grant a search-warrant is now extended to property in, or near, or with respect to which, any offense, punishable either upon indictment or summary conviction by virtue of the Criminal Law Consolidation Act (24 & 25 Vict. c. 96), has been committed. (t) ¹

(s) *Elsee v. Smith*, *Wyatt v. White*, (t) 24 & 25 Vict. c. 96, s. 703. See 32 ante; 4 Inst. 177. & 33 Vict. c. 12, s. 10; c. 57, s. 6.

¹ The power to issue warrants to search dwelling-houses or other buildings in which it is suspected that stolen property is concealed, is now purely statutory, and the provisions of the statute must be strictly complied with, or the officer and all persons acting in pursuance of it, will be trespassers. *State v. Mann*, 5 Ired. (N. C.) 45; *Reed v. Rice*, 2 J. J. Marsh. (Ky.) 44; *Tuell v. Wrink*, 6 Blackf. (Ind.) 249. By the common law a justice of the peace, being a conservator of the public peace, had power to issue a warrant to search suspected places for stolen goods, or for concealed felons, but he could not do this upon mere surmise, but was bound to predicate his warrant upon such facts as amounted to a reasonable suspicion. *Wood's Institutes*, 86; *Johnson v. Leigh*, 4 Taunton, 247. And a warrant issued by a magistrate upon bare suspicion, although said to be quite common, was against *magna charta*, and not justifiable. *Wood's Institutes*, p. 644.

It seems that by the common law, a justice of the peace, who by virtue of his commission was created a conservator of the peace, might, when a felon was known, or suspected to be in a certain house, send his warrant to the constable to go along with the party giving the information of the felony and of the facts, to make a search, but in order to justify the issue of a search-warrant, the magistrate must either have had personal knowledge of the facts, or have received information from others, and that in all cases there must have been reasonable grounds to suspect, &c. *Wood's Institutes*, p. 644. But, as has previously been stated, in this country the jurisdiction and powers of justices of the peace are derived from statutes, and the search of dwellings or buildings of any description for felons or stolen goods, is also regulated by statute, special reference to which should be had.

966. *Liability of justices for acts done by them without jurisdiction, or in excess of their jurisdiction.*—If magistrates, while occupying the bench from which magisterial business is usually administered, publicly disseminate slanders under the pretense of giving advice, they are no more privileged than if they were illiterate mechanics assembled in an alehouse. (u) If a magistrate convicts an accused person of an offense without having any jurisdiction in the matter, and then proceeds to sign and issue a warrant of commitment or distress, under which an imprisonment is effected or goods are seized, the conviction may be removed into the Court of Queen's Bench and quashed by certiorari, and an action may then, and not before, be commenced against the magistrate (post, s. 2), to recover damages for the wrong done. Similar proceedings may be taken against him where he has exceeded his jurisdiction, and done more than he was authorized by law to do.¹

967. *Exemption of justices from actions in cases where they had a prima facie jurisdiction, and no objection was taken to their jurisdiction until after they had adjudicated.*—If, under the special powers of particular Acts of Parliament, justices have a prima facie jurisdiction to inquire into and adjudicate upon certain matters that have been brought before them,

(u) Ld. Campbell, C.J., in *Lewis v. Levy*, Ell. Bl. & Ell. 554; 27 Law J., Q. B. 282.

¹ *Bailey v. Wiggins*, 5 Har. (Del.) 462; *Dupont v. Downing*, 5 Clark (Iowa), 172; *Hall v. Rogers*, 2 Blackf. (Ind.) 429; *Modisett v. Governor*, 2 Id. 135; *Ely v. Thompson*, 3 A. K. Marsh. (Ky.) 70; *Kern v. Shoemaker*, 4 Ohio, 331; *Harmon v. Gould, Wright* (Ohio) 432; *Howe v. Mason*, 14 Iowa, 570; *Ambler v. Church*, 1 Root (Conn.) 211; *Piper v. Pearson*, 2 Gray (Mass.) 120; *Clark v. May*, 2 Id. 140; as for issuing an order or warrant for the arrest of a person without authority; *Johnson v. Tompkins*, 1 Bald. (U. S.) 511; or without a compliance with all statutory requirements. *Whitcomb v. Cook*, 39 Vt. 261; *Sullivan v. Jones*, 2 Gray (Mass.) 570; or an execution, in a case where he had no jurisdiction; *Inas v. Winspear*, 18 Cal. 399; or against one not a party to the suit; *Terrail v. Tinney*, 20 La. Ann. 444; or who acts when he has no jurisdiction, *knowing the facts*; *Clark v. May*, 2 Gray (Mass.) 410; but a justice of the peace or other judicial officer can not be held liable in trespass for an act done by him in excess of his jurisdiction, when the facts occasioning the want of jurisdiction are not known to him, or are not of such a character that he ought to have known them; *Calder v. Hackett*, 3 Moore, P. C. 77; *Pike v. Carter*, 3 Bing. 78; *Lowther v. Earl of Radnor*, 8 East, 113; *Clark v. May*, ante; *Wicks v. Clutterback*, 2 Bing. 483; or when he acts corruptly; *Garfield v. Douglass*, 22 Ill. 100; or maliciously; *Kennedy v. Terrell*, Hard. (Ky.) 490.

and nothing appears, either on one side or the other, to show any want of jurisdiction, they are exempt from liability in respect of their proceedings in the matter. (x) Thus, where an Act of Parliament gave certain magistrates a general jurisdiction over disputes between certain friendly societies and their members, excepting where the rules of the society contained an arbitration clause, and certain disputes were brought before a magistrate, who adjudicated thereon in ignorance of the existence of the arbitration clause in the rules of the society, which deprived him of jurisdiction, it was held that he was not responsible for his want of jurisdiction. "When a party," it was observed by the court, "relies on an exception from a general law, the burden is on him to show that his case falls within the exception; and if the society had produced before the magistrate the clause in their rules enabling them to refer their disputes to arbitration, the magistrate would have had an opportunity of judging whether he had any jurisdiction or not; but they omitted to do this, and the magistrate's attention was never called to the denial of his jurisdiction." (y)

So, if a person be exempted from serving a particular office, and, on being called before a magistrate to show cause why he refuses to do so, if he do not inform the magistrate of the particular ground of his exemption, he can not maintain an action against the magistrate who orders proceedings to be taken against him in consequence of such refusal. (z)

In a case that arose on the 20 Geo. 2, c. 19, giving magistrates jurisdiction to determine differences between masters and servants in husbandry, and other laborers, respecting wages, (a) it was held that an action of trespass would not lie against magistrates, acting upon a complaint made to them on oath, by the terms of which it appeared that they had jurisdiction, although the real facts of the case might not have supported such complaint, if such facts were not laid before them at the time by the party complained against, he having notice of such complaint, and being duly summoned to attend. "The facts stated in the case," observes

(x) *Calder v. Halkett*, 3 Moore, P. C. 7. 68. *Pease v. Chaytor*, 32 Law J., M. C. 121.

(y) *Pike v. Carter*, 10 Moore, 376.

(z) *Best, C.J.*, 10 Moore, 386.

(a) See 30 & 31 Vict. c. 141, continued by 31 & 32 Vict. c. 111.

Lord ELLENBOROUGH, "are not stated as facts appearing before the magistrates at the time, and, in order for the plaintiff to avail himself of them, it should have appeared that the same facts were stated to the magistrates before whom he had notice to appear; for how, otherwise, could the magistrates be affected as trespassers, if the facts stated to them upon oath by the complainant were facts whereof they had jurisdiction to inquire, and nothing appeared in answer to contradict the first statement." (*b*)¹

968. *Wrongful proceedings by justices interested in the matter before them.*—A justice of the peace ought never to execute his office in his own case, or in any case in which he is himself personally interested, (*c*) but must cause the offender to be carried before some other justice. "And therefore the Mayor of Hereford was laid by the heels for sitting in judgment where he himself was the complainant, though, by the charter, he was the sole judge of the court." (*d*) And where a justice of the peace, being also a surveyor of highways, joined in making an order at the sessions in a matter which concerned his office, the court quashed the order. (*e*) So, where a churchwarden, being also a magistrate, made a complaint of the chargeability of a pauper, and then adjudicated in his character of magistrate upon his own complaint as churchwarden, and made an order of removal, the court quashed the order. (*f*) A justice of the peace rated to the poor-rate has been held incompetent to make an order for the removal of a pauper from his own parish on the ground of interest. (*g*) But the 16 Geo. 2, c. 18, enables justices within their jurisdiction to do all acts appertaining to their office as justices relating to the laws for the relief, &c., of the poor, notwithstanding they are rated to or chargeable with poor-rate, &c., but no such justice is (s. 3) to act in the determination of any appeal to the quarter sessions from any order relating to the place where he is taxed or chargeable.

(*b*) *Lowther v. Radnor* (Earl of), 8 East, 113.

(*c*) *Reg. v. Allen*, 33 Law J., M. C. 98.

Rex v. Hoseason, 14 East, 608.

(*d*) *Per Holt, C.J., Anon.* 1 Salk. 396.

(*e*) *Foxham Tithing case*, 2 Salk. 607.

(*f*) *Rex v. Gt. Yarmouth*, 6 B. & C 650.

(*g*) *Rex v. Gt. Chart*, Burr. S. C. 194; 2 Str. 1173. And see *v. Rex v. Gudridge*, 5 B. & C. 459.

¹ See note, 1 page 175, 176.

But where magistrates are acting strictly in the discharge of a public duty in ordering a prosecution to be instituted, and have no private object to serve, they are not disqualified from adjudicating upon the prosecution or complaint which they have themselves directed to be preferred. (*h*) A somewhat analogous case is where they have directed a charge to be brought against the clerk of the peace for misdemeanoring himself in his office (within 1 W. & M. c. 21, s. 6), and have themselves heard the charge and dismissed the clerk. (*i*) And in cases where a contempt of court is supposed to have been committed it becomes the unfortunate duty of the court to act both as party and judge, and to decide whether it has been treated with contempt. (*k*) Therefore, where words are spoken in the presence and hearing of a justice of the peace reflecting upon him in the execution of his office; if he is to his face called a rogue and a liar, the justice may make himself both party and judge, and punish the offender immediately. (*l*) So, if he be assaulted, he may at once commit the offender for trial, or if he be abused to his face in the execution of his office, he may commit the party until he finds sureties for his good behavior. (*m*) If, however, the magistrate himself begins a breach of the peace, he forfeits the protection of the law in the execution of his office. (*n*)

Although any direct pecuniary interest, however small, in the subject of inquiry disqualifies a person from acting as judge, the mere possibility of bias in favor of one of the parties will not have that effect. Where, therefore, two justices after due inquiry gave a certificate that a certain reservoir had been completed by the corporation of a borough, which certificate was necessary before the corporation could compulsorily take water to fill the reservoir, and the effect of such certificate thus necessarily improved the corporation property as a security for money borrowed, and a hospital of which the justices were trustees had lent money on the security of such property, it was held that the interest of such justices, as trustees only, was not sufficiently direct to invali-

(*h*) Pettimangin, *Ex parte*, 33 Law J., M. C. 99 n.

(*i*) Wildes v. Russell, L. R., 1 C. P. 722.

(*k*) Ld. Denman, C. J., in Carus Wil-

son's case, 7 Q. B. 1015.

(*l*) Rex v. Revel, 1 Str. 421.

(*m*) Dalt. Just. c. 173.

(*n*) R. v. Symonds, Ca. Temp. Hardwicke, 240.

date their certificate. (*o*) And if the magistrate has no interest in the matter at the time that the order is made, the fact that he subsequently becomes interested will not invalidate the order. (*p*)

By 30 & 31 Vict. c. 115, a justice is not incapable of acting on the trial of an offense under a statute to be put into execution by a municipal corporation, local board of health, improvement commissioners, trustees, or any other local authority, by reason only of his being one of several rate-payers or other class of persons liable, in common with others, to be benefited by any fund, to which the penalty payable for such offense is to be carried, being thereby increased, or to contribute to any rate, &c., in diminution of which such penalty will go.

If the magistrate, being disqualified by interest or otherwise, remains on the bench and takes any part at all in the proceedings, his presence will vitiate them. (*q*) If he remains he should give a public notice that he is there merely as a spectator, and will not take any part in the adjudication of the matter. (*r*)

969. *Wrongful commitment and imprisonment by justices.*—A magistrate is not at liberty to detain a known person to answer a charge not yet made against him; he ought to have an information regularly, before him, that he may be able to judge whether it charges any offense which the person ought to answer. It may be otherwise in the case of a mere vagabond, who, if he were once allowed to depart from the presence of the magistrate, would probably never be seen again. (*s*)

In an action against a magistrate for an assault and false imprisonment, it appeared that the plaintiff had been summoned, and had appeared before the magistrate to answer a complaint of having unlawfully killed a dog; that the magistrate proposed an arrangement which was rejected by the plaintiff, upon which the magistrate told him that, unless he

(*o*) Reg. v. Rand, L. R. 1 Q. B. 230.
See Reg. v. Manch. and Sheff. Rail. Co.,
ante.

(*p*) Reg. v. Surrey Justices, 21 Law J.,
M. C. 198.

(*q*) Reg. v. Suffolk Justices, 21 Law J.,

M. C. 169. Reg. v. Hertfordshire
Justices, 6 Q. B. 756.

(*r*) Reg. v. Hertfordshire Justices, 2
D. & L. 500 n.

(*s*) Per Ld. Tenterden, C.J., *Rex v.*
Birnie, 1 Mood. & R. 160; 5 C. & P
206.

paid a certain sum of money, he should convict him in a penalty of that amount, and commit him to prison; that he then called in a constable, and ordered him to take the plaintiff outside, and if the matter was not settled to bring him again, when he would proceed to commit him; and that the plaintiff then went out with the constable and settled the affair by paying a sum of money. It was held that the magistrate was guilty of an assault and false imprisonment, and was responsible in damages, as there was no evidence of any conviction, and he had no right to give the plaintiff into the hands of a constable, in order to drive him into a settlement of the complaint. (t)

When constables have arrested a man, and are taking him before a magistrate for the purpose of inquiring into a charge, it is not competent for a magistrate who meets them in the street to order the constables to take the man back to jail, and keep him in prison. "It is a magistrate's duty," observes PATTESON, J., "on all occasions, either to examine into a charge, or, if there is a reason why he can not examine into it, he is not to interfere at all, and he should let the constable take the party before some other magistrate. It would be a very fearful thing, indeed, if any magistrate is at liberty meeting a man in custody of the constables in the street to say, 'Take him back for twenty-four hours, and bring him up to-morrow.'" (u)¹

970. *Acts of a justice of the peace who has not duly qualified* are not absolutely void; and, therefore, persons seizing goods under a warrant of distress, signed by a justice who has not taken the oaths at the general sessions, nor delivered in the certificate required, are not trespassers. Many persons acting as justices of the peace in virtue of offices of corporations, have been ousted of their offices from some defect in their election or appointment; and although all acts, properly cor-

(t) *Bridget v. Coyney*, 1 M. & Ry. (u) *Edwards v. Ferris*, 7 C. & P. 542. 215.

¹ A justice of the peace must, in the issue of a *capias*, or a warrant to arrest an alleged criminal, comply strictly with the provisions of the statute, and, where the statute requires that a previous complaint shall be made, a justice who issues a warrant without a complaint, in fact, having been previously made, as required by law, will be a trespasser, and if the act is malicious is also guilty of a *malfeasance* in office, which subjects him to indictment and removal. *Wallace v. Com.*, 2 Virgin's Cas. (Me.) 130.

porate and official, done by such persons are void, yet acts done by them as justices, or in a judicial character, have in no one instance been thought invalid. (x)¹

971. *Of the form of commitment.*—A commitment by way of punishment, by word of mouth only, without warrant in writing, can not be supported. (y) The commitment should be in writing, under the hand and seal of the justice by whom it is made, and should set forth his office and authority on the face of it, and the time and place at which it is made; also the cause of the commitment, and the period of the imprisonment. A commitment for an indefinite period can not be supported. (z) It need not be immediately made out; the detention of the person during the time necessarily required to make it out would be justifiable, but it should be made out as soon as possible. A commitment is in no respect like a conviction, which is only an entering on parchment the proceedings of a court which have already taken place, like recording a judgment. (a)

Statutory forms of warrants of commitment are given by 11 & 12 Vict. c. 42, and it is enacted (ss. 9, 10) that no objection shall be taken or allowed to any summons or warrant against a party accused for any defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution before the justice who has taken the examination of the witnesses; but if any such variance shall appear to the justice to have deceived or misled the accused, the justice, at the request of the party charged, may adjourn the hearing to some future day, and in the meantime remand the accused, or admit him to bail.

972. *Commitment by justices of accused persons for trial—Examination of the witnesses.*—By 11 & 12 Vict. c. 42, s. 17, it is enacted that in all cases where any person shall appear or be brought before any justice of the peace, charged with any indictable offense, the justice, before he commits the accused person for trial, or admits him to bail, shall, in the presence

(x) *The Margate Pier Company v. Hannam*, 3 B. & Ald. 271.

(y) *Mayhew v. Locke*, 7 Taunt. 69.

(z) *Prickett v. Gratrix*, 8 Q. B. 1029.

(a) *Hutchinson v. Lowndes*, 4 B. & Ad. 121. *Leary v. Patrick*, 15 Q. B. 274.

¹ *Weeks v. Ellis*, 2 Barb. (N. Y.) 320; *Kattman v. Ayer*, 3 Strob. (S. C.) 92; *Greenleaf v. Law*, 4 Den. (N. Y.) 168; *Ex-parte Bollman*, 4 Cranch (U. S.) 75.

of such accused person, who is to be at liberty to put questions to any witnesses produced against him, take the statement on oath or affirmation of those who know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to, and signed respectively by the witnesses who shall have been so examined, and also by the justice or justices taking the same, and shall afterwards be delivered to the proper officer of the court in which the trial is to be had (s. 20); and before the first sitting of the court at which the person committed or bailed is to be tried, such person shall be entitled to have, from the officer or person having custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum (s. 27). If the depositions when taken contain no charge of any indictable offense, oral evidence given before the justice, but not contained in the depositions, can not be brought in aid of the depositions, to support the proceedings of the magistrate, and establish a valid information and the requisite jurisdiction. (*b*)

973. *Effect of the depositions being taken in the absence of the magistrate who acts upon them.*—Every magistrate taking the depositions on oath of the party making the charge has a discretion to exercise; he is to examine the witness, hear his answers, and judge of the manner in which they are given, and to determine in many cases whether bail can or shall be taken. If, therefore, the depositions are taken by the magistrate's clerk in the absence of the magistrate, and the magistrate proceeds to act upon depositions so taken, he acts entirely without jurisdiction; there is no proper charge before him, and if he directs the imprisonment of the person accused by them he is responsible for a trespass. (*c*)

The magistrate is not answerable for the correctness of

(*b*) *Lawrenson v. Hill*, 10 Ir. Com. Law Rep. 185. It has been held, however, in an action for a malicious prosecution, that oral evidence is admissible to add to or explain the examination of the defendant before a magistrate, though the examination was taken down in writing, and that anything the defendant may have said as part of his information beyond what was put into writing may

be proved. *Venafrá v. Johnson*, 1 M. & Rob. 316, for "what a party says is evidence against himself, whether another person took it down or not." Alderson, B., in *Robinson v. Vaughton*, 8 C. & P. 255. But the writing must be produced, to see what it contains, before questions can be asked respecting matters which it does not contain.

(*c*) *C. dle v. Seymour*, 1 Q. B. 892.

the charge, or for any erroneous judgment of his own upon the facts. "The only question is, whether the magistrate had jurisdiction to investigate and commit." (*d*)

974. *Convictions by magistrates on their own view.*—A conviction before a justice or justices of the peace, without the intervention of a jury, is always, as we have seen, under some statute, the common law sanctioning no such proceeding. It is regarded by the courts with no particular favor, and it is necessary that the justice should, on the record of it, show that he has proceeded *recto ordine*. (*e*) In some cases, and under particular Acts of Parliament, a summary remedy is provided, as we have seen, for particular offenses, by enabling a magistrate to convict and punish upon his own view of the commission of the offense, without making any inquiry upon an oath or taking any information. (*f*) The record of the proceedings in such cases need only set forth such circumstances as were necessary to give the magistrate jurisdiction, and show that he pursued the directions of the statute. (*g*)

975. *Summary convictions founded upon informations.*—When the magistrate has not been authorized by statute to act upon his own view, he must have some information or complaint before him in order to give him jurisdiction in the matter. He may have jurisdiction over the offense in the abstract, but to give him jurisdiction in any particular case over a particular individual, there must be a proper charge or information before him. (*h*) If, therefore, he grants a warrant against a person upon a supposed charge of felony, without taking any deposition or information on oath, and the party is arrested under the warrant, this is a trespass, for which an action may forthwith be maintained against such justice for compensation in damages. (*i*) So, if he makes an order for the removal of a pauper, without having before him a complaint by the parish officers of the chargeability of such pauper to the removing parish, he acts wholly without jurisdiction in the matter, and is a trespasser. (*k*)

(*d*) *Mills v. Collett*, 6 Bing. 92. *Windham v. Clere*, Cro. Eliz. 130; 1 Leon. 187.

(*e*) 1 *Smith's L. C.*, note to *Crepps v. Durden*, 6th ed.

(*f*) *Jones v. Owen*, 2 D. & R. 602.

(*g*) *Basten v. Care w.*, 3 B. & C. 649.

(*h*) *Caudle v. Seymour*, 1 Q. B. 832.

(*i*) *Morgan v. Hughes*, 2 T. R. 225.

(*k*) *Reg. v. Justices of Bucks*, 3 Q. B. 807.

976. *Statutory provisions respecting summary convictions and orders of justices.*—By 11 & 12 Vict. c. 43, s. 1, it is enacted, that in all cases where an information shall be laid before one or more of Her Majesty's justices of the peace for any county, riding, division, liberty, city, borough, or place, that any person has committed, or is suspected to have committed, any offense or act within the jurisdiction of such justice, &c., for which he is liable, upon summary conviction, to be imprisoned or fined, or otherwise punished, and also in all cases where a complaint shall be made to any such justice, &c., upon which he has authority to make any order for payment of money, it shall be lawful for the justice, &c., to issue his summons stating shortly the matter of the information and complaint, and requiring the accused party to appear and answer, and be further dealt with in manner therein provided.

977. *Requisites of the information or complaint.*—By s. 8 it is further enacted, that in all cases of complaints upon which a justice of the peace may take an order for the payment of money or otherwise, (1) it shall not be necessary for the complaint to be in writing, unless it shall be required to be so by some particular Act of Parliament upon which it is framed; and (s. 10) that every complaint upon which a justice of the peace is authorized by law to make an order, and every information for any offense or act punishable upon summary conviction, unless some particular Act of Parliament shall otherwise require, may be made or laid without any oath or affirmation being made of the truth thereof, except in cases of informations, where the justice receiving the same shall thereupon issue his warrant in the first instance to apprehend the defendant; and in every such case the matter of such information shall be substantiated by the oath or affirmation of the informant, or by some witness on his behalf, before any warrant shall be issued.

Every such complaint must be for one matter of complaint only, and every such information for one offense only, and every complaint or information may be laid or made by the complainant or informant in person, or by his counsel or attorney, or other person authorized in that behalf; and must disclose upon the face of it some offense, neglect, or default,

(1) See *Sweetman v. Guest*, *post*.

into which the magistrate has authority to inquire, and respecting which he has jurisdiction to adjudicate. (*m*)

When a warrant is intended to be issued on the strength of the information, the information must, in order to give the justice jurisdiction in the matter, disclose a complaint about something that the justice has authority to inquire into and adjudicate upon, and the facts necessary to show jurisdiction must be substantiated on oath. An information on oath laid before a magistrate, charging an offense within his cognizance, is sufficient to give the magistrate jurisdiction over the charge and the person charged, although the information does not disclose any legal evidence of the guilt of the prisoner, and states nothing beyond mere hearsay, upon which neither judges nor juries could properly act. The commitment by the magistrate of a person to jail upon the strength of such an information, amounts at the utmost to no more than an error in judgment on the part of the magistrate, for which, if acting within his jurisdiction, he is not liable. (*n*) But the information must impute a criminal offense within the jurisdiction of the magistrate, and not a mere civil wrong, in respect of which he has no jurisdiction. (*o*)

978. *Of the time within which the information or complaint must be laid.*—By s. 11, it is further enacted, that in all cases where no time is specially limited for making or laying any such complaint or information, such complaint or information shall be laid within six calendar months from the time when the matter of such complaint or information arose. This limitation as to time being entirely distinct from the enactment creating the offense, and there being a prima facie jurisdiction, until it is shown that the period of limitation had expired at the time of the laying the information, the limitation need not be noticed, and it need not be shown on the face of the proceedings that they had been originated within the appointed period. “All that is matter of defense, and need not be noticed in the conviction.” (*p*) “Such” complaint refers to the provisions of s. 8, and is limited to cases mentioned in that section, viz., orders for the payment of

(*m*) Lawrenson v. Hill, 10 Ir. Com. Law Rep. 185. Reg. v. Scotton, 5 Q. B. 499. Perham, In re, 5 H. & N. 30.

(*n*) Cave v. Mountain 1, M. & Gr. 257.

(*o*) Lawrenson v. Hill, *supra*.

(*p*) Wray v. Toke, 12 Q. B. 507.

money. It does not, therefore, refer to warrants of distress for non-payment of rates. (*q*)

979. *Proceedings upon information or complaint.*—By the same statute, provision is made for the service of the summons and for the proof of service thereof, and (s. 2) for the issue of a warrant for the apprehension of the party summoned, in case of his non-appearance, according to the exigency of the summons; and also for the issue, in the first instance, in certain cases, of a warrant for apprehending the person against whom the information has been laid, and bringing him up to answer thereto, and to be dealt with according to law. Power is also given to justices under various statutes to issue summonses, and, in default of appearance, warrants for the apprehension of material witnesses, (*r*) and to issue warrants for the apprehension of parties who have been duly summoned to appear before them, and have failed to appear, according to the exigency of the summons. (*s*)

Where the statute creating the offense directs the issue of a summons, and gives the party summoned a certain time to appear and plead, there will be a clear want of jurisdiction, if the justices proceed to hear the complaint before the expiration of the full period allowed. (*t*)

There must be some evidence before the magistrate of the commission of the particular offense charged in the information or complaint, in order to justify a conviction upon it. (*u*)¹

If a person is summoned before a magistrate for an offense under a particular statute, and appears to answer the charge stated in the summons, he can not be lawfully convicted on a charge, although an analogous one, under a different statute; (*v*) nor, if the evidence fails to substantiate the particular charge specified in the summons, can the summons

(*q*) Sweetman v. Guest, L. R., 3 Q. B. 262.

(*r*) 11 & 12 Vict. c. 42, s. 16; 11 & 12 Vict. c. 43, s. 7.

(*s*) 24 & 25 Vict. c. 97 s. 62; 11 & 12 Vict. c. 43, s. 13.

(*t*) Mitchell v. Foster, 12 Ad. & E. 475.

(*u*) Kirkin v. Jenkins, 32 Law J., M. C. 141. Sherborn v. Wells, 3 B. & S. 784. Evans v. Botterill, Ib. 787.

(*v*) Reg. v. Brickhall, 33 Law J., M. C. 156.

¹ Com. v. Ward, 4 Mass. 497; Ex parte Branigan, 19 Cal. 143.

be altered or amended so as to alter the nature of the offense originally charged, and to answer which the party has appeared; (*w*) a magistrate can not justify a commitment for one offense by a conviction for another and different offense; (*x*) but if the accused party or his attorney appears before the magistrate and cross-examines the witnesses, and makes no objection to his proceeding until after the case for the prosecution has closed, he can not then object to the hearing and adjudication on the ground that no information had been laid, or that the accused had not been duly summoned to answer the particular charge. (*y*) Magistrates can not give themselves jurisdiction by voluntarily shutting their eyes to one part of the charge and adapting it to a charge of some other offense, for the purpose of giving themselves jurisdiction. (*z*) Every accused person must of course be heard in his own defense before he can lawfully be convicted. (*a*)

980: *Unlawful proceedings of justices when there is no information or complaint before them.*—Magistrates have no jurisdiction to convict summarily and impose a fine for an assault, when it is an established fact that a complainant before them does not complain of the assault, and does not intend to give them jurisdiction to deal with it. Therefore, where a person who had been assaulted went before magistrates to have the assaulting party bound over to keep the peace, and the magistrates, finding that an assault had been committed, proceeded to deal with the assault by summary conviction, notwithstanding a protest by the complainant against their deciding on the assault, it was held that the justices had acted without any jurisdiction in the matter, the assault not having been brought before them with a view to their adjudicating upon it, and a rule for a certiorari to remove and quash the conviction was made absolute, in order that the conviction might be no bar to ulterior proceedings by indictment or by action (*b*)

(*w*) *Martin v. Pridgeon*, 1 Ell. & Ell. 778; 28 Law J., M. C. 179.

(*x*) *Rogers v. Jones*, 3 B. & C. 412.

(*y*) *Turner v. Postmaster-Gen.*, 34 Law J., M. C. 11.

(*z*) *Thompson, In re*, 6 H. & N. 133 30 Law J., M. C. 19.

(*a*) *Cooper v. Wandsworth Board, &c.* 32 Law J., C. P. 185; *post*, ch. 23.

(*b*) *Reg. v. Deny*, 20 Law J., M. C. 189; 2 L. M. & P. 230.

¹ But a justice of the peace may arrest a person whom he sees committing a crime; *Willis v. Warren*, 1 Hilt. (N. Y.) 590; so he may issue a warrant ar-

981. *When a complaint once made can not be settled and withdrawn.*—Where, however, a complaint of any crime or misdemeanor, or other statutory offense, has been duly laid before a magistrate, it does not rest with the complainant himself to abandon the charge, or to proceed further with the prosecution. Thus, where a complaint of an assault was duly laid before justices, and a summons issued for the appearance of the defendant, and the defendant went and settled the matter with the complainant by paying him a sum of money, and the complainant told one of the justices that the affair was settled, and that he did not intend to prosecute, but the justice nevertheless issued warrants for the apprehension of the parties, and compelled the complainant under the exigency

abusive words spoken in relation to his office, in his presence, or for threats of personal injury to himself, or may commit the offender or hold him to bail. *Edmondson v. Frean*, 2 Hill (S. C.) 235. So he may authorize any person he pleases to be an officer of his court, unless restrained from so doing by statute. *Flack v. Auckney*, 1 Ill. 144; *Nules v. State*, 24 Ala. 672; *Com. v. Keeper of Prison*, 1 Ashm. (Penn.) 183. So, where by statute they are made presiding officers of town meetings, they may by parol order the removal of disorderly persons. *Parsons v. Brainard*, 17 Wend. (N. Y.) 522. But, except where the offense is committed in presence of a magistrate, he has no authority to issue a warrant for the apprehension of a person upon a criminal charge, except upon a sworn complaint of a private person or the proper prosecuting officer. The complaint need not be technically drawn, but it must set forth facts that show that an offense has been committed; *Crosby v. Hawthorn*, 25 Ala. 221; *Cummings' Case*, 3 Me. 51; *Ford v. State*, 4 Chandler (Wis.) 148; but where a person is brought before a magistrate upon a proper complaint, and the testimony shows that the particular offense charged has not been committed by him, but that an offense of a different character has been, he may hold the prisoner until a complaint for such offense has been prepared. *State v. Shaw*, 4 Ind. 428. In all cases, civil as well as criminal, the record must show all facts necessary to sustain the jurisdiction of the justice, and, in criminal cases, if the record does not show facts sufficient to show jurisdiction the proceedings will be quashed, and if the prisoner is in custody, he will be discharged on habeas corpus. *Brackett v. State*, 2 Tyler (Vt.) 167; *Cummings' Case*, 3 Me. 51; *Com. v. Burns*, 8 Gray (Mass.) 482. And where the jurisdiction does not appear of record, it will not be presumed, particularly in civil cases; *State v. Hall*, 49 Me. 412; *Jolley v. Foltz*, 34 Cal. 321; *Bridge v. Ford*, 4 Mass. 641; *Mitchell v. Runkle*, 25 Tex. 132; but in Vermont the same presumptions are made in favor of justices as are made in favor of courts of general jurisdiction, and the same might, perhaps, be said in reference to all the states in which justices' courts are held to be courts of record. *Wright v. Hazen*, 24 Vt. 143. The reason for this is, that their jurisdiction is limited, and, except in certain instances in criminal cases, is purely statutory. At common law a justice of the peace had no jurisdiction in civil cases, but was merely a conservator of the peace. *Willey v. Strickland*, 8 Ind. 453.

of a warrant to appear and give evidence, and then convicted the defendant, it was held that the justices had not exceeded their authority, for the original complaint gave them jurisdiction in the matter, and the complaint having been made before them, they were justified in exercising all the powers vested in them by law for the purpose of enabling them to investigate it, and adjudicate upon it; and that it was not competent to the complainant to deprive them of jurisdiction by settling the matter with the accused party. (c)

982. *Convictions by justices in excess of their jurisdiction.*—Where there is no evidence at all before justices of the facts necessary to give them jurisdiction, they can not lawfully adjudicate or convict. (d) Where the nature of the offense is such that it can only be committed once on the same day by the same person, and the magistrate proceeds to hear and convict, he is *functus officio*, and has no power to entertain or adjudicate upon a charge of a second offense on the same day by the same person. Thus, where a magistrate convicted a baker in four separate penalties for exercising his ordinary calling by baking rolls on a Sunday, and there were four separate convictions for selling four rolls, upon which the magistrate issued four distress-warrants, it was held that the magistrate, after he had convicted the baker in the first penalty, had no jurisdiction to convict him again for the same offense on the same day. "The act of Parliament," observes Lord MANSFIELD, "gives authority to the justice to punish a man for exercising his ordinary calling on a Sunday. The justice exercises his jurisdiction by convicting him in the penalty for so doing. But then he has proceeded to convict him for three other similar offenses on the same day. Now, if there are four convictions for one and the same offense, committed on one and the same day, three of them must necessarily be bad." (e) So, e converso, a single conviction for several distinct offenses is bad, and if a distress issue to levy the penalty imposed, trespass will lie against the justices. (f) But the swearing a profane curse several times repeated may

(c) *Reg. v. Hawkins*, 2 N. R. 62.

(d) *Reg. v. Johnson*, 34 Law J., M. C.

(e) *Crepps v. Durden*, Cowp. 465.

(f) *Newman v. Bendyshe*, 10 A. & E

constitute one offense only, although it subjects the swearer to a cumulative penalty of a certain sum for each oath. (*g*)

983. *Ouster of the jurisdiction of justices by setting up a claim of title.*—Whenever a criminal statute authorizes justices to punish trespassers on land, a willful trespass is intended, and not an entry on land in the bona fide assertion of some legal right or title. Whenever, therefore, in summary proceedings before magistrates, a bona fide claim of title to real property, or to the possession of some incorporeal right or privilege over land, is set up before justices by a defendant in answer to some complaint of trespass, the jurisdiction of the justices in the matter is ousted, and the information or complaint ought to be dismissed. (*h*) But the complaint ought not to be dismissed on the strength of the mere assertion of the claim, for it is the duty of the justices to inquire into the circumstances, and ascertain whether there is any plausible or colorable ground for the claim, and whether the act was done in the bona fide exercise of what the defendant supposed to be his right in the matter. (*i*) When the defendant sets up some pretended right, which is unknown to the law, or some impossible claim, the title to property can not be said to come in question. Thus, where a man, in answer to an information under the Game Act set up a right of shooting in gross, which he alleged he had acquired by a forty years' user as of right, it was held that the justices were right in disregarding the claim, as the acquisition of such an easement in gross was an impossibility in point of law. (*j*) The mere belief of the party himself that he has the right he asserts is not sufficient, under the Trespass in Pursuance of Game Act (1 & 2 Wm. 4, c. 32, s. 30), or the Larceny Consolidation Act (24 & 25 Vict. c. 96, s. 24), to oust the justices of their jurisdiction, as it might under the Malicious Trespass Act. (*k*) Whenever a question of title is raised before them, and there is fair and reasonable

(*g*) Reg. v. Scott, 33 Law J., M. C. 15.

(*h*) Reg. v. Cridland, 7 Ell. & Bl. 867; 27 Law J., M. C. 28. R. v. Burnaby, 2 Ld. Raym. 900.

(*i*) Reg. v. Dodson, 9 Ad & E. 712; Morden v. Porter, 7 C. B., N. S. 641. Reg. v. Cridland, *ut sup.* Legg v. Pardoe, 30 Law T., M. C. 108. Leatt v. Vine, 1b.

207. Eversfield v. Newman, 4 C. B., N. S. 418.

(*j*) Cornwell v. Sanders, 32 Law J., M. C. 6. Hudson v. Mac Rae, 33 Law J., M. C. 65; 4 B. & S. 585. See Simpson Wells, L. R., 7 Q. B. 214.

(*k*) Cornwell v. Sanders, Hudson v. Mac Rae, *ut sup.*

evidence in support of it, the justices ought not to proceed, for they can not themselves decide whether the claim is well or ill-founded in fact, although, if it can have no foundation in law, they may disregard it as above stated. Whenever a real question is raised between the parties as to the right, the justices ought not to convict. (*l*)

Upon a question of highway arising before justices under the Highway Act, no matter of title comes in question, although the information or complaint is laid against the owner of the land who disputes the existence of a highway across his land. (*m*)²

(*l*) Reg. v. Stimpson, 4 B. & S. 307; (*m*) Williams v. Adams, 31 Law J., M. 32 Law J., M. C. 209. C. 109.

In the various states of this country, a statute quite similar to the statute referred to by the author exists, and, where the title of land is really *bona fide* in issue, a justice of the peace has no jurisdiction, and while the issue may be raised by pleading it, yet this is unnecessary, for if, during the progress of the trial, it becomes apparent from the evidence that it is a material issue, the jurisdiction of the justice is ousted, and he has no authority to proceed further than to abate or dismiss the action. Brooks v. Dalrymple, 1 Mich. 145; Low v. Ross, 3 Me. 256; Wall v. Albertson, 18 Ind. 145; French v. Potter, 2 Root (Conn.) 359; Flannery v. Hinkson, 40 Vt. 485; Willoughby v. Jenks, 20 Wend. (N. Y.) 96; Jacobs v. Haney, 18 Penn. St. 240; Harvey v. Drummond, 1 N. J. 177; Fitzgerald v. Beebe, 7 Ark. 305; Parker v. Russell, 3 Blackf. (Ind.) 411. But the mere fact that the question of title may be raised, when it is not essentially an issue, does not deprive the justice of jurisdiction. In order to deprive him of jurisdiction, the *very nature of the action* must be such that, in order to sustain the action, the title of the plaintiff to lands, or some interest therein, must be shown, that the question of title thereto is necessarily involved, and where evidence of mere possession or occupation is not sufficient to sustain the action. Dixon v. Scott, 18 N. J. 430; Gregory v. Kanouse, 11 N. J. 62; Watney v. Hittgen, 16 Wis. 516. The mere fact that under the general issue, or a special plea, the title of land may be drawn in question, does not oust the jurisdiction; the *nature* of the action must be such that it can not be sustained by the plaintiff without showing title in lands, as in ejectment and other real actions. Jakeway v. Barrett, 38 Vt. 316; Whitman v. Pownal, 19 Id. 223; Judevine v. Hatton, 41 Id. 351; Watney v. Hittgen, *ante*; Dixon v. Scott, *ante*; Heritage v. Wilfong, 58 Penn. St. 137; Bridgman v. Wells, 13 Ohio, 43. Where deeds and other evidences of title are merely introduced to establish *collateral* issues, the jurisdiction is not affected. Nichols v. Bain, 42 Barb. (N. Y.) 353; Adams v. Rivers, 11 Id., 390. Nor is it ousted where the declaration is such that the defendant may *bona fide* plead title to lands in defense, if he neglects to do so, nor in New York, because it may, in an action of trespass on the case, become necessary for the plaintiff to prove title in himself, if it is not disputed by the defendant. Bellows v. Sackett, 15 Barb. (N. Y.) 96.

² Stout v. Berry, 7 Mass. 385; Whiting v. Dudley, 19 Wend. (N. Y.) 373; Randall v. Crandall, 6 Hill (N. Y.) 342; Bundy v. Sabin, 2 Root (Conn.) 54. So ques

The jurisdiction of justices, under the 1 & 2 Vict. c. 74, for facilitating the recovery of possession, by landlords, of premises held over by tenants, after the due determination of their tenancy, can not be ousted by the tenant's setting up the title of some third party, under whom he claims to hold, for as soon as the tenancy is proved to the satisfaction of the justice, the tenant is estopped from disputing the title of his landlord, and no question of title can be raised between them. (*n*)

Justices can not, of course, give themselves jurisdiction by erroneously and capriciously deciding contrary to the truth upon the question upon which their jurisdiction depends. (*o*) "Justices can not give themselves jurisdiction by finding that as a fact which is not the fact." (*p*) Where, therefore, their jurisdiction depends upon whether the objection to the validity of a rate be bona fide or not, if there are facts before the justices tending to show that the objection is not bona fide, the justices are not responsible for an erroneous judgment upon those facts, (*q*) but there must be some reasonable ground before them to warrant them in coming to that conclusion; if there is no such evidence, they act wholly without jurisdiction, and may become liable in trespass for their acts. (*r*) Whenever the defendant, however, submits his case and objections to the decision of the magistrates, and invites them to decide upon them, and makes no objection to their jurisdiction until after they have heard and adjudicated, he is estopped from afterwards objecting to their decision, and the proceedings taken thereon. (*s*)

(*n*) *Rees v. Davies*, 4 C. B., N. S. 56.

(*o*) *Reg. v. Nunneley*, 27 Law J., M. C. 261.

(*p*) *Lawrence, J.*, in *Welch v. Nash*, 8 East, 403.

(*q*) *Reg. v. Blackburn*, 32 Law J., M. C. 41.

(*r*) *Pease v. Chaytor*, 1 B. & S. 658; 31 Law J., M. C. 1; 32 *Ib.* 121. *Reg. v. Huntsworth*, 33 Law J., M. C. 131.

post, s. 2.

(*s*) *Reg. v. Salop*, 29 Law J., M. C. 39. All the above, except *Welch v. Nash*, are cases of church rates, for the enforcement of which all compulsory proceedings are abolished by 31 & 32 Vict. c. 109, unless they have been made under a statutable authority. See *Rip- pin v. Bastin*, L. R. 2 Adm. & Eccl. 386.

tions relating to *private* rights of way, involve the title to real estate, and are not within the jurisdiction of justices of the peace. *Hall v. Hadskins*, 30 How. Pr. (N. Y.) 15; *Osborne v. Butcher*, 26 N. J. 308; *Alleman v. Dey*, 49 Barb. (N. Y.) 641; *Bartlett v. Prescott*, 41 N. H. 493; *Stout v. Barry*, *ante*; *Stoppenbach v. Zorlunt*, 21 Wis. 385.

¹ A justice of the peace can not give himself jurisdiction, where the law doe:

984. *To what extent a justice of the peace is protected in the exercise of a discretionary power.*—Where justices have a discretionary power they must make a fair and reasonable use of their discretion, and can not refuse to act, and decline performance of a duty imposed upon them, because they think the operation of an Act of Parliament unjust. Where, therefore, justices were empowered to issue a distress-warrant, “if they should think fit,” and circumstances were established showing it to be their duty to issue their warrant, but they declined to do so because they thought the law unjust, the court made a rule absolute against them, with costs. (t)

By 11 & 12 Vict. c. 44, s. 4, it is enacted, that in all cases where a discretionary power shall be given to a justice of the peace by any act of Parliament, no action shall be brought against such justice for, or by reason of, the manner in which he shall have exercised his discretion in the execution of any such power. But for the justice to secure his exemption under this section, it is essential that he should be clothed with a legal authority to do the act concerning which he exercises his discretion. If he has no jurisdiction in the matter, he has no valid discretionary power, and is not within the exemption. The magistrate, moreover, must be acting judicially in the exercise of his discretion, for if he is merely determining upon the propriety or expediency of performing some mere ministerial function, and makes a wrong exercise of his discretion by doing what he has no legal authority to do, he can not claim the statutory exemption. Where magistrates,

(t) Reg. v. Boteler, 33 Law J., M. C. 101.

not confer it, or where the law gives it in the first instance, but takes it away upon the happening of certain contingencies. Therefore, where the title of lands within the meaning of the statute necessarily is in issue, a justice can not arbitrarily retain jurisdiction by a wrong decision, or a wrong construction of facts. Thus a justice has no jurisdiction in an action of covenant for a breach of warranty upon the sale of lands; Bickford v. Page, 2 Mass. 455; but *contra*, see Judevine v. Hatton, 41 Vt. 351; nor in any case where it appears by the pleadings that the title of land is involved and disputed; Stout v. Keys, 2 Doug. (Mich.) 184; otherwise where the title is not disputed, and is not in issue; Hastings v. Glenn, 1 E. D. S. (N. Y.) 402; nor for fraud in the sale of land; Brooks v. Dalrymple, 1 Mich. 145; nor in an action for overflowing lands; Dixon v. Scott, 18 N. J. 430; nor in an action for expenses in building a division-fence; Foster v. Bennett, 33 Vt. 66; Hinds v. Page, 6 Abb. Pr. (N. Y.) 58; nor in an action for arrears of rent, under a perpetual lease, brought by an assignee of the lessor against the assignee of the lessee; Main v. Cooper, 25 N. Y. 180; nor where a plea of *liberum tenementum* is filed; Bispham

for example, exercise their discretion as to the granting or withholding a distress-warrant to enforce payment of a rate, the existence of a valid rate and the legal liability to pay on the part of the person distrained upon, are essential to the magistrate's exemption from liability, unless the rate is a poor-rate, and they can shelter themselves under that part of s. 4 of 11 & 12 Vict. c. 44, which expressly exempts justices from actions in respect of the issue of warrants of distress for poor-rate against persons not liable to pay the rate. (u) So when the discretion exercised by the magistrate respects the issuing of a distress-warrant to enforce the payment of money ordered to be paid by some third person, the validity of the order, and the legal liability to pay the money, are a preliminary condition to the magistrate's having any authority to act at all in the matter. (x) ¹

(u) *Pedley v. Davis*, 30 Law J., C. P. 378.

(x) *Newbould v. Coltman*, 6 Exch. 201; 20 Law J., M. C. 149.

v. Inskip, 1 N. J. 231. But where no objection is taken to the jurisdiction, but the party allows the justice to proceed to judgment, he is estopped from attacking the judgment upon that ground. *Bellows v. Sackett*, 15 Barb. (N. Y.) 56.

¹ Where the law invests a justice of the peace with a discretionary power, he is not liable for an *honest* exercise thereof. But if he acts *corruptly* or fraudulently, he is liable; *Tyler v. Alfred*, 38 Me. 53; *Bevand v. Hoffman*, 18 Md. 479; *Halcomb v. Cornish*, 8 Conn. 375; *Ambler v. Church*, 1 Root (Conn.) 211; *Howe v. Mason*, 14 Iowa, 510; *Lester v. Governor*, 12 Ala. 624; *Downing v. Herrick*, 47 Me. 462; *Little v. Moore*, 4 N. J. 74; *Gregory v. Brown*, 1 Bibb. (Ky.) 28; so when he acts beyond his jurisdiction; *Johnson v. Tompkins*, 1 Bald. (U. S.) 571; *Inos v. Winspear*, 18 Cal. 397; *Reville v. Petit*, 3 Met. (Ky.) 314; *Ely v. Thompson*, 3 A. K. Mar. (Ky.) 76; *Wise v. Withers*, 3 Cranch. (U. S.) 331; or corruptly or maliciously; *Garfield v. Douglass*, 22 Ill. 100; *Kennedy v. Ferrel*, Hard. (Ky.) 490; or negligently in the performance of a ministerial duty, he is liable for all the consequences of his acts; *State v. Flinn*, 3 Blatchf. (Ind.) 72; *ex parte Neal*, 14 Mass. 205; *Houghton v. Swarthout*, 1 Den. (N. Y.) 589; *Kerns v. Shoemaker*, 4 Ohio, 331. But, where a justice is made the judge of the sufficiency of bail, he is not liable for an error of judgment whereby insufficient bail is taken; *Tyler v. Alford*, *ante*; *Chickering v. Robinson*, 3 Cush. (Mass.) 543; *Jordan v. Hannon*, 49 N. H. 199; but he is liable for refusing to accept a recognizance for an appeal when offered in time, and when an appeal is allowed by law, not because the recognizance was not sufficient, or in due form, but because it was too late to appeal; *Guenther v. Whiteacre*, 24 Mich. 504; *Hardman v. Jordan*, C. & N. (N. C.) 454; but *contra*, see *Jordon v. Hanson*, *ante*; or refusing an appeal upon improper grounds; *Levy v. English*, 4 Pike (Ark.) 65; *Handison v. Jordon*, *ante*; *Tompkins v. Sands*, 8 Wend. (N. Y.) 462; so he is liable for neglecting to return a recognizance taken by him within the time prescribed by law; *Ex parte Neal*, *ante*; *Cairns v. Sheets*, 4 Blatchf. (Ind.) 275; *Sherwood v. McKinney*, 5 Whart. (Penn.) 435; or for negligently entering a recognizance so that it is ineffectual;

985. *Wrongful ministerial acts* by magistrates may render them liable to an action of trespass, although they may have had the power of hearing and determining on the facts necessary to empower them to do the ministerial act, and have exercised their judgment upon such facts prior to the performance of the ministerial act. Thus, where an Act of Parliament empowered the owners, occupiers, &c., of abbey-lands to make a rate for certain purposes upon the owners of such lands, and provided that if any owner who had been rated should neglect or refuse to pay the rate after demand, then upon proof thereof before a justice, the same should be levied by distress, the defaulter having been first duly summoned to appear and show cause for his neglect or refusal, and the plaintiff being rated, and refusing to pay, was summoned before the defendant, and denied his liability, but failed to show cause for his refusal to the satisfaction of the defendant, who issued a distress-warrant, under which the plaintiff's goods were seized, and the plaintiff then brought his action for a wrongful seizure, and proved that his land was not abbey-land, and that he was not liable to be rated, and recovered damages, it was held that the defendant could not shelter himself from liability on the ground that he was acting judicially when inquiring into, and determining upon, the facts made preliminary to the issue of the warrant. The statute, it was observed, gave the defendant no power to try the question of the plaintiff's claim from exemption from the rate, on the ground that his land was not abbey-land, or to inquire into the validity of the rate, or to adjudicate upon the liability to pay. He was directed to begin by inquiring whether the rated owner had refused to pay, not whether the rate was valid, and his inquiry and deter-

Kerns v. Shoemaker, *ante*; or for an erroneous return upon an appeal; Houghton v. Swarthout, *ante*; or for erroneously entering a satisfaction of a judgment Madisett v. Gavenor, 2 Blackf. (Ind.) 135; or receiving counterfeit or depreciated currency in satisfaction of a judgment; Welch v. Frost, 1 Mich. 30; or for a false return to a certiorari; Kidz v. Suckrider, 14 Johns. (N. Y.) 195; or for refusing to grant an adjournment upon improper grounds, as for refusing to pay his fees; People v. Calhoun, 3 Wend. (N. Y.) 420; and generally in all cases where his action is corrupt or fraudulent; State v. Flinn, *ante*; or where in the discharge of ministerial duties he is chargeable with ignorance, negligence, malice, or fraud; Benard v. Hoffman, *ante*; McDowell v. Buffam, 31 How. Pr. (N. Y.) 154; Bigelow v. Stearns, 19 Johns. (N. Y.) 39; Welch v. Frost, 1 Mich. 30.

mination had reference to the discharge of a mere ministerial function, and were not of a judicial character. (y)

So, where an Act of Parliament, 2 & 3 Vict. c. 84, s. 11 provided that, when any contribution from overseers of moneys required by a board of guardians should be in arrear, it should be lawful for justices to summon the overseers to show cause, &c., and, after having heard the complaint, &c., to issue their distress-warrant for the recovery of such contribution, and, a distress warrant having been issued under the above section, the overseers brought an action of trespass against the justices, it was held that, as the statute did not require any conviction, or order, or act of adjudication at all, but simply a warrant of distress for the levying of the sums legally due, the justices, in hearing and deciding upon the facts which were to guide them in the exercise of their discretion as to the issue or refusal of the warrant, were not acting in the discharge of any judicial functions, but were exercising their discretion respecting the performance of a mere ministerial duty, and that a valid order from the board of guardians, and a legal liability to pay on the part of the overseers, were essential to give the magistrates jurisdiction to act at all in the matter. (z)¹

986. *Convictions upon by-laws.*—If a corporation or a local board exceed their powers in making a by-law, a justice exceeds his power in convicting upon it; and the allowance of the by-law by the Secretary of State does not prevent the Court of Queen's Bench from granting a certiorari for the purpose of bringing up and quashing the conviction. (a) If the validity of a by-law, and the jurisdiction of a justice to convict upon it, depend upon the existence or non-existence of a particular fact, the justice can not give himself jurisdiction by

(y) *Pedley v. Davis*, *supra*. May, *Ex parte*, 2 B. & S. 426; 31 Law J., M. C. 161. *Reg. v. Higginson*, 2 B. & S. 471. *Pease v. Chaytor*, *supra*.

(z) *Newbould v. Coltman*, 6 Exch. 189; 20 Law J., M. C. 149. (a) *Reg. v. Wood*, 5 Ell. & Bl. 49.

¹ *Modisett v. Gavenor*, 2 Blackf. (Ind.) 135; *Howe v. Mason*, 14 Iowa, 510; *Ambler v. Church*, 1 Root (Conn.) 211; *Ex parte Neal*, 14 Mass. 205; *Price v. Haistead*, 3 Mo. 461; *Houghton v. Swarthout*, 1 Den. (N. Y.) 589; *Kerns v. Shoemaker*, 4 Ohio, 331; *Inos v. Winspear*, 18 Cal. 397; *Flack v. Harrington*, 1 Ill. 165; *Spencer v. Perry*, 17 Me. 413; *Kennedy v. Terrell*, Hard. (Ky.) 490; *Jones v. Wenden*, 12 Cush. (Mass.) 543; *Tyler v. Alford*, 38 Me. 530; *Noxon v. Hill*, 2 Allen (Mass.) 215; *Welch v. Frost*, 1 Mich. 30.

finding the existence of the fact, unless there is reasonable evidence before him to support his finding. It is open to the person convicted to show by affidavit that there was no evidence before the justice on which he was warranted in coming to the conclusion that the by-law was valid, and that he had authority to enforce it, because it shows that the justice has exceeded his jurisdiction. (*b*) And if, upon the facts proved before the justice, and the circumstances under which the conviction took place, it appears either that the justice did not determine upon the validity of the by-law, but thought himself bound to enforce it whether valid or invalid, and the by-law is invalid, or if it appears that the justice came to a wrong conclusion in point of law in determining that the facts before him gave him jurisdiction, the court will correct his mistake and quash the conviction, for the "magistrate has no power to hear at all, or to convict, except in the case of a valid by-law." (*c*) But if there are facts before the justice warranting him in coming to the conclusion that he had jurisdiction in the matter, and he adjudicates accordingly, his decision can not be impugned on the ground that there were other facts before him from which he ought to have drawn a contrary conclusion. (*d*)

It is sufficient to support a conviction for a penalty under a by-law made by a railway company pursuant to the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20 (ss. 108-111), to prove that a copy of the by-laws was affixed at the stations where the defendant entered and where he left the train, although the 110th section directs that they shall be hung up at "every wharf or station," &c., and that no penalty shall be recoverable unless they shall have been "kept published in manner aforesaid." (*e*) Such by-laws are public documents within the meaning of the 14 & 15 Vict., c. 99, s. 14, and therefore provable by certified copy under that Act. (*e*)

987. *Of the drawing up of convictions and orders.*—(*f*) If the justice or justices convict or make an order against the

(*b*) Bailey's case, 3 Ell & Bl. 618.
Reg. v. Dickenson, 26 Law J., M. C.
204.

(*c*) Campbell, C.J., and Crompton, J.,
Reg. v. Wood, 5 Ell. & Bl. 57, 58.

(*d*) Bailey's case, *supra*.

(*e*) Motteram v. East. Co. Rail., 7 C.
B., N. S. 58; 29 Law J., M. C. 59.

(*f*) See *ante*.

defendant, a minute or memorandum thereof must then be made (11 & 12 Vict. c. 43, s. 14), and the conviction or order afterwards drawn up in form, and lodged with the clerk of the peace, to be filed among the records of the quarter-sessions. Any omission by the clerk of the justices to perform this duty may render the justices liable to have proceedings taken against them. (g) The conviction may be drawn up in form at a future time, after it has been acted upon, and may then be exhibited to authenticate the proceeding and protect the magistrate. (h)

988. *Disclosure of the authority and jurisdiction of justices on the face of their proceedings.*—"In the case of special authorities given by statute to justices or others acting out of the ordinary course of the common law, the instruments by which they act, whether warrants to arrest, commitments, or orders, or convictions, or inquisitions, ought, according to the course of the decisions, to show their authority on the face of them, by direct averment or reasonable intendment. Not so the process of the superior courts, acting by the authority of the common law." (i) Every order of justices, therefore, should show on the face of it a complaint and an adjudication thereon. (j) "I think," observes COLERIDGE, J., "that the rule is a good rule, and that it is right that the jurisdiction of a judge with limited powers should be shown upon the face of his proceedings; and if this is not done, it would not be known that the matter was coram non judice, and it is not fitting that jurisdiction should be established one way or the other by parol evidence." (k) ¹

(g) Hayward, *In re*, 3 B. & S. 546; Ell. 527. Lindsay v. Leigh, 11 Q. B. 32 Law J., M. C. 89. 465.

(h) Massey v. Johnston, 12 East, 81.

(i) Gosset v. Howard, 10 Q. B. 453.

(j) Labalmondiere v. Frost, 1 Ell. &

(k) Reg. v. St. George, Bloomsbury, 24 Law J., M. C. 49.

¹ The jurisdiction of a justice must appear upon the face of the record, and will not be presumed.

In *Bridge v. Ford*, 4 Mass. 641, PARSONS, C.J., in delivering the opinion of the court, said: "It does not appear from any part of the record, that the justice had any jurisdiction in the cause referred to in the recognizance. We can not conjecture in what manner the process was instituted, or what was the cause of it, or whether it was a cause within the jurisdiction of the justice. *And we can not presume anything in favor of the jurisdiction of an inferior magistrate, as it is not general, but given and limited by statute.* The justice ought to have recited so much

989. *Description of the offense or subject-matter of complaint.*

—The nature of the offense concerning which the justice is to inquire and determine must be correctly stated, in order to show that the justice has jurisdiction over it. It should be described in the words of the statute creating it. (*l*) Where an Act of Parliament made the willful misapplication of parish money by a relieving officer a penal offense, to be inquired into and adjudicated upon by justices, and the information charged merely a misapplication of the parish money, not saying that it was willful, it was held that it did not charge any offense cognizable by the justices, and that the conviction founded upon it could not be supported. (*m*) And where an Act of Parliament made it a penal offense, cognizable by justices, to expose for sale metal buttons marked gilt, "knowing the same not to be gilt with gold or plated with silver," and the information charged the act to have been done fraudulently and unlawfully, without saying "knowingly," it was held that there was no offense charged of which the justices, had authority to take cognizance. (*n*)

A description, in the conviction, of the offense, in the terms of the Act creating it, where it appears from the whole tenor and scope of the Act that more is necessary to be proved by the evidence in order to constitute the offense than is stated in express terms upon the face of the statute, is not a sufficient description. (*o*) Where a statute enacted "that no conviction on this Act shall be set aside by any court for want of form, or through the mistake of any fact, circumstance, or other matter whatsoever, provided the material facts alleged in such conviction, and upon which the same shall be grounded, be proved to the satisfaction of the court," LORD KENYON declared that he could understand the enactment so far as it regarded the proceedings before

(*l*) *Rex v. Speed*, 1 Ld. Raym. 583. 630.

Smith Ex parte, 27 Law J., M. C. 186.

(*m*) *Carpenter v. Mason*, 12 Ad. & E.

(*n*) *Rex v. Jukes*, 8 T. R. 536.

(*o*) *Fletcher v. Calthorp*, 6 Q. B. 880.

of the cause, in the condition of the recognizance, as showed that he had legal cognizance of it." See also *State v. Hartwell*, 35 Me. 129; *Reeves v. Clark*, 5 Ark. 27; *Trader v. McKee*, 2 Ill. 558; *Jolly v. Fultz*, 34 Cal. 321; *Willey v. Strickland*, 9 Ind. 453.

courts of quarter sessions on appeal, but not as applied to proceedings removed into the Court of King's Bench. "On an appeal," observes his lordship, "the whole case is to be gone into; evidence is to be given to support the conviction, and then it may be known whether or not the material facts alleged in such conviction, and upon which the same shall be grounded, be proved to the satisfaction of that court: but when the conviction is removed here by certiorari, I do not understand how we can inquire into those facts. The great question here is, whether or not the material facts to constitute the offense be alleged in the conviction." (*p*)

990. *Of singling out the offender.*—Although it is, generally speaking, sufficient, in describing an offense in a conviction, to follow the words of the Act creating the offense, yet it is always necessary to add such facts as show that the person convicted was a party to the offense so described. (*q*) The conviction must single out the offender, and specify him by name, and therefore a conviction of "Harrison and Company" is a nullity, even against the party named. "We can not tell upon the face of such proceeding whether the delinquency of Harrison's partners, who are not before the court, may not have been imputed to him." (*r*) If the conviction convicts the offender of one or other of two offenses in the alternative, it is bad. (*s*)

991. *Description of the locality of the offense.*—It is a general rule, that all judicial acts exercised by persons whose judicial authority is limited as to locality must appear to be done within the locality to which the authority is limited. Justices, therefore, acting judicially, must appear to be acting in their jurisdiction, as well as for it; and those cases which seem at first sight to afford some ground for a different opinion, will be found on examination to be all cases in which the act done might be valid, though in point of fact done out of the jurisdiction. (*t*) . It is not sufficient to describe the justices as justices in the county, nor as justices for the county; but if they are described as doing the act as "jus-

(*p*) *Rex v. Jukes*, 8 T. R. 540.

(*q*) *Chaney v. Payne*, 1 Q. B. 721.

(*r*) *Rex v. Harrison*, 8 T. R. 508.

(*s*) *Rex v. Morley*, 1 Y. & J. 221.
Rex v. North, 6 D. & R. 146. See

Morris v. Ogden, L. R. 4 C P. 687; 38 Law J., C. P. 329.

(*t*) *Reg. v. Totness*, 11 Q. B. 90. *Reg. v. Crowan*, 14 Id. 221.

tices in and for the county," that will suffice. "'For,' observes WILLIAMS, J., "describes the authority, 'in' the place, in which the justices were when they made the order." (u)

In convictions, the place for which the magistrates act must be shown, the offense must be set out, and either it must appear that the offense was committed within the limits for which the convicting magistrates are appointed, or facts must be stated which give them jurisdiction beyond those limits. (x) It is not sufficient to affirm that the offense was committed within a locality over which they had jurisdiction as justices, without naming it. (y) Even where justices followed a form of conviction prescribed by statute, which form did not set forth the place where the offense was committed, it was nevertheless held that the conviction was bad, for not showing that the offense was committed at some place within the county of which they were justices. (z) It is not in all cases sufficient, therefore, to follow a form given by statute. (a)

Where a statute directs an act to be done by justices acting for the division, any justice of the county acting within the division is for this purpose a justice of the division. (b)

992. *Orders and adjudications by justices* must show upon the face of them that the justice had jurisdiction to make the order. "However high the authority may be, where a special statutory power is exercised, the person who acts must take care to bring himself within the terms of the statute. Whether the order be made by the Lord Chancellor or by a justice of the peace, the facts which gave the authority must be stated." (c) An order of justices under 11 Geo. 2, c. 19, s. 4, adjudging a person to pay double the value of goods fraudulently removed to prevent a distress, must show on the face of it that the person removing the goods was the tenant, and that the complainant was his landlord, or the bailiff, agent, or servant of such landlord, as otherwise it is not made to appear that the magistrates had any juris-

(u) Reg. v. Stockton, 7 Q. B. 527.

(x) Kite and Lane's case, 1 B. & C. 104.
 Rex v. Edwards, 1 East, 278. R. v. Chandler, 14 Ib. 274.

(y) Rex v. Johnson, 1 Str. 261.

(z) Rex v. Hazell, 13 East, 141.

(a) Re Peerless, 1 Q. B. 152.

(b) R. v. Price, Cald. 305 n.

(c) Coleridge, J., Christie v. Unwin, 11 Ad. & E. 379.

diction to make the order. (*d*) There must be a distinct finding on the face of the order by the magistrates of all the facts necessary to constitute the offense, and to give the justices authority to deal with it. (*e*) An order of justices, therefore, was quashed because it did not appear on the face of it that they were justices of the county or for the county, but only that they were residing in the county. (*f*)

The mention of the name of the county in the margin of the instrument only proves that it was made by the justices for that county, but does not show that the act to which it relates was committed in the county; (*g*) nor does it show that the justices were acting within the county at the time they made the order, (*h*) unless the marginal note of the county is incorporated into the body of the order by words of reference, and the whole when read together shows upon the face of it that the justices making the order were justices of or for the county, and that they made it in the county. Where an order of justices was headed "Westmoreland to wit," and the justices were described in the body of the order as justices of the peace "in and for the said county," it was held that this could mean no other county than the county stated in the margin; that the reference to it made it part of the order, and that it sufficiently appeared that the order was made in the county by justices for the county. (*i*) But where one county was named in the margin of the order and another in the body of it, and the justices omitted to state of which county they were justices, it was held that the jurisdiction was not shown, and that the order was bad. (*k*) It is not sufficient to place the name of a county or of a borough in the margin of the order, and to state in the body of it that the order is made by justices having jurisdiction within and for the said county or borough, without stating or showing that the order itself was made by them within the county or the borough for which they were justices. (*l*)

If a conviction and order, and adjudication thereupon made, are so worded as to impose a larger obligation than i

(*d*) *Rex v. Davis*, 5 B. & Ad. 554

(*e*) *Day v. King*, 5 Ad. & E. 366.

(*f*) *Rex v. Dobbyn*, 2 Salk. 474.

(*g*) *Rex v. Austin*, 8 Mod. 310.

(*h*) *Reg. v. St. George, Bloomsbury*,

24 Law J., M. C. 49.

(*i*) *Reg. v. Casterton*, 6 Q. B. 512.

(*k*) *Rex v. Moor Critchell*, 2 East, 66.

(*l*) *Reg. v. Newton Ferrers*, 9 Q. B.

32.

imposed by the statute authorizing them, the conviction and order can not be supported. A conviction, therefore, of several defendants, making each of them liable to be imprisoned until he has paid a penalty, and the costs and expenses of conveying not only himself but the other persons convicted to jail, will be bad, unless the statute on which the conviction is founded expressly renders all the defendants liable to be imprisoned until the costs of conveying all to jail have been paid. (*m*)

993. *Statutory forms of convictions and orders* are given by 11 & 12 Vict. c. 43, s. 17. These forms begin with a marginal note of the county; and they record that on a certain day and year within the said county the offending party was convicted before the undersigned justices of the peace for the said county; they state the nature of the offense, the time and place when and where it was committed, and the adjudication and order thereupon made. In stating the offense, care must be taken to show that the offense or act is within the cognizance or jurisdiction of the justice who makes the conviction or order, and that the offense created by the statute upon which the proceedings are founded has been committed. (*n*) The forms given by these statutes dispense with the necessity of setting out the information, the summoning of the defendant, the fact of his appearance or non-appearance, the evidence adduced against him, and the various details previously considered necessary to show that the magistrates proceeded recto ordine. (*o*) "If justices substantially adopt the forms given by the statute, they do all that is required of them." (*p*)

994. *Immateriality of mere surplusage*.—If proceedings before magistrates correctly describe the offense, and show when and where it was committed, and that the magistrate had jurisdiction over it, and over the individual charged with it, and contain all that is prescribed by statute to make them valid, they are not rendered invalid because they set out the information, the summons, the defendant's appearance, the examinations of the witnesses, and a host of particulars which are not now required to be stated or set forth on the face of

(*m*) Reg. v. Cridland, 27 Law J., M. C. 28.

(*n*) Reg. v. Johnson, 8 Q. B. 106.

(*o*) Wray v. Toke, 12 Q. B. 492.

(*p*) Allison, In re, 10 Exch. 568.

the proceedings. Where a particular form is required by statute, and the form actually used contains all that the statute requires, and a great deal more, the unnecessary addition does not necessarily invalidate the proceedings. (*q*) But it will do so if the unnecessary addition renders the order or instrument substantially different from what is required by the statute. (*r*)

995. *Effect of the conviction.*—So long as the conviction remains in force, it can not be contradicted, nor the facts recorded therein be controverted; (*s*) and it is a principle of law, that where justices of the peace have an authority given them by an Act of Parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the Act to do to originate their jurisdiction, a conviction drawn up in due form and remaining in force is a protection in any action brought against them for the act so done, unless they have acted corruptly, and have convicted and granted a warrant maliciously, and without any reasonable and probable cause (*t*) (post, s. 2). And now, although the magistrate had no jurisdiction in the matter, and had no legal authority to make the conviction or order, the conviction is nevertheless conclusive, and protects him from an action until it has been quashed.

996. *Warrants of distress and commitment* must state the cause of the committal or distress. (*u*) By 11 & 12 Vict. c. 43, s. 19, it is enacted, that where a conviction adjudges a pecuniary penalty to be paid, or where an order requires the payment of money, (*v*) and by the statute authorizing the conviction or order, such penalty, compensation, or sum of money is to be levied upon the goods and chattels of the defendant by distress and sale thereof, and also in cases where, by the statute in that behalf, no mode of levying the penalty, compensation, &c., is provided, it shall be lawful for the justice, &c., making the conviction or order, or for any justice of the peace for the same county, riding, division, &c., to issue a distress-warrant for the levying of the same in the

(*q*) *Rex v. Jefferies*, 4 T. R. 769.

(*r*) *Rex v. Priest*, 6 T. R. 538.

(*s*) *Strickland v. Ward*, 7 T. R. 633 n.

(*t*) *Basten v. Carew*, 3 B. & C. 653.

(*u*) *Lawrenson v. Hill*, 10 Ir. C. L. R.

184.

(*v*) As to imprisonment in case of non-payment of penalties of £5 and under, see *The Small Penalties Act*, 1865, 28 & 29 Vict. c. 127.

mode therein provided, or, in case the defendant has no sufficient goods and chattels, to issue a warrant of commitment (s. 21). And it is enacted (s. 20), that in all cases where a justice of the peace shall issue any such warrant of distress, it shall be lawful for him to suffer the defendant to go at large, or verbally, or by a written warrant, to order the defendant to be detained in custody until return be made to such warrant of distress, unless security is given by recognizance or otherwise, to the satisfaction of such justice, for his appearance, &c. "It is to be remembered," observes COLERIDGE, J., "that such an imprisonment is not a part of the punishment under the conviction, but is a mere detention until the return of the warrant, in case there should be no distress. It is a power to imprison quia timet, extra the punishment, and such a power should be strictly pursued. Now, assuming that magistrates acting in the exercise of that power, have detained a party by parol commitment for an indefinite time (the warrant of distress not being returnable on a day certain), there is an excess of jurisdiction." (x) In all cases of commitment of persons to prison, the exact period of imprisonment must be stated on the face of the warrant, for "if it is left indefinite, a man may be imprisoned for life." (y)

In all cases of convictions, where the statute on which the same are founded provides no remedy, in case it shall be returned to a warrant of distress thereon, that no sufficient goods can be found, the justice to whom such return is made (s. 22), or any other justice for the same county, &c., may, by his warrant, commit the defendant for any term not exceeding three calendar months, unless the sum adjudged to be paid, and all costs, &c. (the amount thereof being ascertained and stated in such commitment), shall be sooner paid. Provision is made (s. 23) for the issue of warrants of commitment for enforcing payment of penalties, and punishing (s. 24) disobedience of orders of justices. See 28 & 29 Vict. c. 127.

Where an imprisonment, warrant of justices, and seizure of goods thereunder, are all defended on the ground that there was an adjudication to pay costs, and there is no such adjudication, the warrant is illegal, and the imprisonment and

(x) *Leary v. Patrick*, 15 Q. B. 274.

(y) *Ld. Denman, C. J., Prickett v. Gratex*, 8 Q. B. 1029.

seizure of the goods are wrongful, and an excess of jurisdiction. (z)

By the 32 & 33 Vict. c. 62, arrest and imprisonment for debt are abolished with certain exceptions, one of which is "default in payment of any money recoverable summarily before a justice or justices of the peace" (s. 4). Under these words it has been held that costs, awarded by the court of quarter sessions to one of the parties to an appeal, and which by certain Acts might be enforced before a justice by warrant of distress, and in default of distress by warrant of commitment, are within the exception. (a)

997. *Exemption of justices from actions in respect of warrants of distress for poor-rate.*—By the 11 & 12 Vict. c. 44, s. 4, it is enacted, that where any poor-rate shall be made, allowed, and published, and a warrant of distress shall issue against the person named and rated therein, no action shall be brought against the justice who shall have granted such warrant by reason of any irregularity or defect in the rate, or by reason of such person not being liable to be rated therein.

998. *Warrants of distress and commitment in case of non-payment of costs by an informer or complainant.*—By 11 & 12 Vict. c. 43, s. 25, it is enacted, that where any information or complaint is dismissed with costs, the sum awarded for costs may be levied by distress on the goods of the prosecutor or complainant; and, in default of distress or payment, such prosecutor or complainant may be committed to prison for any time not exceeding one calendar month, unless such sum, and all costs and charges of the distress, and of the commitment, and conveying of such prosecutor or complainant to prison (the amount thereof being ascertained and stated in the commitment), shall be sooner paid.

999. *Service of a copy of the minute of the order before the issue of a warrant of commitment or distress.*—It is enacted also (s. 17), that in all cases where by Act of Parliament authority is given to commit a person to prison, or to levy upon his goods or chattels by distress, for not obeying any order of justices, the defendant shall be served with a copy of the minute of such order before any warrant or commitment or of distress shall issue, and such order or minute shall

(z) *Leary v. Patrick*, 15 Q. B. 274.

(a) *Reg. v. Pratt*, L. R., 5 Q. B. 176.

not form any part of such warrant of commitment or of distress. Wherever the interest of a person is to be affected by an order of magistrates; he ought to have an opportunity of contesting it. (*b*)

1000. *The power of appeal to the court of quarter sessions against summary convictions and orders of justices* is not a matter of common right, but of special provision in particular statutes. It may be given either absolutely, or conditionally, and if no limits as to time be prescribed, the appeal must be brought within a reasonable time. (*c*) A right of appeal can not be applied, but must be given in express terms. (*d*) Most statutes giving to justices a power of summary conviction, also give a right of appeal, and prescribe the time and mode of exercising the right; and some of them impose upon the convicting justice the duty of making known to the party convicted his right of appeal. (*e*) Any person who thinks himself aggrieved by any summary conviction by borough justices, under the Municipal Corporation Act, may appeal to the court of quarter sessions in the manner therein provided. (*f*) The procedure in cases of appeal to courts of quarter sessions is now mainly regulated by 12 & 13 Vict. c. 44, which prescribes fourteen clear days' notice of appeal, and requires the grounds of appeal to be set forth in such notice; but the provisions in this statute relating to notices of appeal do not (s. 2) affect appeals against summary convictions, orders of removal, orders relating to pauper lunatics, orders in bastardy, or proceedings under statutes relative to the excise, customs, stamps, taxes, or post office.

1001. *Excess of jurisdiction may be made a ground of appeal* as well as an erroneous decision. But a person having power of appeal is not bound to appeal where a magistrate has acted without jurisdiction. He is at liberty to treat the act as void, and to avail himself of all existing remedies at common law for obtaining satisfaction for the wrong done. Many recent statutes giving magistrates authority to make orders in certain cases or certain things to be done, but giving parties the

(*b*) Reg. v. Totness Union, 7 Q. B. 699. Painter v. Liv. Gas Co., 3 Ad. & E. 443.

(*c*) Lord Ellenborough, Rex v. Oxfordshire Just., 1 M. & S. 448. Rex v. Cashio-

bury Just., 3 D. & R. 35.

(*d*) Reg. v. Stock, 8 Ad. & E. 411.

(*e*) Paley on Summary Convictions, 5th ed., p. 340, *et seq.*

(*f*) 5 & 6 Wm. 4, c. 76, s. 131.

power of appealing to the superior courts against the decision of such magistrates, do not in anywise abridge the controlling power of the Court of Queen's Bench, in cases where the justices have exceeded their authority, or have acted without authority. The power of appeal is given for the purpose of reviewing the decision of justices in cases where they had jurisdiction in the matter, but are supposed to have decided erroneously in point of law on the facts before them, or upon the merits. Where they had no jurisdiction to make the order, an aggrieved party is entitled to a writ of certiorari, to remove the order and quash it, just the same as if no power of appeal at all had been given. (*g*)

1002. *Of the execution of convictions and orders after notice of appeal.*—Some statutes giving an appeal against summary convictions expressly stay execution pending the appeal. (*h*) From the 27th section of the 11 & 12 Vict. c. 43, it may be argued that, pending an appeal, justices are not at liberty to grant a warrant of execution, as they are expressly authorized to grant the warrant after the appeal is determined. But section 35 enacts that the Act shall not extend to any complaints, orders, or warrants in matters of bastardy, with certain exceptions. The pendency of an appeal, therefore, against an order on a putative father, and the granting of a case for the opinion of the Court of Queen's Bench, as to whether the order ought to be enforced, does not take away the jurisdiction of justices to issue a warrant in execution of the conviction, and to enforce payment of the money due under the order in the interim; for if the putative father could, as a matter of right, entirely escape all liability to contribute to the maintenance of the child pending the appeal, he might for three months allow the child to starve and oppress the mother, although he never meant bona fide to prosecute the appeal. "In a vast majority of cases, however," observes LORD CAMPBELL, "it would be exceedingly improper in the justice to grant a warrant after notice of appeal had been given and recognizances entered into, and before the hearing of the appeal, or before the time for hearing it,

(*g*) *Birmingham Churchwardens, &c. v. Shaw*, 10 Q. B. 880; 18 Law J., M. C.

89. *Pedley v. Davis*, 10 C. B., N. S., 492; 30 Law J., C. P. 379.

(*h*) *Reg. v. Aston*, 1 L. M. & P. 491.

has expired. And, acting from a corrupt motive, he might be liable to an action for maliciously granting it. But I do not think that in granting it he could be said to have acted without jurisdiction, and possibly he might show that he had acted laudably in granting it. It might, on the other hand, be highly improper for the justice to try to enforce the order when the justices at quarter sessions had expressed a grave doubt as to its validity, and his doing so might be evidence of malice." (i)

1003. *Exemption of justices from liability where a defective conviction or order has been confirmed upon appeal.*—By the 11 & 12 Vict. c. 44, s. 6, it is enacted, that in all cases where a warrant of distress or warrant of commitment shall be granted by a justice of the peace upon any conviction or order, which either before or after the granting of such warrant shall be confirmed upon appeal, no action shall be brought against the justice who granted the warrant for anything which may have been done under the same by reason of any defect in such conviction or order.

1004. *Statement of a case to the superior courts by way of appeal from decisions of justices.*—By 20 & 21 Vict. c. 43, it is enacted, that after the hearing and determining by justices of any information or complaint which they have power to hear and determine in a summary way, (k) either party to the proceeding may, if dissatisfied with the determination as being erroneous in point of law, apply in writing within three days to the justices to state and sign a case, setting forth the facts and grounds of such determination, for the opinion thereon of one of the superior courts of law, to be named by the party applying. (l) Notice in writing, with a copy of the case stated and signed, is to be given to the other party to the proceedings, and security is to be given (m) by the appellant to prosecute the appeal without delay, and to pay such costs as may be awarded (s. 3). If the justices refuse to state a case (s. 4), the appellant may apply (s. 5) to the Court of

(i) *Kendal v. Wilkinson*, 4 Ell. & Bl. 690; 24 Law J., M. C. 89.

(k) *May, Ex-parte*, 2 B. & S. 428; 31 Law J., M. C. 161. Whether a warrant of distress for the non-payment of a rate is such a proceeding, *quare*? See *Sweetman v. Guest*, L. R., 3 Q. B. 262.

(l) The decision of a dispute referred to justices, under 21 & 22 Vict. c. 101 (as to friendly societies), is within the above Act. *R. v. Lambarde*, L. R. 1 Q. B. 388.

(m) See *Stanhope v. Thorsby* L. R., 1 C. P. 423.

Queen's Bench, upon an affidavit, for a rule calling upon the justices and the respondent to show cause why the case should not be stated; and if the rule is made absolute, the case is to be stated on the appellant's entering into the required recognizances.

Power is given to the superior courts to hear and determine cases sent up to them under this statute, and reverse, affirm, or amend the decision of the justices below, or send the case back (s. 7) for amendment, and to make all necessary orders in the matter. The authority and jurisdiction of the superior courts in the matter may (s. 8) be exercised by a judge at chambers, and after the decision of the superior court has been given, the order is to be enforced in the mode pointed out by the statute. "It is a very salutary practice," observes LORD CAMPBELL, "for the recorder or justices to find the facts, and submit them to this court for us to decide whether the case was within the jurisdiction of the justices or not. That is much better than for the court to have to gather the facts from conflicting affidavits." (n)

1005. *Of the quashing of convictions and orders—Removal of orders and convictions by certiorari.* (o)—The proceedings of all inferior courts of record are removable by certiorari, for the purpose of being examined by the Court of Queen's Bench, except where the writ of certiorari is expressly taken away by statute; (p) and even then the writ is not taken away, as we shall presently see, in those cases where inferior courts or magistrates have acted in a matter over which they had no jurisdiction, nor in cases where they have exceeded their jurisdiction, nor is it taken away by express prohibitory words when it is moved for on behalf of the crown. If there has been before the inferior court reasonable evidence from which that court could draw the conclusion that facts existed which would give them jurisdiction, and they have drawn that conclusion, the Court of Queen's Bench has no power to review their decision, and determine whether it was right or wrong. (q) Where an order of justices confirming a conviction is

(n) *Reg. v. Dickenson*, 26 Law J., M. C. 204.

(o) See Chitt. Arch. Pr., 11th ed., tit. CERTIORARI.

(p) *Groenvelt v. Burwell*, 1 Ld. Raym. 469. *R. v. Moreley*, 2 Burr. 1041. R.

v. West Riding Justices, 34 Law J., M. C. 227.

(q) *Blackburn, J., In re Pater*, 33 Law J., M. C. 151. *Pease v. Chaytor*, 32 L. W. J., M. C. 121.

void, on the ground of interest in the justices who made the order, the Court of Queen's Bench will grant a certiorari to bring up the order for the purpose of quashing it, although the writ is taken away by statute, for a statutory clause taking away the writ must be understood to assume that the order has been made by proper authority; but that is not proper authority which is exercised by interested justices. (*r*) If the order was made by a court of quarter sessions on appeal from justices in petty sessions, the Court of Queen's Bench will quash it, and grant a mandamus to compel the quarter sessions to enter continuances, and again hear the appeal. (*s*) But a person who seeks to quash a conviction on the ground that the justices were personally interested, should make the objection at the time of the hearing, or show that both he and his attorney were ignorant of the fact at that time. (*t*)

1006. *Decisions which are final, and can not be reviewed by certiorari or mandamus.*—By 12 & 13 Vict. c. 45, it is enacted, that the decisions of courts of quarter sessions upon the hearing of any appeal, as to the sufficiency of the statement of any ground of appeal, and as to the amending, or refusing to amend, any order or judgment of justices appealed against, or the statement of any ground of appeal, and as to the substitution of new recognizances, shall be final, and not liable to be reviewed in any court by means of a writ of certiorari or mandamus, or otherwise.

1007. *Commitment for contempt.*—If an inferior court having power to commit or fine for contempt treats that as a contempt which there was no reasonable ground for so treating, the Court of Queen's Bench will interfere to protect the person subjected to an improper exercise of the power, but the court can not take upon itself the functions of a court of appeal from the decision of the court below, and if there was any colorable ground for the exercise of its jurisdiction, the Court of Queen's Bench will not interfere with its judgment

(*r*) Reg. v. Hertfordshire Justices, 6 Q. B. 753. Reg. v. Chelt. Com., 1 Q. B. 467. See Rex v. Justices of Monm., 8 B. & C. 137.

(*s*) Hopkins, Ex-parte, Ell. Bl. & Ell.

100.

(*t*) Reg. v. Ld. Huntingtower, 8 Cox Cr. C. 562. Reg. v. Chelt. Com., 1 Q. B. 474. Dimes v. Grand Junc. Canal Co., 3 H. L. C. 759.

in the matter. (u) A contempt of court being a criminal offense, no person can be punished for it, unless the specific offense charged against him be distinctly stated, and an opportunity given him of answering. (x)¹

1008. *When the writ of certiorari is not taken away by express statutory prohibition.*—The writ of certiorari is not taken away by express prohibitory or restraining clauses in cases where justices of the peace have acted without jurisdiction, (y) or where there were no facts before them to give them jurisdiction, or where a summons has been granted under one statute, and the defendant is convicted under another, (z) or where the decision has been made by a court improperly constituted, as where magistrates have acted in the execution of their office in matters and proceedings in which they were personally interested, (a) or where it can be shown that the conviction has been obtained by fraud and collusion to defeat the law, or interfere with the pure administration of justice; for in all cases where the proceedings of courts of inferior jurisdiction are shown to have been a fraud and mockery, or the result of conspiracy and subornation of perjury, the court will exercise its jurisdiction as a court of control over infe-

(u) *Pater*, In re, 33 Law J., M. C. 142.

(x) *Ex-parte Pollard*, L. R., 2 Pri. Co. Ca. 106. See *M'Dermott v. Judges of British Guiana*, 38 Law J., P. C. 1; L. R., 2 P. C. Ca. 341.

(y) *Rex v. Derb. Just.*, 2 Kenyon, 299.

Reg. v. Warwick Just., 6 Ell. & Bl. 837. *Reg. v. Badger*, Ib. 154. *Reg. v. St. Albans*, 22 Law J., M. C. 142.

(z) *Reg. v. Brickhall*, *ante*.

(a) *Reg. v. Cheltenham*, 1 Q. B. 474. *Reg. v. Aberdare Canal Co.*, 14 Ib. 854.

¹ A justice of the peace may commit a person for contempt during the progress of a trial before him, and may impose a fine therefor, and imprison the person offending until the fine is paid. *Brown v. People*, 19 Ill. 613; *Luning v. Bentham*, 2 Bay. (S. C.) 1; *State v. Johnson*, 1 Brev. (S. C.) 155; *Furr v. Mass.*, 7 Jones (N. C.) 525. But in New York it is held that they have no power to commit a person refusing to be sworn as a witness in criminal cases; *People v. Webster*, 3 Parker Cr. (N. Y.) 513; and in Pennsylvania, it is held that they have no power to commit for contempt summarily; *Albright v. Lapp*, 26 Penn. St. 99. But it would seem that where a justice of the peace is invested with judicial powers, he is also invested with all the power requisite to support his authority and vindicate and support the laws. Otherwise his authority is a myth, and may be set at defiance by any one. At the common law, any judicial officer, whether of an inferior or superior jurisdiction, when sitting as a court upon a matter within his jurisdiction, is invested with power to protect the power, authority, and dignity of his court, and to commit for all contempts, either of word or deed, committed in open court, and in the presence of the judge or justice. 5 Viner's Abr. Contempts, 447; 2 Hawkins P. C., 96, 112, 113; Lilly's Register, 305.

rior jurisdictions, and will interfere by certiorari and quash the proceedings, although it is expressly enacted that no certiorari shall be issued to remove them, (*b*) "for fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice." LORD COKE says, "It avoids all judicial acts, ecclesiastical or temporal," and therefore the sentence of a spiritual court may be annulled by proving the same to have been obtained by fraud or collusion. (*c*)

If a local board exceed their powers in making a by-law, and a justice convicts upon the strength of it, he exceeds his authority in so doing, and the conviction may be quashed on certiorari, although the statute authorizing the creation of the board and the making of the by-laws enacts that no proceeding touching the conviction of any offender shall be removable by certiorari; and the allowance of the by-law by the Secretary of State makes no difference, "for no power is given to him to legislate; he can only confer an authority on a by-law made conformably to the statute authorizing it to made." (*d*)

"It is a known rule," further observes BAYLEY, J., "that general words in an Act that no certiorari shall be allowed, or the like, will not bind the crown," (*e*) nor any private person prosecuting on behalf of the crown, (*f*) for the king's prerogative can not be taken away by Act of Parliament except by express words, and it is part of his prerogative to try his cause in what court he pleases. (*g*) "If," observes ERLE, J., "the use of the writ of certiorari were restored in all cases, for the purpose of raising questions of substance for the opinion of the court, it would be a salutary addition to the jurisprudence of this country." (*h*)

A certiorari will lie to remove judicial acts only. It will not be granted, therefore, to remove mere ministerial proceedings, such as a warrant to apprehend an offender, or a

(*b*) Reg. v. Gillyard, 12 Q. B. 527.

(*c*) Duchess of Kingston's case, 2 Smith's L. C. 679, 6th ed. See Patch v. Ward, L. R., 3 Ch. App. 203. Pearse v. Dobinson, L. R., 1 F.q. Ca. 241.

(*d*) Reg. v. Wood, 5 Ell. & Bl. 55. Brown v. Local Board of Holyhead, 32

Law J., Exch. 25. R. v. Grey, L. R., 1 Q. B. 469.

(*e*) Rex v. Allen, 15 East, 342. Rex v. Davies, 5 T. R. 626.

(*f*) Reg. v. Spencer, 9 Ad. & E. 485.

(*g*) Rex v. Berkley, 1 Kenyon, 100.

(*h*) Reg. v. Dickenson, 26 Law J., M. C. 206.

warrant of distress, (*i*) or an order for the appointment of overseers. (*k*)

1009. *Proof by affidavit of the facts and circumstances calling for the interference of the superior court.*—Although the proceedings before justices are all regular on the face of them, and disclose a case within the jurisdiction of the magistrates, yet the parties on either side may bring before the superior courts affidavits disclosing on the part of the magistrates the evidence on which they acted, and on the part of the defendant the evidence on which he relied before them, as well as other evidence affecting the merits not adduced before them, for the purpose of showing that the case was not within the jurisdiction of the magistrates. The superior court has no power to review the decision on the merits, and to reverse it on the ground that it was unwise or unjust. All that it can do is to see that the case was within the jurisdiction of the magistrates who adjudicated upon it, and that their proceedings are on the face of them regular, and according to law. (*l*)

“Magistrates,” observes the court, “can not, as it is often said, give themselves jurisdiction merely by their own affirmation of it. (*m*) But it is obvious that this may have two senses: in the one it is true; in the other, on sound principles and on the best considered authority, it will be found untrue. Where the charge laid before the magistrate does not amount in law to the offense over which the statute gives him jurisdiction, his finding the party guilty, by his conviction in the very terms of the statute, would not avail to give him jurisdiction. If, the charge being really insufficient, the magistrate has misstated it in drawing up the proceedings, so that they appear to be regular, it would be clearly competent to the defendant to show by affidavits what the real charge was, and, that appearing to be insufficient, we should quash the conviction. Whenever a charge has been presented to the magistrate over which he has no jurisdiction, he has no right to entertain the question, or commence an inquiry into the merits, and his proceeding to a conclusion will not give

(*i*) *Rex v. King*, 2 T. R. 235. *Rex v. Atkins*, 4 Ib. 12.
(*k*) *Re The Overseers of Pudding Nor-*

ton, 33 Law J., M. C. 136.

(*l*) *Terry v. Huntingdon*, Hardr. 480

(*m*) *Welch v. Nash*, 8 East, 404.

him jurisdiction. But as in this latter case we can not get at the want of jurisdiction but by affidavits, of necessity we must receive them. But where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the inquiry. In so doing he undoubtedly acts within his jurisdiction, but in the course of the inquiry, evidence being offered for and against the charge, the proper, or the irresistible, conclusion to be drawn may be that the offense has not been committed, and so that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of showing this is clearly in effect to show that the magistrate's decision was wrong if he affirms the charge, and not to show that he acted without jurisdiction; for they would admit that, in every stage of the inquiry up to the conclusion, he could not but have proceeded, and that if he had come to a different conclusion, his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offense. Upon principle, therefore, affidavits can not be received under such circumstances. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; (n) it is determinable on the commencement, not at the conclusion, of the inquiry; and affidavits to be receivable must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry." (o)

Affidavits may be used to show that there was no evidence before the justice of the facts necessary to give him jurisdiction in the matter, but if there were facts in evidence before the justice, from which it was reasonable to infer that he had jurisdiction, it can not be shown that there was other evidence, from which the justice might reasonably have inferred the contrary; for that would only go to show that the finding of the justice on a matter within his jurisdiction was wrong. Thus, although an information under 4 Geo. 4, c. 34, for punishing certain classes of servants who have contracted to serve, and have refused to enter upon the service, or who

(n) See *Ex parte Vaughan*, L. R., 2 Q. B. 114. Thompson, *In re*, 30 Law J., M. C. 23. Penny, *In re*, 7 Ell. & Bl. 600; 26 Law

(o) Reg. v. Bolton, 1 Q. B. 72. Thompson v. Ingham, 14 Q. B. 718.

have absented themselves therefrom without leave, or have misconducted themselves in such service, is good on its face, as showing that there was the requisite contract to serve, yet it is competent to an accused person to show that there was no evidence before the justice on which he was warranted in coming to the conclusion that there was any contract of service at all, and that there was nothing from which he could legally or reasonably infer that he had any jurisdiction in the matter. (*p*)

If justices have proceeded to remove a pauper without any complaint by parish officers of the chargeability of such pauper, the fact may be shown by affidavit; for if there is no complaint, the magistrates have nothing before them in respect of which they can make an order, or exercise their magisterial functions. (*q*)

1010. *Amendment of orders or judgments of justices on return to a certiorari.*—By 12 & 13 Vict. c. 45, s. 7, it is enacted, that if upon the return to any writ of certiorari any objection shall be made, on account of any omission or mistake in the drawing up of an order or judgment of justices, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the justices making such order, or giving such judgment, to have authorized the drawing up thereof free from the said omission or mistake, it shall be lawful for the court, upon such terms as to payment of costs as it shall think fit, to amend such order or judgment, and to adjudicate thereupon as if no such omission or mistake had existed; but no such objection is to be allowed unless the omission or mistake has been specified in the rule for issuing such certiorari. (*r*) If, on the face of an order, the justices making it are not described as justices “in and for” the borough in which the order is made, or there is any other defect in point of form; the court will amend the defect without payment of costs on either side. (*s*)

1011. *Of testing the legality of a commitment by writ of*

(*p*) *Bailey's Case*, 3 Ell. & Bl. 618.
Reg. v. Dickenson, 26 Law J., M. C. 204.
Pedgrift v. Chevallier, 8 C. B., N. S. 240, 246. *Ellis v. Kelly*, 6 H. & N. 222.
Ciaven v. Stubbins, 34 Law J., Ch. 126.

(*q*) *Reg. v. Justices of Bucks*, 3 Q. B. 807.

(*r*) *Reg. v. Higham*, 26 Law J., M. C. 116. *R. v. Purdey*, 34 Law J., M. C. 4.

(*s*) *Reg. v. Hellingley*, 1 Ell. & Ell. 749; 28 Law J., M. C. 167.

habeas corpus.—The legality of an imprisonment under a warrant of commitment may be brought under the consideration of the superior courts, or a judge in chambers, by writ of *habeas corpus*, which may be sued out either in term or vacation. It is directed to the jailer in whose custody the prisoner is detained, directing him to bring up the body of such prisoner before the court or judge, together with the cause of his being taken and detained. (t) Where a prisoner has been lodged in jail under a bad warrant of commitment in execution of a conviction, a good warrant of commitment subsequently made out and delivered to the jailer, but before a rule for a *habeas corpus* has been obtained, is a good answer to the rule. (u)

The validity of the commitment may be tried on moving for a rule to show cause why a writ of *habeas corpus* should not issue, and why, in the event of the rule being made absolute, the prisoner should not be discharged, without the writ actually issuing, or the prisoner being personally brought before the court. (x) On moving for a writ of *habeas corpus*, the conviction may be brought before the court, verified by affidavit, for the purpose of defeating the magistrate's commitment; but in such case the commissioner, before whom the affidavit is sworn, ought to certify on the exhibit annexed that it is the document referred to in the affidavit. (y) Although a return to a writ of *habeas corpus* may be good on the face of it, it may be shown that the conviction and commitment, under which the prisoner is detained, were substantially a civil proceeding, and that the arrest took place on a Sunday. (z)

Upon a return to a *habeas corpus* affidavits are not admissible to show that the offense was not committed within the jurisdiction of the committing justice. (a)

When a prisoner is entitled to his discharge from custody as a matter of right, the court has no power to impose any terms upon him as the condition of his release, and will not

(t) 2 Chitt. Arch. Pr. 1309, 11th ed. Fry's *HABEAS CORPUS* (*Canadian Prisoner's Case*).

(u) Cross, *Ex parte*, 26 Law J., M. C. 201. Reg. v. Richards, 5 Q. B. 932. Smith, *Ex parte*, 27 Law J., M. C. 186.

(x) Eggington's Case, 2 Ell. & Bl. 731

(y) Allison, *In re*, 10 Exch. 561.

(z) Eggington's Case, 2 Ell. & Bl. 717. Swan v. Dakins, 16 C. B. 93.

(a) Smith, *Ex parte*, 27 Law J., M. C. 186.

make his discharge from custody dependent upon his undertaking to bring no action against those who have unlawfully caused him to be imprisoned. (*b*)

1012. *Proceedings against justices to compel them to act in particular cases.*—By the 11 & 12 Vict. c. 44, s. 2, it is enacted that in all cases where a justice of the peace shall refuse to do any act relating to the duties of his office as such justice, (*c*) it shall be lawful for the party requiring such act to be done to apply to the Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice, and also the party to be affected by such act, to show cause why such act should not be done; and if after due service of such rule good cause shall not be shown against it, the said court may make the same absolute, with or without, or upon payment of, costs, as to them shall seem meet; and the justice, upon being served with such rule absolute, is to obey the same and do the act required; and no action or proceeding whatsoever is to be commenced or prosecuted against such justice for having obeyed the rule and done the act thereby required. (*d*)

Before the court will make an order under this section of the statute, it must be satisfied that the act sought to be enforced would be a lawful act. Where a rule was obtained calling upon justices to show cause why they should not issue a distress-warrant to enforce an order made by them, and it appeared that the order was invalid, and that the issuing and execution of a distress-warrant upon it would be an act of trespass, the court discharged the rule. (*e*) But the court can not inquire into the merits, and if the justices have jurisdiction, and the order is good upon the face of it, they will be compelled to enforce it. (*f*)

The court will not try a doubtful question of title on application for an order under this section. "It would be very awkward," observes PATTESON, J., "if the new statute had the effect of bringing all questions of title before us upon affidavit." (*g*)

(*b*) Downey's Case, 7 Q. B. 281.

(*c*) As to what is a refusal, see R. v. Paynter 26 Law J., M. C. 102.

(*d*) Reg. v. Mainwaring, Ell. Bl. & Ell. 474.

(*e*) Reg. v. Collins, 21 Law J., M. C.

73.

(*f*) Hartley, *In re*, 31 Law J., M. C.

222.

(*g*) Reg. v. Browne, 13 Q. B. 654.

1013. *Right of county justices to order the expense of county litigation to be defrayed out of the county funds.*—Whenever a duty is imposed on a county, and costs incidentally and necessarily arise in questioning the propriety of acts done to enforce that duty, the magistrates who have the superintendence of the county purse have a right to defray such expenses out of the county stock. Expenses of this sort have always been borne by the county, and uniform and unbroken usage facit jus. (*h*)

1014. *Of the power of justices to give costs.*—Justices in their courts have power under divers statutes to order payment of costs by the party whom they decide against. (*i*) An order directing the losing party to pay costs to the clerk of the peace to be by him paid to the party entitled to them is correct in form. (*k*) Where there has been an information before, and a conviction by, justices, which conviction is appealed against and quashed, the informer lodging the information, and not the justices who convict, is the party to the proceedings against whom the order for costs is to be made. (*l*)

SECTION II.

EXEMPTION OF CONSTABLES AND THEIR ASSISTANTS FROM LIABILITY WHEN ACTING IN THE EXECUTION OF WARRANTS AND ORDERS OF MAGISTRATES.

1015. *Exemption of constables, officers, and their assistants from liability for acts done by them in obedience to warrants of justices.*—By 24 Geo. 2, c. 44, s. 6, it is enacted, that no action shall be brought against any constable or other officer, or against any person acting by his order or in his aid, for anything done in obedience to any warrant under the hand and

(*h*) *Rex v. Essex*, 4 T. R. 591.

(*i*) As to costs under the Vagrant Acts, 5 Geo. 4, c. 83. Costs in appeals, 12 & 13 Vict. c. 45, ss. 5, 13. *Reg. v. Justices of Middlesex*, L. R., 6 Q. B. 220. *Rawnsley v. Hutchinson*, L. R., 6 Q. B. 305. Costs of prosecutions for the non-repair of a highway, 5 & 6 Wm. 4, c. 50,

s. 98. Where the liability to repair is disputed, 25 & 26 Vict. c. 61, s. 19.

(*k*) *Gay v. Matthews*, 33 Law J., M. C. 14. As to orders to pay to the party entitled, see *Reg. v. Huntley*, 3 Ell. & Bl. 172.

(*l*) *Reg. v. Purdey*, 34 Law J., M. C. 4

seal of any justice, until demand has been made or left at his usual place of abode by the party intending to bring the action, or his attorney or agent, in writing, signed by the party demanding the same, (*m*) of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after demand. And in case after demand and compliance therewith any action shall be brought against such constable, officer, or person acting in his aid, without making the justice a defendant, the jury shall, on production and proof of the warrant at the trial, give their verdict for the defendant, notwithstanding any defect of jurisdiction in such justice. And if the action is brought jointly against the justice and constable, or officer, &c., then, on proof of the warrant, the jury shall find for such constable, officer, &c., notwithstanding such defect of jurisdiction.

Every person to whom a statute requires a warrant to be directed, and who is required to execute the same, may be considered an officer of the law, coming within the principle of the protection afforded by this statute, (*n*) and has the period of six days after the demand of his authority for the production of it; within which time, if he comply with the demand, he secures his indemnity. But if he delay after that time, he subjects himself to be sued as any other person. If, however, after the six days have expired, but before the issue of a writ, he complies with the demand, he is still entitled to the protection of the statute. (*o*) This statute is confined to actions of tort, (*p*) and the officer, in order to be entitled to protection, must show that in doing what he did he acted in obedience to the warrant; for if he exceeds his authority, or acts without a warrant, or arrests a person not named in the warrant, he is not entitled to the benefit of the statute. (*q*)

If the warrant is directed to be executed within the limits of a particular county, and the officer by mistake executes it beyond the prescribed limits, he has not acted in obedience to the warrant, and is not entitled to the statutory protec-

(*m*) *Clark v. Woods*, 2 Exch. 405.

(*n*) *Pedley v. Davis*, 30 Law J., C. P.

374.

(*o*) *Jones v. Vaughan*, 5 East, 447.

(*p*) *Irving v. Wilson*, 4 T. R. 485.

(*q*) *Bell v. Oakley*, 2 M. & S. 250
Postlethwaite v. Gibson, 3 Esp. 220
Galliard v. Laxton, *ante*.

tion. (*r*) Neither can he claim the benefit of the statute in cases where, when acting under a search-warrant, he has seized and carried away articles not mentioned in the warrant, and not in anywise connected therewith; (*s*) nor when, under a warrant to apprehend A, or to seize the goods of A, he apprehends B, or takes the goods of B; (*t*) nor if he exceeds the authority given him by the warrant and commits any excess, such as remaining longer in a dwelling-house than he was legally authorized to remain, or breaking open doors and windows which he was not authorized to break open. (*u*) But whenever the officer has acted in obedience to the warrant, he secures his indemnity by complying with the requirements of the statute, although the warrant may be illegal or improper, or may have been granted by a magistrate who had no jurisdiction or power to grant it. (*x*) If the officer loses the protection of the statute, he must justify under the justice's warrant. (*y*)

By the 11 & 12 Vict. c. 43, s. 19, constables are authorized to execute warrants out of their districts, provided they are executed within the jurisdiction of the justice granting or backing the same. But the constable is not bound to execute a warrant out of his own district. (*z*) A warrant of distress for rates directed to two persons for execution, may be executed by one of them alone. (*a*)

1016. *Excess of authority on the part of constables and officers—Handcuffing unconvicted prisoners.*—If a constable abuses the legal authority conferred upon him by detaining a prisoner an unreasonable time without taking him before a magistrate, or by unnecessarily handcuffing him, he becomes a trespasser ab initio, and can not protect himself under the warrant. A constable or peace-officer has no right to handcuff an unconvicted prisoner unless he has attempted to escape, or except it be necessary in order to prevent his es-

(*r*) *Milton v. Green*, 5 East, 238.

(*s*) *Crozier v. Cundey*, 6 B. & C. 232.

(*t*) *Money v. Leach*, 3 Burr. 1768.

Kay v. Grover, 7 Bing. 312; 5 M. & P.

145. *Hoye v. Bush*, 1 M. & Gr. 775; 2 N. R. 92.

(*u*) *Peppercorn v. Hofman*, 9 M. & W.

Bell v. Oakley, 2 M. & S. 259.

Sir Michael Foster's Discourse of

Homicide, p. 319.

(*x*) *Atkins v. Kilby*, 11 Ad. & E. 784.

Price v. Messenger, 2 B. & P. 158. Reg.

v. Davis, 30 Law J., M. C. 159.

(*y*) *Read v. Cocker*, 13 C. B. 859.

(*z*) *Gimbert v. Coyney*, M'Clel. & Y.

469.

(*a*) *Lee v. Vessey*, 25 Law J., Excl

271.

caping. "Such a degree of violence and restraint," observes BAYLEY, J., "upon the person can not be justified, even by a constable, unless he makes it appear that there are good special reasons for his resorting to it." (b)

1017. *Abuse of a search-warrant.*—If a constable armed with a search-warrant searches the wrong house, or stays an unreasonable and unnecessary time in a house he is authorized to search, or uses any unnecessary violence in the execution of the warrant, or seizes things not specified in the warrant, and which are not likely to furnish evidence of the identity of the articles stolen and mentioned in the warrant, or to support a charge of felony, he becomes a trespasser, and is liable to an action for damages. (c)

SECTION III.

REMEDIES FOR WRONGS DONE UNDER COLOR OF CONVICTIONS AND WARRANTS OF JUSTICES.

1018. *Replevin of chattels distrained under warrants of justices.*—"Though in ordinary practice," observes PARKE, B., "the remedy by replevin is applied only to a distress for rent, yet it is at common law applicable in all cases where goods are improperly taken; (d) and I find no satisfactory authority to show that it will not lie where goods are improperly taken under a warrant of a justice of the peace. In some cases, no doubt, the court will interfere to prevent a replevin, to save its process from being defeated. The rule is correctly stated in Chief Baron GILBERT'S treatise on Replevin, p. 138, where it is said, 'If a superior court award an execution, it seems that no replevin lies for goods taken by the sheriff by virtue of the execution, and if any person shall pretend to take out a replevin and execute it, the court would commit them for contempt for attempting to defeat the execution, and would punish the sheriff by attachment.' But

(b) Wright v. Court, 6 D. & R. 625; 4 B. & C. 596. Griffin v. Coleman, 4 H. & N. 265; 28 Law J., Exch. 134.

(c) Crozier v. Cundey, 6 B. & C. 232;

9 D. & R. 224. Burn's Justice, SEARCH-WARRANT.

(d) Mellor v. Leather, 1 Ell. & Bl. 619.

Chief Baron GILBERT also says, 'that in cases in which the court has no jurisdiction, the goods may be replevied.' If, therefore, goods have been seized under a justice's warrant, and if the justice had no jurisdiction to make the warrant, the goods so seized may be replevied." (e) "It is true," further observes ALDERSON, B., "that replevin will not lie for goods seized under the judgment of a superior court; for if you replevied on the first judgment, you could do so on the judgment upon that also, and so there would be replevin on replevin ad infinitum. It is different in the case of an inferior jurisdiction, which is to be set right by the superior." (f)

1019. *Of actions against justices.*—By the 11 & 12 Vict. c. 44, s. 1, it is enacted, that every action thereafter against a justice of the peace, for any act done by him in the execution of his duty with respect to any matter within his jurisdiction, shall be an action on the case as for a tort, and in the declaration of the cause of action it shall be expressly alleged and proved at the trial, that the act was done maliciously, and without reasonable and probable cause. (g)

Also (s. 2), that for any act done by a justice of the peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction, or order made, or warrant issued, by such justice in any such matter, may maintain an action against such justice as before the passing of the Act, without proving that the act was done maliciously, and without reasonable and probable cause: (h) but no such action shall be brought for anything done under such conviction or order, until after the conviction shall have been quashed, either upon appeal or upon application to the Court of Queen's Bench: nor shall any such action be brought for anything done under any warrant which shall have been issued by such justice to procure the appearance of a party before him, and which shall have been followed by a conviction or order in the same matter, until after the conviction or order shall have been quashed; or if such last-

(e) *George v. Chambers*, 11 M. & W. 159. *Gay v. Mathews*, 32 Law J., M. C. 58. *Pease v. Chaytor*, Id. 121. *Morrell v. Martin*, 3 M. & Gr. 590. *Parke, B., Jones v. Johnson*, 5 Exch. 875.

(f) 11 M. & W. 161. As to proceedings in replevin, see *ante*.

(g) *Burley v. Bethune*, 5 Taunt. 583.

(h) See *Midleton v. Gale*, 8 A. & E. 155. *Pease v. Chaytor*, *supra*.

mentioned warrant shall not have been followed by any such conviction or order, or if it be a warrant upon an information for an alleged indictable offense, nevertheless, if a summons was issued previously to such warrant, and served upon the party, either personally or by leaving the same for him with some person at his last or most usual place of abode, and he did not appear according to the exigency of the summons, (i) in such case no action shall be maintained against such justice for anything done under such warrant.

1020. *When the action is brought in respect of things done without jurisdiction, or in excess of jurisdiction*, therefore, as where a warrant is made or an order granted, which the justice had no authority to make or grant, and the warrant or order has been enforced, and any person has been imprisoned or his goods have been seized under it, an action for a trespass is maintainable against the justice. (k) But before such action is commenced notice of action must be given, and the conviction or order must be quashed.

1021. *When the action is brought for a malicious conviction, commitment, or distress, or a malicious abuse by a magistrate of the functions of his office*, it is not necessary to get the conviction quashed before bringing the action, but notice of action must be given, and the action must be brought within the time limited by the statute, and proof must be given that the magistrate acted corruptly or maliciously, and had no reasonable or probable cause for convicting or making the order. (l)

Where an information was laid before a justice, upon which he convicted and awarded a penalty and costs, and ordered them to be levied by distress, and so far pursued his jurisdiction, but he then exceeded it, by adding an alternative that the plaintiff should be put in the stocks in case the penalty and costs were not paid or raised by distress, and the plaintiff's goods were seized under a distress, but the plaintiff was not put in the stocks, and the conviction was afterwards quashed, and an action was brought against the justice for the distress, it was held that the justice was entitled to

¹ (i) An appearance by counsel or attorney is a sufficient appearance. *Bessell v. Wilson*, 1 Ell. & Bl. 496.

(k) *Leary v. Patrick*, 15 Q. B. 272.

Lawrenson, 5 Hill, *ante*.

(l) *Kirby v. Simpson*, 10 Exch. 367; 23 Law J., M. C. 165

the protection afforded by the first section of the statute, and could not be treated as a trespasser. "It can not be doubted," it was observed, "that the justice had jurisdiction in everything except the alternative order, and the action is brought, not for putting the plaintiff in the stocks under it, but for doing that which the defendant might have justified if he had drawn up his conviction in proper form. The construction of sect. 2 of the statute must be so controlled by sect. 1 as to be consistent with it; and that is done by so construing sect. 2 as to confine its application to cases in which the cause of action arises from the excess of jurisdiction, as it would have done in this case, if the plaintiff had been put in the stocks, and had brought his action for that." (*m*)

1022. *Effect of the existence of a power of appeal on the right to bring an action.*—It does not follow that because a plaintiff had a power of appeal and failed to exercise it, that he is thereby precluded from having recourse to the ordinary remedy by action to try the right. There is a great distinction in this respect between cases where there was jurisdiction to convict or to make an order and issue a warrant, and the aggrieved party had a ground of appeal against the conviction or order made with jurisdiction, and the case where there was no jurisdiction to convict or to make the order, and so no jurisdiction to issue the warrant. "If, in the first instance, the court has gone beyond its jurisdiction, the Act is void. The party aggrieved may, if he pleases, appeal, because excess of jurisdiction is as much a ground of appeal as a merely erroneous decision; and if the court of appeal erroneously confirms the act of the court below, it may be that the party appealing can not object to the want of jurisdiction in any collateral proceeding. His own act may estop him personally, but he is not bound to appeal, because he is at liberty to treat the act as void." (*n*)

1023. *Objections by justices to actions against them in the county court.*—In all actions against justices of the peace in

(*m*) Per Coleridge and Erle, JJ. ; Barton v. Bricknell, 13 Q. B. 393 ; 20 Law J., M. C. 1. Lawrenson v. Hill, *ante*.

(*n*) Churchwardens of Birmingham v.

Shaw, 10 Q. B. 880 ; 18 Law J., M. C. 89. Pedley v. Davis, 10 C. B., N. S. 492 ; 30 Law J., C. P. 379.

county court, the action must be brought in the court within the district in which the act complained of was committed; but no action can be brought in any county court against a justice of the peace for anything done by him in the execution of his office, if such justice shall object thereto. (o) Where a justice of the peace, who had been sued in the county court for an act done by him in the execution of his office, gave notice that he objected to being sued in the county court, and afterwards applied for and obtained a writ of certiorari to remove the cause from the county court into the Court of Exchequer, it was held that this notice terminated the proceedings in the county court altogether, and therefore that the suit could not be removed into the superior court. (p)

1024. *Of setting aside certain actions brought against justices of the peace.*—Provision is made by the 11 & 12 Vict. c. 44, s. 7, for setting aside proceedings in certain actions against justices of the peace, brought in defiance of the provisions of that statute.

1025. *Limitation of actions against justices of the peace.*—By s. 8 it is enacted, that no action shall be brought against any justice of the peace for anything done by him in the execution of his office, unless the same be commenced within six calendar months after the act complained of has been committed. The period of limitation runs from the termination, not from the commencement, of the wrongful act. (q) Therefore, when a person has been wrongfully imprisoned under an illegal commitment, the time of limitation will run from the period of the termination of the imprisonment, and not from the time of the making out of the warrant of commitment. (r) And where goods have been sold under an illegal warrant of distress, the time of limitation will run from the period of the sale of the goods, and not from the time of the original seizure. The seizure is not made absolutely in the first instance, but with a view only to the detention of the goods, until the amount ordered to be levied should be paid, and their subsequent sale, if it should not be paid, so that the seizure and sale form part of one continued grievance, which dis-

(o) 11 & 12 Vict. c. 44, s. 11.

(p) *Weston v. Sneyd*, 1 H. & N. 703;
26 Law J., Exch. 161.

(q) *Jacomb v. Dodgson*, 32 Law J., M.

C. 113.

(r) *Massey v. Johnson*, 12 East, 67.
Hardy v. Ryle, 9 B. & C. 607. *Violet*
v. Sympson, 8 Eil. & Bl. 346.

tinguishes it from cases where the seizure is for a forfeiture. (s)

Where an action is intended to be brought against a justice of the peace for a wrongful imprisonment, under a conviction or order of commitment which the justice had no jurisdiction to make, the time of limitation will run from the time of the making of the conviction or order, and not from the time of the quashing thereof. The quashing of the conviction is only a condition to the prosecution of the action, like the delivery of an attorney's bill, or the giving a notice of action. (t)

1026. *Of notice of action against justices.*—By s. 9 it is enacted, that no action shall be commenced against any justice of the peace for anything done by him in the execution of his office, until one calendar month at least after a notice in writing of such intended action had been delivered to him, or left at his usual place of abode, by the party intending to commence such action, or by his attorney or agent; in which notice the cause of action, and the court in which the same is intended to be brought, shall be clearly and explicitly stated, and upon the back thereof shall be endorsed the name and place of abode of the party intending to sue, and also of the attorney or agent, when the notice is served by an attorney or agent. (u)

Statutory clauses for the protection of magistrates in the execution of the duties of their office appear always to have been construed on the principle that where the magistrate, with some color of reason and bona fide, believes that he is acting in pursuance of his lawful authority, he is entitled to protection, although he may proceed illegally or exceed his jurisdiction. (x) And where he acts in his magisterial capacity maliciously, and without bona fides, he is still entitled to the statutory protective preliminaries to an action, and to an opportunity of tendering amends. A magistrate may act maliciously (post, s. 2), and yet may have reasonable and probable cause for his acts. So he may be in the execution of his duty although he may act maliciously: and in all cases where

(s) *Collins v. Ross*, 5 M. & W. 202.

(t) *Haylock v. Sparke*, 1 Ell. & Bl. 471; 22 Law J., M. C. 67, 71.

(u) As to notice of action, see *ante*.

(x) *Hazeldine v. Grove*, 3 Q. B. 1006. *Lawrenson v. Hill*, 10 Ir. Com. Law Rep. 504, *ante*

the substance of the complaint is that he has abused his power as a magistrate, he is entitled to notice of action. (*γ*) The question as to whether the magistrate was acting in the execution of his office, is a question at the trial for the judge, and not for determination by a jury. (*γ*)

Wherever the magistrate has authority to act upon the subject-matter of the complaint brought before him, he must be considered to have acted by virtue of his office, although the place where the offense was committed was not within his jurisdiction. (*ε*) In a case where one magistrate acted alone in a matter which required the concurrence of two, it was held that he was acting in execution of his office, and was entitled to notice of action. (*α*)

Wherever, also, the magistrate, in what he did, intended to act in the execution of some special power or authority conferred by a statute requiring notice of action to be given, notice of action must be given to the magistrate, although, in point of fact, he was not acting under the statute, and had no power to do what he has done. But to be entitled to the protection, the party claiming it must be actually a justice, accidentally committing an error, and not doing a wrongful act for his own benefit. (*β*)

A person who intends to sue a justice of the peace for an act done by him in a matter respecting which he had no jurisdiction, need not wait for the quashing of the conviction or order of commitment before giving the notice of action. The notice of action may be given as soon as the wrongful act has been committed, though the action itself can not be commenced until after the conviction or commitment has been quashed. (*ε*) If in the case of a conviction the magistrate receives notice of action before the conviction is quashed, he may at his peril rely upon the validity of the conviction, and abstain from tendering amends; but if he does so, and the conviction is quashed, the action may be commenced against him one calendar month after service of the notice. (*δ*)

(*γ*) Kirby v. Simpson, 10 Exch. 358 ;
23 Law J., M. C. 165.

(*ε*) Prestidge v. Woodman, 1 B. & C.
12 ; 2 D. & R. 45.

(*α*) Weller v. Toke, 9 East, 363.

(*β*) Morgan v. Palmer, 2 B. & C. 729 ;
4 D. & R. 433. Briggs v. Evelyn, 2 H.
Bl. 111.

(*ε*) Haylock v. Sparke, 22 Law J., M.
C. 67.

(*δ*) Haylock v. Sparke, *ut sup.*

1027. *Statement of the cause of action on the face of the notice.*—The nature of the cause of action, or of the complaint or grievance, should be explicitly stated on the face of the notice, so as to show whether the plaintiff proceeds against the magistrate for an act done by him maliciously, and without reasonable and probable cause, in the execution of his duty as a justice, with respect to some matter within his jurisdiction, within the first section of 11 & 12 Vict. c. 44, or for an act done by him in a matter over which he had no jurisdiction, or respecting which he had exceeded his jurisdiction within the second section of that statute. If the notice fails clearly and explicitly to point out the nature of the cause of action, so as to show whether it is governed by the first or the second section of the statute, it will be a bad notice. (*e*) “But the notice,” justly observes ABBOTT, C. J., “ought not to be construed with great strictness, its object being merely to inform the defendant substantially of the ground of complaint, but not of the mode or manner in which the injury has been sustained.” (*f*) The time and place of the doing the act complained of ought also be stated in the notice. “I do not go so far,” observes LORD DENMAN, “as to say that a party will always be strictly bound to prove the time and place which he names in his notice, but I think the words of the statute require that a time and place for the occurrence be named.” (*g*)

1028. *Tender of amends before action.*—By 11 & 12 Vict. c. 44, s. 11, it is enacted, that after notice of action has been given to a justice, and before the action shall be commenced, the justice to whom such notice shall be given may tender to the party complaining, or to his attorney or agent, such sum of money as he may think fit, as amends for the injury complained of in such notice; and if the jury at the trial shall be of opinion that the plaintiff is not entitled to damages beyond the sum so tendered, then they shall give a verdict for the defendant, and the plaintiff shall not be at liberty to elect to be non-suited. Whether the preliminary matters required by statute for the protection of magistrates have been duly com-

(*e*) Taylor v. Nesfield, 3 Ell. & Bl. 724; 23 Law J., M. C. 169.

(*f*) Prickett v. Gratrex, 8 Q. B. 1020.

Jones v. Bird, 5 B. & Ald. 844. Jacklin v. Fytche, 14 M. & W. 387.

(*g*) Martins v. Upcher, 3 Q. B. 668.

plied with appears to be a question for the decision of the judge at the trial, and not for determination by a jury. (*h*)

1029. *Of the computation of the month's notice, and of the time for tendering amends.*—The general rule is, that when time for a particular period is allowed to a person to do any act, the day from which the computation is to be made is to be reckoned exclusively. And whenever a certain space of time is given to a person to do some act, which space of time is included between two other acts to be done by another person, “both the days of doing those acts ought,” observes ALDERSON, B., “to be excluded, in order to insure to him the whole of that space of time. Thus, where a month's notice of action is required to be given to a justice of the peace before an action can be commenced against him, and the justice is to have the whole of that month for tendering amends, both the day of the giving of the notice and the day of the tendering amends are to be excluded from the computation of the time: for, wherever the Act of Parliament allows a party an intervening period of a month, within which to deliberate whether he will tender amends or not, unless you exclude both the first and the last day you do not give him a whole month for that purpose.” (*i*)

1030. *Of the statutory protection to constables, officers, and their assistants from vexatious actions.*—Where a constable is acting bona fide, and with an honest opinion that he is discharging his duty, and that he is acting at the time in obedience to the warrant of a magistrate, he is entitled to statutory protection although he is altogether mistaken in the proceedings he has adopted, and had in truth no warrant or authority for what he has done. If, for example, an officer meaning bona fide to act under a warrant, by mistake arrests the wrong person, or seizes the goods of the wrong party, and so does an act which the warrant did not order him to do, and for which he had consequently no authority, he is nevertheless, if he acted bona fide, entitled to the benefit of the protecting clause, limiting the time for the bringing of an action against him for the trespass. (*k*)

(*h*) Parke, B., Kirby v. Simpson, 10 M. & W. 54.
Exch. 366. Arnold v. Hamel, Id. 366.

(*i*) Alderson, B., Young v. Higgon, 6 335. Parton v. Williams, 3 B. & Ald.

Smith v. Wiltshire, 5 Moore, 322.

1031. *Parties to be made defendants—Wrongful convictions and orders by one justice acted upon by another justice.*—By 11 & 12 Vict. c. 44, s. 3, it is enacted, that where a conviction or order shall be made by one justice, and a warrant of distress or of commitment shall be granted thereon by some other justice, bona fide and without collusion, no action shall be brought against the latter by reason of any defect in such conviction or order, or for any want of jurisdiction in the justice who made the same; but the action, if maintainable, is to be brought against the justice or justices who made the conviction or order.

1032. *Liability of persons who set justices and constables in motion.*—If a person merely lays a cause of complaint before a magistrate in a matter over which the magistrate has a general jurisdiction, and the magistrate grants a warrant, upon which the person charged is arrested, the party laying the complaint is not responsible for an assault and false imprisonment, although the particular case be one in which the magistrate had no authority to act. (*l*) But if the proceeding is founded in malice, or if the complainant accompanies the constable charged with the execution of the warrant, and points out the person to be arrested under it, he may render himself liable either to an action for a malicious prosecution, or to an action for false imprisonment. (*m*) If a private person intervenes between the magistrate and the constable, and busies himself in executing the justice's warrant, and the proceedings should be set aside, he may render himself responsible in damages for the consequences of his interference. (*n*) Where the defendant having accused the plaintiff of embezzlement, both parties agree to go before a magistrate to settle the matter, and the defendant addressing the magistrate, said he came to prefer a charge of embezzlement against the plaintiff, whereupon the plaintiff was ordered to go into the dock, and was detained in custody until the charge had been heard and dismissed, it was held that the defendant was not responsible for the imprisonment, which was an act done by the magistrate in the exercise of his authority. (*o*)

(*l*) Carratt v. Morley, 1 Q. B. 28.

(*m*) Cohen v. Morgan, 6 D. & R. 8.
Barber v. Rollinson, 1 Cr. & M. 330.
West v. Smallwood, 3 M. & W. 418.

(*n*) Peinter v. Liv. Gas Co., 3 Ad. & E. 444.

(*o*) Brown v. Chapman, 6 C. B. 370.
Barber v. Rollinson, 1 Cr. & M. 330.

1033. *Evidence at the trial of actions against justices.* (*p*)—In all actions against justices of the peace for any matter done by them in the execution of their office, they may plead the general issue, not guilty by statute, and give the special matter in evidence; (*q*) and the same privilege is extended by various statutes to constables and officers in cases of actions against them for things done by them by virtue of their offices. If the act of a magistrate is done without jurisdiction, it is a trespass; if within his jurisdiction, the action rests upon the corruptness of motive, and to establish this the act must be shown to be malicious. (*r*)

1034. *Proof of malice and of want of reasonable and probable cause.*—There is a wide distinction between an action against a prosecutor for a malicious prosecution, and an action against a magistrate for a malicious conviction and imprisonment thereunder. In the former case, proof that there was in reality no ground for imputing the crime to the plaintiff, shows that the prosecution was instituted without probable cause, and malice may be inferred from thence; but in an action against a magistrate for a malicious conviction, the question is not whether there was any actual ground for imputing the crime to the plaintiff, but whether, upon the hearing, there appeared to be none. The plaintiff must prove a want of probable cause for the conviction, which he can only do by proving what passed upon the hearing before the magistrate when the conviction took place. The magistrate has nothing to do with the guilt or innocence of the offender except as they appear from the evidence laid before him. The conviction must be founded on that evidence alone, and it is impossible to show that there was no probable cause for the conviction, without showing what that evidence was. There may be malicious prosecution without a malicious conviction, and there may be an unfounded conviction by the magistrate without malice. (*s*)

The question as to whether the magistrate has acted in the discharge of his duty with bona fides, and with reasonable and probable cause, is a question at the trial for the decision of the judge, and not for determination by a jury. (*t*)

(*p*) As to the pleadings, see *ante*.

& Bl. 730.

(*q*) 11 & 12 Vict. c. 44, s. 10.

(*s*) *Burley v. Bethune*, 5 Taunt. 583.

(*r*) *Erle, J., Taylor v. Nesfield*, 3 Ell.

(*t*) *Kirby v. Simpson*, see *ante*.

A justice's warrant put in by the plaintiff is evidence for the defendant of an information on oath before the justice recited in the warrant. The recital must be considered part of the warrant, and admissible evidence for the defendant, when the warrant is produced against him by the plaintiff, for the purpose of showing on what grounds, and in relation to what subject-matter he was acting when he granted it; in the same manner as if the magistrate were to commit for a felony on his own view, the warrant reciting that he had seen the felony committed when put in evidence against him, would be admissible evidence for him that he had seen the felony committed. (u)

1035. *Evidence at the trial of actions against constables and officers—Proof of the injury having been done in execution of a warrant of justices.*—By the common law, an officer who merely executed the warrant of a magistrate, was answerable for the consequences if the magistrate acted without authority. But the 6th section of 24 Geo. 2, c. 44, makes it necessary to demand a copy of the warrant from the officer before he can be sued. If he gives that copy, although the party may be entitled to an action against the magistrate, yet, if he joins the officer in it, the production of the warrant will be a protection to the latter, and will entitle him to a verdict. The 6th section is, therefore, obviously intended to protect the officer in those cases only where the justice remains liable. It is necessary, in order to bring the officer within it, that he should act most strictly in obedience to his warrant: and in that case the statute gives him absolute protection, at whatever time the suit may be brought against him. (x)

1036. *Proof of warrant of justices—Secondary evidence of the contents of a warrant.*—Where the high constable of a borough, who had been served with a subpoena duces tecum, to produce a warrant under which he had made a levy, stated that he had no doubt he had deposited the warrant in his office; that he had searched for it and could not find it, and did not know what had become of it, and that the town clerk had access to his office, and might have taken it away,

(u) Haylock v. Sparke, 22 Law J., M.,
C 71

(x) Abbott, C. J., Parton v. Williams,
3 B. & Ald. 332.

it was held that secondary evidence might be given of the contents of the warrant. (y)

1037. *Proof by the plaintiff of his demand of the perusal and copy of the warrant.*—If a plaintiff's attorney, previous to bringing an action against a constable or officer for an imprisonment or seizure of goods by a constable, makes out two papers in writing precisely similar, purporting to be demands of the perusal and copy of the warrant, and signs both for his client, and then delivers one to the defendant, they are both duplicate originals; and the one retained by the attorney may be given in evidence at the trial, without proving any notice to produce the one left in the hands of the defendant. "Unless I am mistaken," observes LORD ELDON, C. J., "it is the usual course in actions of this sort to produce a duplicate original; and the same thing is done with respect to notices to quit. The practice of allowing duplicates of this kind to be given in evidence seems to be sanctioned by this principle, that the original delivered being in the hands of the defendant, it is in his power to contradict the duplicate original by producing the other if they vary." (z)

1038. *Proof by the defendant of the production of the warrant—Production and perusal of a copy of the warrant.*—Where the warrant under which the constable acted was lodged in the hands of the jailer at the time the plaintiff was taken to prison, and the constable proved that when the demand for the perusal of the warrant was made he produced a correct copy of it, telling the person making the demand that the original was in the hands of the jailer, and no objection was made to the non-production of the original, it was held that there had been a substantial compliance with the requirements of the statute by the officer, so as to entitle him to the benefit of the statutory protection. "The conduct of the agent of the plaintiff," observes LORD DENMAN, C. J., "was such as to lead to the belief that the delivery of a copy of the warrant, under the circumstances, was all that was required. But for this, steps might have been taken to procure the original; and the plaintiff can not therefore rely on its non-production to oust the constable of the protection of the statute." (a)

(y) *Fernley v. Worthington*, 1 M. & Gr. 491

(z) *Jory v. Orchard*, 2 B. & P. 41.

(a) *Atkins v. Kilby*, 11 Ad. & E. 785.

1039. *Damages recoverable in actions against justices of the peace.*—By 11 & 12 Vict. c. 44, s. 13, it is enacted, that where the plaintiff in any action against a justice of the peace, for anything done by him in the execution of his office, shall be entitled to recover, and shall prove the levying or payment of any penalty or money, under any conviction or order, as parcel of the damages he seeks to recover; or if he prove that he was imprisoned under such conviction or order, and seeks to recover damages for such imprisonment, he shall not be entitled to recover the amount of such penalty or sum so levied or paid, or any sum beyond the sum of two pence as damages for such imprisonment, or any costs of suit whatever, if it is proved that he was actually guilty of the offense of which he was convicted, or that he was liable by law to pay the sum he was ordered to pay, and (with respect to such imprisonment) that he had undergone no greater punishment than that assigned by law for the offense of which he was convicted, or for non-payment of the sum he was ordered to pay.

If a magistrate has committed the plaintiff to prison in a case in which he has no jurisdiction, and the conviction is quashed, the magistrate is liable for all the usual and ordinary injurious consequences of a conviction and commitment, such as handcuffing, cutting off the hair, immersion in a bath, payment of penalties, fees, and all such expenses as are reasonably necessary to enable the plaintiff to procure his liberty; but the magistrate is not responsible for any unnecessary or excessive violence on the part of the officers executing the warrant. (*b*)

(*b*) *Mason v. Barker*, 1 C. & K. 100. As to damages recoverable in actions for false imprisonment, see *ante*.

CHAPTER XVI.

OF INJURIES FROM THE EXERCISE OF STATUTORY POWERS—
STATUTORY COMPENSATIONS FOR INJURIES AUTHORIZED BY STATUTE.SECTION I. *Of injuries from the exercise of statutory powers.*

- 1040. Exemption of persons from personal liability in respect of things done under statutory authority.
- 1041. Injuries from the negligent execution of statutory powers.
- 1042. Nuisances from the negligent working of railways.
- 1043. Duties and responsibilities of boards of public works, trustees and commissioners—Contractors and workmen acting in the exercise of statutory powers.
- 1044. Surveyors of highways and county bridges.
- 1045. Effect of clauses in particular statutes exonerating persons from all personal liability in respect of things done in the bona fide execution of the statute.
- 1046. Right of commissioners, trustees and public officers to indemnify themselves in respect to the costs and expenses they incur out of the public funds they are authorized to administer.
- 1047. When expenses incurred through blunders or negligence may be charged upon a public or trust fund.
- 1048. Creation of nuisances in the bona fide exercise of statutory powers.
- 1049. Pollution of streams and inju-

ries to docks, wharfs, towing-paths, &c., in the exercise of statutory powers.

- 1050. Creation of nuisances in the exercise of the statutory powers contained in the Towns Improvement Clauses Act.
- 1051. The Metropolis Local Management Act.
- 1052. Of the power to take lands and streams for public purposes.
- 1053. Licenses to enter upon land authorized to be taken for public works.
- 1054. Seizure and detention of goods by custom-house officers acting in the execution of statutory powers.

SECTION II.—*Of statutory remedies for the recovery of compensation for injuries authorized by statute.*

- 1055. Injuries establishing a right to statutory compensation.
- 1056. Of ascertaining the amount of statutory damage by arbitration.
- 1057. Jurisdiction of the arbitrator.
- 1058. Damages recoverable before justices of the peace and not by action.
- 1059. Of the statutory remedy for the recovery of compensation under the provisions of the Lands Clauses and Railway Clauses Consolidation Acts.
- 1060. Of statutory compensation to tenants and occupiers of lands taken for public works

1061. Notices by claimants of the nature and extent of the injury sustained, and of the amount of compensation required.
1062. Assessment of damages.
1063. Future damages.
1064. Assessment of damages to which the claimant is not legally entitled—Removal of the inquisition by certiorari.
1065. Recovery of the amount of compensation assessed by a jury.
1066. Declaration in actions for railway compensations.
1067. Pleadings—Defenses—Traversal of the injury to the land.
1068. Remedy for subsequent unforeseen damages.
1069. Remedy in cases of severance.
1070. Compulsory purchase of house by railway company.
- SECTION III.—*Remedies by action and by injunction in respect of injuries from the negligent doing of things authorized to be done by statute.*
1071. Limitation of actions in respect of things done under local and personal statutes.
1072. Accrual of the cause of action and commencement of the period of litigation.
1073. Of notice of action.
1074. Notice of action to gas companies and trading corporations and their officers.
1075. Notice of action to toll and tax-collectors and revenue officers.
1076. Notice of action against contractors, &c., under local boards of health.
1077. Notice of action against surveyors and persons acting in execution of the highway acts.
1078. Tender of amends before action.
1079. Parties to be made defendants.
1080. Pleadings—Plea of not guilty.
1081. Plea of tender of amends before action.
1082. Pleas of justification under the authority of an act of parliament.
1083. Evidence at the trial—Proof of notice of action.
1084. Power of the court of chancery to grant an injunction to prevent unnecessary injury from the execution of statutory powers.
1085. Injunction to restrain nuisances created by public bodies acting in the exercise of statutory powers.
1086. Injunction to prevent misuse by companies and public bodies of land acquired by them under statutory authority.

SECTION I.

OF INJURIES FROM THE EXERCISE OF STATUTORY POWERS.

1040. *Exemption of persons from personal liability in respect of things done under statutory authority.*—An action will not lie on behalf of a plaintiff who has sustained injury from the execution of powers and authorities given by an Act of Parlia

ment, those powers being exercised with judgment and caution. (a) But if the statutory powers are exceeded, or are not strictly pursued, (b) or the things authorized to be done are carelessly and negligently done, an action is maintainable for damages (post, s. 3). "If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it; and this is clear on the legal presumption, that the act creating the damage being within the statute, must be a lawful act." (c) Where, therefore, the legislature, authorized a railway company to lay down a railway alongside a public highway, it was held that the legislature must be presumed to have contemplated the possibility that the railway would be a nuisance to persons using the highroad, and that such persons must submit to the inconvenience necessarily resulting from the working of the railway. (d) And where a rail-

(a) *Ld. Truro, Lond. and North West. Rail. Co. v. Bradley*, 3 Macf. & G. 341; 6 Rail. Cas. 551. *Caledonian Rail. Co. v. Ogilvy*, 2 Macq. Sc. App. 246. *Boulton v. Crowther*, 2 B. & C. 706.

(b) *Brownlow v. Metrop. Board, &c.*, 31 Law J., C. P. 140. *R. v. Darlington Local Board, &c.*, 5 B. & S. 515; 6 Id.

562; 33 Law J., Q. B. 305; 35 Id. 45.

(c) *Duncan v. Findlater*, 6 Cl. & Fin. 908.

(d) *Rex v. Pease*, 4 B. & Ad. 42. But not to unnecessary annoyances; *Manchester and Altr. Rail. Co. v. Fullarton*, 14 C. B., N. S. 54.

¹ The right to take private property for public purposes, is a power necessarily incident to all governments, and, unless there is some check or limitation imposed by constitutional provision, it may be exercised without giving any compensation for the property so taken. In England the power of Parliament is omnipotent, and it may give the right to take private property for public uses without compensation; but in this country both the national and state governments are, by constitutional provisions, limited in the exercise of this power, and can not authorize the taking of private property for *any* purpose without providing for the payment of a just and reasonable compensation therefor. Nor can it authorize the taking of private property for any but *public* purposes. *Weir v. St. Paul R. R. Co.*, 18 Minn. 155; *R. R. Co. v. Greeley*, 17 N. H. 47; *Hall v. Boyd*, 14 Ga. 1; *Lance's Appeal*, 55 Penn. St. 16; *Charles River Bridge Co. v. Warren Bridge Co.*, 7 Pick. (Mass.) 344; *Dunham v. Williams*, 36 Barb. (N. Y.) 136; *Stockton, &c., R. R. Co. v. Stockton*, 41 Cal. 147; *County Commis. v. Humphrey*, 47 Ga. 565; *Matter of Commis. of Washington Park*, 52 N. Y. 131; *Osborn v. Hart*, 24 Wis. 89.

The legislature can not, even by providing the fullest compensation therefor, give authority to take private property for *private* uses, nor is the legislature the final judge as to what is, and what is not, a public use. *Osborn v. Hart*, *ante*; *Sadler v. Langham*, 34 Ala. 311; *Le Coul v. Police Jury*, 20 La. An. 308; *Memphis Freight Co. v. Memphis*, 4 Cald. (Tenn.) 419; *Vanhorne's Lessee v. Dorrance*, 2 Dallas (U. S.) 312. It can not authorize the taking of the property of one person for the benefit of another. *Coster v. Tide Water Co.*, 3 Green. (N. J.) 54; *Nesbitt v. Trumbo*,

way company was authorized to lay down a railway across a public thoroughfare, and have gates across the highroad to prevent persons from passing along the road at the time when it would be dangerous, by reason of trains being near at hand, it was held that a person, who had been delayed and impeded in his journey along the highroad by reason of the necessary closing of the gates, had no right of action against the railway company for the injury he had sustained. Neither has the owner of an estate any right of action against a railway company for laying down a railway across a turnpike road close to the entrance of his estate, under the powers of an Act of Parliament, by means whereof he is impeded and hindered in going from and returning to his house, and his horses are frightened and become ungovernable from the noise of the trains. (e) But these cases only decide that where the statute

(e) *Caledonian Rail. Co. v. Ogilvy*, 2 Macq. Sc. App. 229.

39 Ill. 10; *Tyler v. Beacher*, 44 Vt. 649; *Crear v. Crossley*, 40 Ill. 175. In the first instance, the legislature is the judge as to whether the purpose for which land is authorized to be taken is a *public* purpose, but its determination is not conclusive, and it is the province of the courts to say, whether *in fact* it is so. *Sweet v. Hurlburt*, 57 Barb. (N. Y.) 312; *Coster v. Tide Water Co.*, *ante*; *Horton v. Squakham & Freehold Marl Co.*, 17 Amer. Law Reg. 179; *Tyler v. Beacher*, *ante*; *Talbot v. Hudson*, 2 Mass. 417; *Fleming's Appeal*, 65 Penn. St. 444. But as to the *necessity* for the taking, except where a different provision is made by the constitution, the legislature is the sole judge, and its action, in that respect, is final and conclusive. *De Varaigne v. Fox*, 2 Bl. C. C. (U. S.) 95; *Powers v. Bergen*, 6 N. Y. 358; *Tyler v. Beacher*, *ante*; *Talbot v. Hudson*, *ante*; *Coster v. Tide Water Co.*, *ante*.

As to what in law, within the meaning of the several state constitutions, is a *public use*, is, in a great measure, dependent upon the facts and circumstances of each case. No definite and fixed rule, applicable to all cases, can be given, but it may be said that, where the benefit or advantage is mainly restricted to a few persons, or to a body of persons, and there is no corresponding benefit or advantage therefrom derived by any considerable number of people, or to any considerable section of country, the purpose is *private*, and can not be upheld as within the contemplation of the constitution. Thus, where the legislature authorized the owner of a grist-mill to flow the lands of *supra* riparian owners for the benefit of his mill, it appearing that the owner of the mill conducted the business for his own benefit and profit, and, while he ground all grain brought to his mill for that purpose, yet was under no obligation to grind grain brought to him, and was at liberty to receive or refuse it, as he chose, it was held that the act was unconstitutional, as the purpose could not in any sense be said to be public. *Tyler v. Beacher*, 44 Vt. 649. If, however, a legal obligation had been imposed upon the mill owner to receive and grind all grain offered to him for that purpose, and the mill had been a convenience and a benefit to a considerable number of people and to the neighborhood, although not a convenience or benefit to all the public, yet the rule would probably have

expressly contemplates the creation of a nuisance, no action will lie. Where, therefore, a canal company were empowered to take the water of a certain brook, which was then pure, but subsequently became polluted by drains, &c., and the company by using and penning back the water of the brook in the canal after it had become so polluted created a nuisance, it was held that they were responsible. (*f*)

It has been held, that if a canal company has been authorized by statute to make and use a canal, and the canal is made in the usual manner, and water leaks out and comes upon the plaintiff's premises, without any negligence or breach of duty on the part of the canal company, the company will not be responsible in damages for the injury; (*g*)

(*f*) Reg. v. Bradford Navigation Co.,
34 Law J., Q. B. 191.

(*g*) Whitehouse v. Birm. Can. Co., 27
Law J., Exch. 25.

been different, as it has repeatedly been held that acts allowing the flowage of lands for mill purposes, is a public use, and as such are valid to confer the right. Thien v. Voegland, 3 Wis. 461; Olmstead v. Camp, 33 Conn. 532; Boston, &c., Mill Dam v. Newman, 12 Pick. (Mass.) 467; Harding v. Goodlett, 3 Verg. (Tenn.) 41; Hazen v. Es-ex Co., 12 Cu-h. (Mass.) 478; Com. v. Essex Co., 13 Gray (Mass.) 249. The rule seems to be, as nearly as it can be definitely stated, that, in order to amount to a *public use*, within the letter and spirit of the constitution, the use must be such as in its nature and effect concerns the whole community, as distinguished from particular individuals, and that, while the immediate and direct result may be to enhance the private gains and personal advantage of certain individuals, yet if, *indirectly*, and as a natural result, the community as a whole is benefited thereby, although all are not benefited, and the benefit is not equal in degree, the purpose is public. But the purpose must reach beyond mere private gain or individual advantage, and confer some benefit or advantage upon the public, as such, as a result of the exercise of the right. The benefits need not be direct; it is enough if they are the natural result, although indirect and consequential, and affect the general public, although mainly confined to a particular community or neighborhood, as by developing its resources, opening up new avenues for business, increasing its business facilities, promoting industrial enterprises and the productive power of the locality, or as tends to increase its population, enhance its convenience, or in any sensible measure increases its prosperity or importance. Gilmer v. Lime Point, 18 Cal. 229; Matter of Bloomfield Gas Co., 63 Barb. (N. Y.) 437; Talbot v. Hudson, 82 Mass. 417; Hayes v. Risher, 32 Penn. St. 169.

Thus, the legislature may authorize the taking of private property for the construction of railroads and lateral lines thereof. Hays v. Risher, 32 Penn. St. 169; United States v. Railroad Bridge, 6 McLean (U. S.) 517; Wills v. Somerset, &c., R. R. Co., 47 Me. 345; Scudder v. Trenton Del. Fall. Co., 1 N. J. 694; Arnold v. Hudson R. R. Co., 49 Barb. (N. Y.) 108. For the laying out of highways. Shaver v. Starett, 4 Ohio St. 494. Across railroad tracks, even without compensation, Albany, &c., R. R. Co. v. Brownell, 24 N. Y. 345. For the laying out and grading public streets, and may impose the expense on the lands contiguous thereto

but every canal company is bound to maintain and keep its canal in good order, and manage it so that it may not become a source of injury to the adjoining landowners; and if the water can be prevented from escaping from the canal, it is the duty of the company to adopt the necessary measures for the purpose. (*h*)

1041. *Injuries from the negligent execution of statutory powers.*—"Powers given by statute," observes WATSON, B., "are not to be used to the peril of the lives or limbs of the Queen's subjects. They are to be exercised reasonably, and with due care, so as not by negligence to cause dangers to others." Where, therefore, a canal company was authorized by a statute to intersect highways with their canal, carrying the highway over the canal by means of bridges, it was held that they were bound to erect proper and suitable

(*h*) *Lawrence v. Gt. North. Rail. Co.*, 31 Law J., Exch. 121. *Barber v. 16 Q. B. 653*; 20 Law J., Q. B. 293. *Nottingham and Grantham Rail. Co.*, 33 Bagnall v. Lond. & North-West. Rail, Law J., C. P. 193.

Trustees v. Berry, 2 J. J. Marsh. (Ky.) 483; *Walsh v. Matthews*, 29 Cal. 123; *Emery v. San Francisco Gas Co.*, 28 Id. 345. For the erection of bridges for public use. *Charles River Bridge v. Warren Br. Co.*; *United States v. Railroad Bridge*, 6 McLean (U. S.) 517; *Philadelphia v. Field*, 58 Penn. St. 320. For reclaiming swamp lands. *Columbia, &c., Co. v. Mier*, 39 Mo. 53. For the erection of light-houses. *Gilmer v. Lime Point*, 18 Cal. 229. Wharves, piers, warehouses, &c. *Stevens v. Walker*, 15 La. An. 577; *Eddings v. Seabrook*, 12 Rich. (S. C.) 504. For the laying of aqueducts to supply water to a town. *Cringh v. Harrisburgh*, 1 Penn. St. 132. For rendering a river navigable. *Canal Appraisers v. People*, 17 Wend. (N. Y.) 571; *Hinde v. Navigation Company*. For improving a great mill power. *Hazen v. Essex Co.*, 12 Cush. (Mass.) 475. For turnpikes with toll-gates. *Att.-Gen. v. Germantown, &c., Road*, 55 Penn. St. 466. For building and maintaining canals. *Hooker v. Canal Co.*, 14 Conn. 146. For forts. *Gilmer v. Lime Point*, *ante*. For public school-houses. *Williams v. School Dist.*, 33 Vt. 271. For the improvement of harbors. *Owners v. Mayor of Albany*, 15 Wend. (N. Y.) 374. For widening and improving streets. *Parks v. City of Boston*, 15 Pick. (Mass.) 198. For laying gas pipes to supply a town with gas. *Matter of The Bloomfield Gas Co.*, 63 Barb. (N. Y.) 437. And generally for any and all purposes of public improvement, benefit, or advantage. And, as has been heretofore stated, although primarily, the object of the power sought to be exercised is private advantage and gain. Yet, if the effect of its exercise will tend to purposes of public utility and will result in essentially promoting public interests or enhancing its convenience, it is not prohibited by the constitution, or beyond the power of the legislature to confer. The question as to what constitutes a *public use*, within the meaning of such constitutional provisions, was very ably considered by BIGELOW, C. J., in *Talbot v. Hudson*, cited *ante*, and his views upon this point are so clear and so correct—in my judgment—that I have concluded to give them here. In that case

bridges, sufficient for all the requirements of an increasing traffic, and were bound to put up proper lights, fences, and guards for the protection of the public; and that if they erected a swing-bridge, they must use all due and proper precautions for the protection of the public whilst the bridge was open. And if such a bridge is left open by boatmen using the canal, and a passenger traversing the highway falls into the canal and is injured, the canal company will be responsible for the injury in an action for negligence. (2)

Where a municipal corporation was authorized by statute to lay down gas-pipes, and an action was brought against them for an injury to the plaintiff's eye, by reason of the negligence of a servant of the corporation, who had been employed by them to chip a gas-pipe, and the corporation pleaded that the injury was done in the execution of their

(2) *Manley v. St. Helen's Canal and Rail. Co.*, 2 H. & N. 840; 27 Law J., Exch. 164.

the legislature of Massachusetts had authorized the removal of a dam belonging to the Middlesex Company from the Concord river in Bilerica, in order to redeem and reclaim the lands bordering on the stream about the dam from overflow occasioned by the maintenance of the dam. It was insisted that the provisions of the act were inoperative to confer the power, because the purpose thereof was not a *public* purpose, and the removal of the dam was sought to be restrained. In denying the injunction and sustaining the validity of the act, he said: "The ultimate purpose which the legislature had in view in passing the act under consideration, does not distinctly appear by the terms of the act itself. But it may be inferred from the title of the act and the general scope of its provisions, that it was intended to relieve the meadows lying on the borders of Concord and Sudbury rivers, chiefly in the towns of Lincoln, Concord, Sudbury, and Wayland, from large quantities of water with which they are constantly overflowed, and which are supposed to be set back by the dam owned by the plaintiffs. . . In many cases there is no difficulty in determining whether an appropriation of property is for a public or a private use. If land is taken for a fort, a canal, or a highway, it would clearly fall within the first class; if it is transferred from one person to another, or to several persons, *solely* for their peculiar benefit and advantage, it would as clearly come within the second class. But there are intermediate cases where public and private interests are blended together, in which it becomes more difficult to decide within which of the two classes *they* may properly be said to fall. . . In the present case there can be no doubt that every owner of meadow land bordering on these rivers will be directly benefited to a greater or less extent by the reduction of the height of the plaintiff's dam. The act is, therefore, in a certain sense, for a private use, and enures directly to the advantage of such owners. But this is by no means a decisive test of its validity. Many enterprises of the greatest utility are productive of great and immediate benefits to individuals. A railroad or canal may largely enhance the value of private property, situated at or near its termini; but it is not for that reason any *the*

Local Improvement Act, and without any neglect or mismanagement of the defendants otherwise than by their workman, and that the workman employed by them was well skilled and qualified, it was held that the plea was no answer to the action. (*j*)

If persons authorized by statute temporarily to close a public highway have by mistake stopped up the wrong thoroughfare, or if they have continued an obstruction in a public thoroughfare beyond the time authorized by statute, and an adjoining householder or shopkeeper sustains a particular injury beyond what is sustained by the public at large; if he loses his customers, or his trade is injured by the unauthorized obstruction, there is a remedy by action for damages. (*k*)

Where a railway company was authorized to make an em-

(*j*) *Scott v. Mayor, &c., of Manchester*, 2 Sc. 462, 463; 2 B. N. C. 381. See also to this case, *Ricket v. Metrop. Rail. Co.*, 1 H. & N. 59; 2 H. & N. 204.

(*k*) *Wilkes v. Hungerford Market Co.*, L. R., 2 H. of L. Ca. 188.

less a public enterprise, for the construction of which private property may well be taken. . . . It has never been deemed essential that the entire community, or any considerable portion of it, should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use, within the true meaning of these words as used in the constitution. Such an interpretation would greatly narrow and cripple the authority of the legislature, so as to deprive it of the power of exerting a material and beneficial influence on the welfare and prosperity of the state. In a broad and comprehensive view, such as has been heretofore taken of this clause of the declaration of rights, *everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state*, or which leads to the growth of towns and the creation of new sources for the employment of private capital and labor, *indirectly contributes to the general welfare and the prosperity of the whole community*. It is upon this principle that many of this statutes of this commonwealth, by which private property has been heretofore taken and appropriated to a supposed public use, are founded. Such legislation has the sanction of precedents, coeval with the origin and adoption of the constitution," and he proceeds to enumerate the instances in which such power has been exercised, as for the support and regulation of mills, and the creation of large mill powers, in the one instance authorizing the flooding of lands, and in the other a similar power, with the added right of destroying other mills and other mill powers even, for the consummation of the object and purpose sought, by a concentration of such power at a particular locality. He then goes on to say: "It is certainly difficult to see any good reason for making a discrimination in this respect between different branches of industry. If it is lawful and constitutional to advance the manufacturing or mechanical interests of a section of the state, by allowing individuals, acting primarily for their own profit, to take private property, there would seem to be little, if any, room for doubt as to

bankment for carrying their railway across a valley, through which the waste waters from the adjoining land flowed away, and the embankment was made without proper openings and culverts for the passage of the waste water, by reason whereof the flood water was penned back after heavy rains and forced upon the plaintiff's land and injured his crops, it was held that the plaintiff was entitled to an action for damages. "It is contended by the defendants," observes PATTESON, J., "that they have constructed their railway according to the provisions of their Act of Parliament, and that they are not liable for any consequences which may follow to the damage of the plaintiff; and the question is whether the company are protected by their Act? Here the company might, by executing their works with proper caution, have avoided the injury which the plaintiff has sustained; and we think

the authority of the legislature . . . to promote the agricultural interests of a large territory," and he then proceeds to enumerate instances in which the legislature has by similar acts provided for redeeming swamp lands, and cites the cases of *Cooms v. Burt*, 22 Pick. (Mass.) 422, and *Day v. Hurlburt*, 11 Met. (Mass.) 321. In the *Matter of the Commissioners, &c. of The Central Park*, 63 Barb. (N. Y.) 282, it was held that an act which authorized the taking of land for public parks and squares, whether advantageous to the public for recreation, health, or business, or not, was constitutional, and that the taking was for a public use. In the *Matter of the Bloomfield Gas Co.*, 63 Barb. (N. Y.) 437, it was held that the power to exercise the right of eminent domain is not affected by the fact that the corporation upon which it is conferred acts for its own interests and for purposes of private gain, but that the question as to whether it is for a public use, depends upon its effect upon the public, or as to how the public would be affected thereby, if the purposes of the corporation are carried out, and that the mere fact that the public benefit contemplated may be confined to a particular community, does not strip it of the character of a public use.

It is sometimes quite difficult to determine what is a *taking* of property within the meaning of the constitution, for which compensation must be made. It may be said that, even in cases where the property of an individual is not actually taken, yet, if the exercise of the power operates a partial destruction thereof, or even a diminution of its value, by reason of actual physical agencies, or divests him of actual vested rights, or essentially impairs their enjoyment, or deprives him of their ordinary use, it is a *taking* of property which the legislature can not authorize without compensation, and in an action for the injury, the legislative grant is no protection, unless the land to which the right or easement attaches, has been actually taken, and the damages duly assessed and paid, as provided by the terms of the act. *Hooker v. Canal Co.*, 14 Conn. 146; *Glover v. Powell*, 10 N. J. 211; *Cash v. Whitworth*, 13 La. An. 401. Thus, although the land itself is not taken, yet, if by the exercise of the authority conferred by the act an easement is destroyed or materially impaired in its convenient use or value, as a right of access to premises; *Miller v. R. R. Co.*, 6 Hill. (N. Y.) 61; a right of way; a franchise issuing out of land

that the want of such caution is sufficient to sustain the action." (1) And this is so, even though the injury might not have happened but for the fault of others in not keeping an outfall for the water of the dimensions which they, and not the defendants, were bound to keep it. (m) Where a trading company was incorporated by statute for the purpose of manufacturing gas, and was authorized to make gas to light the streets of a town, it was held that the statute did not authorize the company to make gas so as to create a nuisance, and therefore that they were liable, notwithstanding the statute, to an action for damages for making gas so as to create a nuisance. (n)

1042. *Nuisances from the negligent working of railways.*—

It does not follow that because a railway company is authorized to carry its railway across or alongside a public carriage-

(1) *Lawrence v. Gt. North. Rail. Co.*, 16 Q. B. 653, 654; 20 Law J., Q. B. 293. *Broadbent v. Imp. Gas. Co.*, 26 Law J., Ch. 281. *Blagrove v. Waterworks Co.*, 1 H. & N. 369. *Sutton v. Clarke*, 6 Taunt. 42. *Grocers' Co. v. Donne*, 3 Sc. 357. *Brine v. Gt. West. Rail. Co.*, 31

Law J., Q. B. 101. *Bagnall v. Lond. and North-west. Rail. Co.*

(m) *Harrison v. Gt. North. Rail. Co.*, 33 Law J., Exch. 266.

(n) *Broadbent v. Imp. Gas. Light Co.*, 26 Law J., Ch. 280.

either by grant or prescription; *Enfield Bridge Co. v. R. R. Co.*, 17 Conn. 454; or any right or privilege incident to and properly a part of the estate, it is a taking of the property within the meaning of the constitutional limitation, as much as the taking of the land itself, which the legislature can not authorize without compensation.

In reference to the damages, it may be said that all the loss that will be the natural and proximate result of the exercise of the power is the proper measure of compensation. The damages are not limited to the actual value of the land actually taken, or to the depreciation of the value of the remaining portion, but in addition thereto, the probable loss, inconvenience, and damage that will result to the premises. Thus, in estimating the damage to premises from the construction of a railroad through a town lot, on which dwellings and out houses were erected, that would be a very unjust measure of compensation that simply allowed the owner the actual value of the land taken, without reference to the injuries to his remaining portion of the lot, from the noise, smoke, vibration, risk from fire, and destruction of essential conveniences, and these elements not only may, but should be considered. *Matter of Utica, &c., R. R. Co.*, 56 Barb. (N. Y.) 436; *Virginia, &c., R. R. Co. v. Elliott*, 5 Nev. 358.

As to injuries resulting to the premises of those not taken under the grant, it may be said that the legislature can not authorize the doing of an act by another, that operates to destroy the value of property of others, by any of the elements constituting an actual nuisance, so as to preclude a recovery by the person injured thereby. Thus, it can not authorize the erection of a slaughter-house, or a gas-house, or any other erection for the prosecution of a noxious trade, so as to prevent

road, that it is thereby authorized to conduct its traffic so as to create a nuisance. The company is not responsible for unavoidable noises caused by its engines; (o) but if the engine-driver unnecessarily puts on the whistle, or unnecessarily lets off steam, or discharges mud or water when crossing or running alongside a public carriage-road, and by so doing frightens horses lawfully traversing the highway, and causes them to upset a carriage, the railway company will be responsible for the damage done. (p)

So, if the property of the plaintiff adjoining a railway has been set on fire and destroyed by a spark from the locomotive engine and furnace, which the railway company is authorized by statute to use on their railway, the railway company is *prima facie* responsible for the damage done, for the Acts of Parliament authorizing railway companies to run

(o) *Rex v. Bease*, 4 B. & Ad. 30.

Fullarton, 14 C. B. N. S. 54.

(p) *Manch. and Altring. Rail. Co. v.*

me from recovering for the injury to my premises, if, in the prosecution of the business, noxious smells or gases are emitted therefrom, so as to essentially impair the value of my property or its comfortable enjoyment. The only effect of the grant, is to authorize the doing of the act named therein, and, so far as the public is concerned, upon compensation for the property taken, and to debar the public from proceeding against the persons exercising the power for a *public* nuisance. If a *private* nuisance results therefrom, an action lies therefor, notwithstanding the grant. *People v. Manhattan Gas Light Co.*, 64 Barb. (N. Y.) 55; *Carhart v. Auburn Gas Light Co.*, 22 Id. 297; *Richardson v. Vt. Centl. R. R. Co.*, 25 Vt. 465; *Wilson v. New Bedford*, 108 Mass. 261. By this, it is not meant that every discomfort, every annoyance, or every inconvenience, or even the actual depreciation of the value of surrounding property, by reason of the exercise of the powers conferred by the grant, gives a right of action, but that, when the injury is such that, if it had been caused by the act of the owner of the adjoining property, an action would lie therefor, an action will lie against the person or corporation, notwithstanding the legislative grant. *People v. Gas Light Co.*, *ante*; *Clark v. Mayor of Syracuse*, 13 Barb. (N. Y.) 32; *Richardson v. Vt. Cent. R. R. Co.*, *ante*; *State v. Western Inland Lakes Nav'n Co.*, 2 Johns. (N. Y.) 283; *Manhattan Gas Co. v. Barker*, 36 How. Pr. (N. Y.) 233; *Eastman v. Company*, 44 N. & L. 143; *Lee v. Pembroke Iron Co.*, 57 Me. 481; *Estabrook v. Peterboro R. R. Co.*, 12 Cush. (Mass.) 224; *Eaton v. Boston & Concord R. R. Co.*, 51 N. H. 504; 12 Am. Rep. 147.

In *Robinson v. N. Y. & Erie R. R. Co.*, 27 Barb. (N. Y.) 512, the court held that a legislative grant to construct a railroad can give no authority to invade any private rights without just compensation. It confers a franchise simply, and the title and the rights of a private corporation, *but no exemption for wrongs to private property*. In *Hatch v. Vermont Central R. R. Co.*, 25 Vt. 67, REDFIELD, J., in commenting upon the liabilities of corporations exercising powers conferred by

locomotive steam furnaces through the country, do not authorize them to scatter sparks or lighted coals upon the adjoining land, to the injury of the proprietors thereof, if by any means their engines can be prevented from so doing. (q)

1043. *Duties and responsibilities of boards of public works, trustees, and commissioners—Contractors and workmen acting in the exercise of statutory powers.*—Trustees and commissioners of public works, having certain public duties to perform under the authority of a statute, incur no personal responsibility for their acts if they act within the strict line of their duty; but if they order a thing to be done which is not within the scope of their authority, (r) or are themselves or by their servants guilty of negligence or misconduct in doing that which they are empowered to do, they render themselves liable to an action. If an action is brought against contractors and workmen who are personally engaged in the execution of public works, under the order or authority of trustees, or a board of public works, and the damage of which the plaintiff complains is the inevitable result of the execution of

(q) *Freemantle Gt. North. Rail. Co.*, 31 Law J., C. P. 12. *Dimmock v. North. Staff. Rail. Co.*, 4 F. & F. 1058. (r) *Reg. v. Longton Gas Co.*, 29 Law J., M. C. 118.

specia. grant from the legislature, for injuries to those whose lands have not been taken, seems to have favored the doctrine that their liability stands upon precisely the same ground as that of an individual. In that case the plaintiff sought to recover for consequential injuries arising from the construction of the defendant's railroad in the village of Burlington, upon the ground that the excavations and embankments made by the defendants in the necessary construction of their road, prevented the free escape of surface-water arising from rains and the melting of snow from the streets, so that it was sent into his store and upon his premises, to his damage, and whereby his premises were rendered less accessible from the street; that before the erection of the plaintiff's road, people could safely hitch their horses in front of his premises, and that he could safely drive to and from his premises with horses and carriages. The court held that the plaintiff was not entitled to recover the damages ensuing from these acts of the company, upon the ground that, even if the acts had been done by an individual clothed with no special powers from the state, it would not have created an actionable injury. The work done was lawful. It was performed prudently and "with as little injury as possible to the plaintiff's property consistently," &c. The learned judge said: "In the absence of all statutory provisions to that effect, no case, and certainly no principle, seems to justify the subjecting a person, either *natural* or artificial, in the prudent pursuit of his own lawful business, to the payment of consequential damages to other persons in their property or business. This always happens more or less in

a public work under statutory authority, the action will fail; but if the damage arises from the negligent execution of the work, and might have been avoided by the exercise of proper skill and care, the contractors and workmen, or the trustees, &c., as the case may be (see *infra*), will be personally answerable for the damage done. (s)

Where an action was brought by the plaintiff against one of several trustees under a turnpike act, who had joined in an order made by the trustees for cutting a drain through certain lands, whereby considerable damage had been done to the plaintiff's estate, and it appeared that the trustees had acted in the execution of statutory powers, in the best mode they could, under competent advice, and in the faithful execution of the duties imposed upon them by the Legislature, it was held that they were not personally responsible for the

(s) *Jones v. Bird*, 5 B. & Ald. 837; 31 Law J., C. P. 317.
Clothier v. Webster, 12 C. B., N. S. 790;

all rival pursuits, and often, where there is nothing of that kind, one mill or one store or school injures another. One's dwelling is undermined, or its lights darkened, or its prospect obscured and thus materially lessened in value, by the erection of buildings upon the lands of other proprietors. One is beset with noise or dust or other inconvenience, by the alteration of a street, or more especially by the introduction of a railway, but there is no redress in any of these cases. The thing is lawful in the railroad as much as in the other cases supposed." In the same opinion the court disposes of a question between one *Whitcomb* and the same defendant, for injuries resulting from a neglect of the defendant to build a proper sluice or culvert for the passage of a stream of water, whereby the plaintiff's lands were injured. For the neglect of the defendant to erect such a culvert as was necessary and sufficient for that purpose, the court held that the defendant was clearly liable both at common law and under the provisions of its charter.

The conferring of special privileges upon an individual or corporation to exercise a particular franchise, is always upon the implied understanding that the franchise shall be prudently exercised, and in such a manner as to inflict the least injury upon others. It is upon this principle that it is held that where there are two modes of exercising the right, by one of which it would be a nuisance to others, and by the other of which it would not, that the method by which the nuisance would be avoided must be adopted. Corporations are given large latitude for the exercise of a reasonable discretion in the prosecution of their work, but they are subject to the supervision of the courts; and if they abuse this discretion and exercise it in a careless or unreasonable manner, redress may be had for damages resulting therefrom, either at law or in equity. *Whitcomb v. Vermont Central R. R. Co.*, 25 Vt. 69; *Regina v. Scott*, 3 Ad. & El. 543. Damages that result from a careless or unreasonable exercise of their powers, are not treated as covered by the franchise, or as having been contemplated by the act conferring the authority; consequently a land-

damage done; (t) but where the act authorized to be done by the trustees is done so carelessly and improperly that the careless or improper manner in which it is done either increases the damage or creates it, then the trustees will be liable, if the work has been done by their own servants, or persons acting under their immediate orders. Where the trustees of a public road covered over an open drain by the roadside, and thereby caused an accumulation of water in the road which flooded the adjoining land, and ran into and swamped the plaintiff's colliery, it was held that the trustees were responsible in damages for the injury. (u)

If the act done is in itself lawful, it can only become unlawful in consequence of the negligent and improper manner in which it is executed. (v)

When commissioners intrust the execution of public

(t) *Sutton v. Clarke*, 6 Taunt. 42. *Grocers' Co. v. Donne*, 3 Sc. 357; 3 B. N. C. 34. *Herring v. Metrop. Board of Works*, 34 Law J., M. C. 224. *Coe v. Wise*, *post*.

(u) *Whitehouse v. Fellowes*, 30 Law J. C. P. 305.

(v) *Boulton v. Crowther*, 2 B. & C. 709, *Governor, &c., of Cast Plate v. Meredith*, 4 T. R. 796.

owner whose land has been taken under the grant, and whose damages have been appraised and paid, is not thereby debarred of a remedy for damages arising from such a course, whereas he would be if the damages arose from a prudent and reasonable exercise of the powers conferred. Such damages are not regarded as covered by the appraisal or award, and may be recovered by him, as well as by one whose land has not been taken, as all such acts are regarded as being *ultra vires*, and not protected by the grant. *Eaton v. Boston, Concord & Maine R. R. Co.*, 51 N. H. 504; 12 Am. Rep. 147; *Baltimore & Potomac R. R. Co. v. Magruder*, 34 Md. 79; 6 Am. Rep. 311; *Cooper v. N. British R. R. Co.*, 27 Jur. 241; *Fletcher v. R. R. Co.*, 25 Wend. (N. Y.) 462; *State v. Stoughton*, 5 Wis. 291; *People v. Law*, 34 Barb. (N. Y.) 494; *Hinchman v. R. R. Co.*, 17 N. J. 75; *Potter's Dwarries on Statutes*, 75; *First Baptist Church v. R. R. Co.*, 5 Barb. (N. Y.) 79; *Steele v. Western Inland Nav. Co.*, 2 Johns. (N. Y.) 283. The real test is really this: all the natural and probable consequences of the exercise of the power given may be said to have been within the contemplation of the grant, but those results which are a *possible*, but not the necessary result thereof, are *not* covered by the grant, and liability exists therefor as much as though the legislative power had never been given.

In *Estabrook v. Peterboro R. R. Co.*, 12 Cush. (Mass.) 224, the defendants, in the construction of their railroad, filled up the bed of a river running through the plaintiff's lands, so that his lands were thereby overflowed and injured. The defendants contended that, as the injury resulted from the construction of the road, as authorized by the statute, the plaintiff could have no remedy except such as the statute provided, even though the road did not actually touch the plaintiff's land. The court held, that as the result was not such as *necessarily* arose from the construction of the road, the plaintiff could maintain the action. *SHAW, C. J.*, said:

works to contractors, engineers and surveyors, who select their own workmen for the execution of the work, the commissioners are not personally liable for the mistakes or negligence of the contractors, engineers, or workmen. (x) So trustees of turnpike-roads, in whom the soil of the highway is not vested, and who are not in possession thereof, are not personally responsible for the negligence of contractors and those employed by the contractors in the repair of the roads, unless they personally interfere in the management of the works. (y) But if trustees and commissioners of public works, acting within their jurisdiction, and exercising powers given them by Act of Parliament, act wantonly and oppressively, and do unnecessary injury to individuals, they are personally responsible in damages to the parties injured. Thus, where an action was brought against certain commis-

(x) See *ante*.

107. Duncan v. Findlater, 6 Cl. & Fin.

(y) Humfreys v. Mears, 1 M. & Ry. 894.

"The remedy of the plaintiff was by an action of tort for the nuisance. If the obstruction of the river was strictly necessary, and no sufficient lateral canal could be made, then we should consider that the mode of laying the railroad was contemplated and authorized by the legislature, and the remedy would be by complaint for damages;" and he cites in support of the position, *Dodge v. County Commrs. of Essex*, 3 Met. 380; *Springfield v. Conn. Riv. R. R. Co.*, 4 Cush. 63. "But," he adds, "it does not appear that it was necessary to locate the railroad so as to cross the river and obstruct it, but only that the engineers thought it the best mode, the easiest, and, perhaps, the cheapest. Nor does it appear that a canal could not be made of a capacity equal to the original watercourse, to carry off the water, as required when such artificial watercourse is substituted for a natural one. The course adopted by the railroad company not being over the plaintiff's land, *was a nuisance for which he has his remedy at law.*"

It has been held that a legislative grant does not exempt a gas company from liability for damages for polluting the air so as to impair the comfortable enjoyment of surrounding property; *People v. Manhattan Gas Co.*, *ante*; or from damages arising from the pollution of the waters of a stream by turning therein the refuse from its works; *Carhart v. Auburn Gas Light Co.*, *ante*; or a railroad company from injuries resulting from the obstruction of a navigable stream by the erection of a bridge; *Jolly v. Terre Haute R. R. Co.*, 6 McLean (U. S.) 661; or from excavating so near the lands of another as to let down his soil; *Richardson v. Vt. Central R. R. Co.*, *ante*; or so as to injure adjoining houses; *Biscoe v. Great Eastern R. R. Co.*, L. R. 16 Eq. Cas. 640; turning surface-water upon another's premises; *Waterman v. Vt. Central R. R. Co.*, 30 Vt. 61; diverting the water of a stream; *Catt v. Lewiston*, 35 N. Y. 214; charging the soil with water by reason of embankments; *Wilson v. New Bedford*, 108 Mass. 261; flooding the lands of another by removing embankments; *Eaton v. Boston & Concord R. R. Co.*, 51 N. H. 504; cutting off access to public streets; *Wetmore v. Story*, 22 Barb. (N. Y.) 414; Cutting

sioners of pavements for so raising a pavement as to obstruct the plaintiff's doors and windows, and it appeared that the commissioners were acting in the exercise of statutory powers, but that proper advice had not been taken, and the works were improperly executed, and the injury done to the plaintiff might have been readily avoided by laying down the pavement in a proper manner, it was held that the commissioners were personally responsible in damages for the nuisance they had unnecessarily and wantonly created. (z)

Public commissioners and trustees who continue in the actual occupation of public works constructed and maintained for the use of the public, and in receipt of the tolls levied for the use thereof, are bound, as we have seen, to maintain and manage their property so that it may not become a source of danger to those who are invited to use it. (a) But if they

(z) *Leader v. Moxon*, 2 W. Bl. 926; 3 J., Exch. 321; 3 H. & N. 164; 35 Law Wils. 461.

(a) *Gibbs v. Trust. Liv. Docks*, 27 Law

J., Exch. 225.

off access to a navigable stream, when the right existed as an incident of the estate; *Duke of Buccleugh v. Bd. of Met. Works*; 5 H. L. Cas. 405; casting rocks upon an adjoining estate in the process of blasting; *Labin v. Vt. Cent'l R. R. Co.*, 25 Vt. 353; injuries by noise from erection of forges near dwellings; *Cooper v. No. British R. R. Co.*, 35 Jurist, 295; and generally for all such injuries to the estate of another as amount to an actual nuisance thereto; *Johnson v. Atlantic, &c. R. R. Co.*, 35 N. H. 569; *Whitcomb v. Vt. Cent'l. R. R. Co.*, 25 Vt. 465; *Drake v. Hudson R. R. Co.*, 7 Barb. (N. Y.) 508; *Renshaw v. Slate River Co.*, 6 Rand. (Va.) 245; *Hogg v. Zanesville Canal, &c. Manuf. Co.*, 5 Ham. (Ohio), 410; *People v. Manhattan Gas Light Co.*, *ante*; *Stone v. F. P. & N. W. R. R. Co.*, (Ill.) Am. L. T. (N. S.) vol. 2, p. 54; *Wood on Nuisances*, 782-798. Where the lands of an individual are taken under the authority of the state, the assessment of damages is regarded as including all the natural and probable damages resulting from the use of the property for the purpose for which it was taken, and no recovery can be had for any injuries resulting from such use within the scope and provisions of the grant, express or implied. But all such privileges, conferred upon an individual or corporation, are always held to be subject to the qualification that the franchise shall be prudently exercised, and in such a manner as to produce the least possible injury to others. In *Wood on Nuisances*, p. 795, the doctrine is laid down, thus: "Where a person or corporation is vested with authority by the legislature to do an act which, unless carefully and skillfully done, will operate injuriously to the public or to individuals, they are bound to execute the power *in good faith*, and to exercise the highest degree of care to prevent injurious results, and it is only against those acts which, in the exercise of such care and skill, operate injuriously, that their grant operates as an excuse or defense. If negligence can in any measure be predicated of their acts, they are liable for all the consequences, civilly and crim-

have demised the property to a lessee, who is in the actual use and occupation of it, and in receipt of the tolls, it is not then the duty of the commissioners or trustees to maintain the works in a safe and secure state, unless the particular statute under which they act imposes that duty upon them. (*b*) Whenever an Act of Parliament imposes upon commissioners, or upon any public body, the duty of maintaining or repairing a highway or any public work, and special damage is sustained by a particular individual from the neglect of the public duty, an action for damages is maintainable against such commissioners or public body, (*c*) unless there are provisions in the statutes creating them for limiting their liability, (*d*) or the duty of repairing the highway, &c., is not absolute; (*e*) the rule being, that in the absence of something to show a contrary intention, the Legislature intends that the

(*b*) Walker v. Goe, 3 H. & N. 395; 27 Law J., Exch. 427.

(*c*) Gibbs v. Trustees of Liverp. Docks, 35 Law J., Exch. 225; L. R., 1 App. Ca. 93.

(*d*) Young v. Davis, 31 Law J., Exch. 256.

(*e*) Wilson v. Mayor of Halifax, L. R., 3 Exch. 114.

inally, resulting therefrom. *Briscoe v. Great Eastern Railway Co.*, 10 L. R. Eq. Ca. 640. The rule is, that where a corporation or an individual are authorized to do an act which is in derogation of private rights, they are bound to exercise the power given, with moderation and discretion, and not negligently. Thus, where a railroad company were authorized to make excavations for their road-bed, it was held that they were bound to make them with reasonable regard to the rights of adjoining owners, and when they were proceeding with the work without taking sufficient precaution to secure the safety of an adjoining house, they were restrained from proceeding until such precautions were properly provided for, and an inquiry as to damages was granted. *Rickett v. Metropolitan Railway*, 2 H. L. 175. When the company can exercise its rights in a way that will not be productive of injury to private rights, it is bound so to exercise it, and a court of equity will always interfere to prevent their exercise in a vexatious or careless way. *R. R. Co. v. Canal Co.*, 1 Ra. Ca. 225. If there are two modes in which the work can be done, one of which would create a nuisance, and the other not, they are bound to choose the method which will obviate the nuisance.

In *Matthews v. West London Water Works Co.*, 3 Camp. 402, the defendants were authorized to make excavations in the street to lay their water pipes. In doing so they threw up rubbish without properly guarding the same, whereby a stage coach, which the plaintiff was driving, was overturned and injured, and he, plaintiff, severely injured. Lord ELLENBOROUGH held that the company was clearly liable, even though the work was done by a contractor.

In *Waterman v. Conn. & Pass River R. R. Co.*, 30 Vt. 610, damages were allowed for injuries from surface-water, through the unskillful manner in which the road was constructed. But see *Henry v. Vt. Central R. R. Co.*, 30 Id. 638, where land resulting from change in the course of a river by a railroad company

body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same things. (*f*) And this, whether they have or have not funds at their disposal for effecting the repairs; though if there be no funds, there may be a difficulty in the way of the plaintiff's getting his damages. (*g*)

Whenever injury is sustained from the non-repair of water-pipes, fire-plugs, drains, or works erected for the use or accommodation of the public, the liability to make compensation for the injury arising from such neglect rests with the parties upon whom the duty of repairing is imposed. (*h*)

1044. *Surveyors of highways and county bridges* are not responsible in damages to travellers who have sustained injury from the highway or bridge being out of repair. (*i*) Nor

(*f*) Per Blackburn, J., *Mersey Dock Trustees v. Gibbs*, L. R. 1 Ap. Ca. 110.

(*g*) *Hartnall v. Ryde Improvement Commissioners*, 33 Law J., Q. B. 39. *Bush v. Martin*, 33 Law J., Exch. 17. *Ohrby v. Ryde Commis.*, 33 Law J., Q. B. 296. *Coe v. Wise*, L. R., 1 Q. B. 711. If they are in possession of land, it may be taken under a writ of *elegit*. *Worrall*

Waterworks Co. v. Lloyd, L. R., 1 C. P. 719.

(*h*) *Bayley v. Wolverhampton Waterworks Co.*, 6 H. & N. 241; 30 Law J. Exch. 57.

(*i*) *Young v. Davis*, 31 Law J., Exch. 250; 2 H. & C. 197. *M'Kinnon v. Penson*, 9 Exch. 609. See *Parsons v. St. Matthews, Bethnal Green*, L. R., 3 C. P. 56.

in necessary erection of their road, was held not recoverable, though such erections were unskillfully made. *Robinson v. N. Y. & Erie R. R. Co.*, 27 Barb. (N. Y.) 512.

It must lay its track skillfully in a public street, and is liable for injuries resulting from unskillfulness in that respect. *Wooster v. Forty-second Street R. R. Co.*, 50 N. Y. 203.

It must not let down the lands of an adjoining owner, whether by skillful or unskillful prosecution of its work. *Richardson v. Vt. Central R. R. Co.*, 25 Vt.

Authority to erect a bridge over a navigable stream, if the navigation is not impeded, does not authorize it even temporarily to obstruct it while erecting the bridge. *Memphis & Ohio R. R. Co. v. Hicks*, 5 Sneed. (Tenn.) 427.

In *Lawrence v. Great Northern R. R. Co.*, 4 Eng. Law & Eq. 265, held liable for not providing proper flood-gates for escape of water, which by erection of its road-bed were prevented from spreading as formerly, even though the act did not provide for their being made.

In the *Freehold General Investment Co. v. The Metropolitan R. R. Co.*, Weekly Notes, 1866, p. 66, the defendants in the construction of their road were building tunnels under valuable houses, and among the rest, under the plaintiff's house. Upon a bill for an injunction to restrain them from proceeding until they had provided proper means for securing the house from further injury,—the walls having already begun to crack,—the Vice-Chancellor in disposing of the question said: "The Legislature has given power to the defendants to make their works, by

is a local board in whom the highways have been vested by the Public Health Act, 1848, 11 & 12 Vict. c. 63 (see ss. 68 & 117), so liable, *i. e.*, for mere misfeasance in omitting to repair, simply as surveyors. (*j*) But a local board of health discharging the duties of surveyor of highways under s. 117 of 11 & 12 Vict. c. 63, is liable for the negligence of themselves or their servants in leaving heaps of stones, &c., unlighted at night, though it seems doubtful whether they would be, if the negligence was that of their surveyor appointed under s. 37, as he is not removable at their pleasure, but only on the approval of the General Board of Health. (*k*) The proper remedy for the non-repair of a highway is by indictment against the parish, but a surveyor of highways is responsible, like any other person, for any negligent act of his own, creating a nuisance, and causing injury to another.

(*j*) *Gibson v. Mayor of Preston*, L. R., 5 Q. B. 218.

(*k*) *Foreman v. Mayor, &c., of Canterbury*, L. R., 6 Q. B. 214.

means of a tunnel, close to and through the midst of valuable houses, and must have foreseen that some damage would be done. . . . But the company are not only bound to make compensation for the damage sustained, but are bound to prosecute the work skillfully, and, if there are two ways of doing the work, to choose the one that will do the least injury."

In *Regina v. No. Staffordshire R. R. Co.*, 8 E. & B. 836, it was held that a railroad company having carried a highway over its road by a bridge, was bound at all times not only to keep the bridge in repair, but also all approaches thereto.

In *Hamden v. N. H. R. R. Co.*, 27 Conn. 158, it was held that a railroad company altering a highway for the purposes of its road, is bound to restore it to its former condition, and that this liability continues until it is so restored, and until that is done, that it remains a continuing nuisance, rendering it liable for all damages, either to the town or individuals.

In *Regina v. Train*, 2 B. & S. 640, an iron tramway laid in a highway so as to cause the wheels of vehicles to skid, and to frighten horses hitting their feet on them, is a nuisance, and that no degree of public benefit will operate as a defense.

In *Johnson v. Atlantic R. R. Co.*, 35 N. H. 567, it was held that it is the duty of a railroad company to construct culverts and ditches sufficiently low to carry off water set back upon lands by the construction of its road, when this can be done without difficulty.

In *Sabin v. Vt. Central R. R. Co.*, 25 Vt. 363, defendants were held liable for not removing stones thrown upon land in process of blasting for their road-bed.

In *Pittsburgh, &c., R. R. Co. v. Gielleland*, 56 Penn. St. 445, it was held that a culvert so unskillfully constructed as to be insufficient to carry off the water of a stream in ordinary high water, renders the company liable for all injuries resulting therefrom; *Slatten v. Des Moines Valley R. R. Co.*, 29 Iowa, 154; *Terre Haute, &c., R. R. Co. v. McKinley*, 33 Ind. 274; *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 304; *Attorney-General v. Metropolitan Board of Works*, 1 H. & M. 320;

The only legitimate way in which a parish can do an act is by convening a vestry, and duly conducting the proceedings therein to their legitimate termination, by show of hands, or by poll, when a poll is duly demanded. If, therefore, a poll is demanded and refused, and a resolution carried by show of hands, the resolution so carried can not be safely acted upon as being the resolution of the parish, for a ratepayer has a right, at common law, to obtain the sense of the parish by means of a poll, and this right can not be taken away by any general words in a statute respecting the taking the sense of a vestry. (*l*)

1045. *Effect of clauses in particular statutes exonerating persons from all personal liability in respect to things done in the bona fide execution of the statute.*—By s. 140 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), it is enacted, that no

(*l*) *White v. Steele*, 12 C. B., N. S. 408; 31 Law J., C. P. 265.

and the question of proper execution of the works is a question of fact. *Ware v. Regent's Canal Co.*, 3 D. & J. 227; *Coats v. Clarence R. R. Co.*, 1 R. & M. 181.

Thus it is held that authority given to construct a railroad, and to operate it by steam, does not operate as an authority to use engines thereon that are defectively constructed, so as to scatter coals along the line of the road, endangering the property of those through whose lands it passes; *King v. Morris & Essex R. R. Co.*, 3 C. E. Green (N. J.) 377; *Cleveland v. Grand Trunk Railroad Co.*, 42 Vt. 449; nor with smoke-stacks so defectively constructed as to permit the free escape of sparks from the engine or engines, exposing property on the road to imminent danger from fire. *Gaudy v. Chicago, &c., R. R. Co.*, 30 Iowa, 420. See *Jackson v. Same*, 31 Id. 176; *Kellogg v. Chicago, &c., R. R. Co.*, 26 Wis. 223; *Bedell v. Long Island R. R. Co.*, 44 N. Y. 367; *Case v. Northern Central R. R. Co.*, 59 Barb. (N. Y.) 644. And the fact that a fire is set by sparks from a railroad engine is presumptive evidence that the spark protector is defective, and throws the burden of the proof of the contrary upon the company. *Bedford v. Hannibal, &c., R. R. Co.*, 46 Mo. 456; *Case v. Northern Central R. R. Co.*, *ante*. See as to presumption of defects in machinery, *Illinois Central R. R. Co. v. Phillips*, 49 Ill. 234; *Reed v. New York Central R. R. Co.*, 56 Barb. (N. Y.) 493. But see *Indianapolis R. R. Co. v. Paramore*, 31 Ind. 143; *Fitch v. Pacific R. R. Co.*, 45 Mo. 322; *Barron v. Eldridge*, 100 Mass. 455. Neither does it authorize a constant ringing of the bell or blowing of the whistle, to the annoyance of people living along its line, but only such necessary use of those devices as the public safety and the proper running of the trains require. *First Baptist Church Society v. R. R. Co.*, 5 Barb. (N. Y.) 79. The noise and rumble of the trains, the smoke escaping from the engines, and the jarring occasioned by the proper operation of the road, must be borne as *damnum absque injuria*, but the best and most approved devices must be used that skill and science has devised, to prevent injury from the exercise of the powers given by the grant, either to public or individual rights. *Bell v. Railroad Co.*, 25 Penn. St. 161; *Brand v. Hammersmith R. R. Co.*, 1 L. R. (O. B.) 130; *Sparhawk v. Union, &c. R. R. Co.*

matter or thing done by the local board of health, nor by any superintending inspector, or any member of the local board, or by the officer of health, clerk, surveyor, inspector of nuisances, or other officer or person acting under the direction of the local board, shall, if the matter or thing were done bona fide for the purpose of executing the Act, subject them, or any of them personally, to any action, liability, claim, or demand whatsoever, and any expense incurred by such local board, member, officer of health, &c., acting as last aforesaid, shall be borne and repaid out of the general district rates levied under the authority of the Act.

Similar provisions are to be found in other statutes respecting matters or things done by commissioners, or by any clerk, surveyor, or other officer or person acting under the direction of such commissioners, and, in some cases, the sav-

54 Penn. St. 401; *Burton v. Philadelphia R. R. Co.*, 4 Har. (Del.) 252. But where the noise is unnecessary, the rule is otherwise, or when the use complained of can be dispensed with in a populous locality. *Mulford v. Wolverhampton*. In *Cooper v. North British R. R. Co.*, 35 Jurist, 295; 2 Macph. (Sc.) 499, when authority was given to defendants to erect workshops to manufacture machinery, apparatus, &c., it was held that this would not justify the erection of a shop for hardening rails in a locality where the noise would be a nuisance. When this is done, the grant is a full protection; failing in that, it is no protection at all to the extent of the injury occasioned or threatened by such neglect, and for the injuries resulting therefrom, it is liable both to indictment in behalf of the public, and to respond in damages to individuals injured thereby. *Costello v. Syracuse, &c.*, R. R. Co., 65 Barb. (N. Y.) 92; *Chicago v. Quaintance*, 58 Ill. 389; *Spaulding v. Chicago, &c.*, R. R. Co., 30 Wis. 110; *King v. Morris & Essex R. R. Co.*, 3 C. E. Green (N. J.) 277; *Queen v. Darlington Board of Health*, 5 B. & S. 562; *Brine v. Great Western R. R. Co.*, 2 Id. 402; *Broadbent v. Imperial Gas Co.*, 7 D. M. & G. 600; *Caledonian R. R. Co. v. Sprot*, 3 Macph. 383.

Authority given to erect a bridge across a navigable stream, even in the absence of a provision that it should be erected with proper draws, and in such a way as to interfere as little as possible with navigation, would undoubtedly be held to be subject to such restrictions, but, as that question will not be likely to arise, it will not be profitable to discuss it here. It is sufficient to say that when authority is given to erect a bridge over a navigable stream in such a way as to interfere as little as possible with its navigation, the authority does not operate as a protection, if the bridge interferes with navigation in any degree unnecessarily, which, by a more skillful construction, or by the adoption of other methods or better appliances, might be avoided. *State v. Parrott*, 71 N. C. 311; *Jolly v. Terre Haute Bridge Co.*, 6 McLean (U. S.); *Columbus Ins. Co. v. Peoria Bridge Association*, Id.; *Columbus Ins. Co. v. Curtenas*, Id.; *Attorney-General v. Hudson River R. R. Co.*, Stockt. (N. J.) 526; *Newark Plank Road Co. v. Elmer*, Id. 754; *Com. v. New Bedford Bridge Co.*, 2 Gray (Mass.) 339; *Com. v. Nashua & Lowell R. R. Co.*, 2 Id. 54; *Com. v. Erie & N. E. R. R. Co.*, 27 Penn. St. 339.

ing clause is added, "unless the action, suit, damages, costs, and charges have arisen in consequence of willful neglect or default on the part of the commissioners, or person incurring the same."

The effect of clauses of this sort is not to leave a complaining party remediless, but to oblige him to bring his action against the public board, or against the commissioners as a body, in the name of their clerk, in which case the liability would not be personal; and any damages that might be recovered would be payable out of the funds at their disposal under the provisions for the payment of damages and costs, recovered in any such action against the clerk. (*m*) Thus, where certain commissioners for the improvement of a town, acting under the powers of the Public Health Act, made a new sewer communicating with the plaintiff's drain, and neg-

(*m*) *Ward v. Lee*, 7 Ell. & Bl. 430; 26 Law J., Q. B. 142. *Southampton and Itchin Bridge Co. v. Southampton Local Board, &c.*, 8 Ell. & Bl. 801, 812; 23 Law J., Q. B. 41; *post*, s. 2. *Bush v. Martin*, *ante*.

An individual or corporation acting strictly within the scope of legislative power, can not be indicted for a public nuisance. The legislative grant is a license to do the act, and operates as a complete and full immunity from prosecution, either civilly or criminally, on the part of the public. *People v. Law*, 34 Barb. (N. Y.) 294; *HOGEBROOM, J. People v. Manhattan Gas Co.*, 64 Id. 55; *Davis v. R. R. Co.*, 16 N. Y.; *Crittenden v. Wilson*, 5 Cow. (N. Y.) 163; *People v. Platt*, 17 Johns. (N. Y.) 195; *State v. Stoughton*, 5 Wis. 271; *Com. v. Reed*, 34 Penn. St. 375; *Harris v. Thompson*, 9 Barb. (N. Y.) 350; *Carhart v. Auburn Gas Co.*, 2 Id. 297; *Rex v. Pease*, 4 B. & Ad. 302; *Clark v. Syracuse*, 13 Barb. (N. Y.) 32; *Anderson v. R. R. Co.*, 9 How. (N. Y.) Pf. 553. But it by no means follows that because an act is done under legislative authority, that the person doing the act can not be punished therefor by indictment, if the act creates a public nuisance, or if the act is in excess of the power given. *Com. v. Old Colony R. R. Co.*, 14 Gray (Mass.) 93; *Donnahue v. State*, 8 Sm. & M. (Miss.) 549; *Glover v. North Staffordshire R. R. Co.*, 16 Q. B. 912; *Hentz v. L. I. R. R. Co.*, 13 Barb. (N. Y.) 646; *In re Penny*, 7 E. & B. 660; *Mares v. R. R. Co.*, 21 Ill. 516; *Imperial Gas Light Co. v. Broadbent*, 7 H. L. 600; *Ware v. Regent's Canal Co.*, 3 D. & G. 227; *Frewin v. Lewis*, 4 M. & C. 255; *Oldaker v. Hunt*, 6 D. M. & G. 389; *Caledonian R. R. Co. v. Colt*, 3 Mac. & G. 838; *New Albany R. R. Co. v. O'Dailey*, 12 Ind. 557; *Brine v. Great Western R. R. Co.*, 6 B. & S. 562; *Witmore v. Story*, 22 Barb. (N. Y.) 414; *Com. v. Erie & N. E. R. R. Co.*, 27 Penn. St. 339. And the fact that the excess arises from a misapprehension of the power conferred, is no excuse; *Hudson R. R. Co. v. Artcher*, 6 Paige (N. Y.) 84; *Sandford v. R. R. Co.*, 24 Penn. St. 378; or if it is done in a manner not within the reasonable contemplation of the legislature, to be gathered from a fair construction of the grant—as if it is not a necessary and probable result of the exercise of the power given—the act will be no protection against liability, both civilly and criminally. *Steele v.*

lected to take proper precautions to prevent the plaintiff's premises from being flooded by storm waters, and by inundations from an adjoining river, which communicated with the new sewer, it was held that the plaintiff was entitled to maintain an action against the clerk of the commissioners, for the recovery of all the damage he had sustained by reason of the negligence of the commissioners, and that these damages were to be paid out of the rates levied under the Act. (*n*)

But protecting clauses of this sort do not exempt contractors and workmen from personal liability in respect of the negligent performance of work intrusted to them to execute. Where there is no negligence, a person doing the act in obedience to the commissioners or the board would be properly absolved, and the board would have to make compensation; but if he has been guilty of negligence in doing

(*n*) *Buck v. Williams*, 3 H. & N. 308; *of Canada v. Braid*, 1 Moore's P. C. Ca., 27 Law J., Exch. 357. *Allen v. Hayward*, 7 Q. B. 960. *Gt. West. Rail. Co. N. S.* 101.

Western Inland Locks Navigation Co., 2 Johns. (N. Y.) 283. *The Queen v. Bradford Canal Co.*, 6 B. & S. 649; *Delaware Canal Co. v. Com.*, 60 Penn. St. 367. It is only against such consequences as are fairly within the contemplation of the legislature in conferring the authority, and such results as are necessarily incident to its being done—in other words, such results as are the natural and probable consequence of an exercise of the power at all—that the grant operates as a protection. *Rex v. Pease*, 4 B. & Ad. 30; *Lawrence v. R. R. Co.*, 16 Q. B. 642; *Regina v. Charlesworth*, Id. 1010; *Abraham, et al. v. The Great Northern Railway*, Id. 584. Beyond that, it affords no protection whatever. It is sometimes laid down in elementary works, and appears in the opinions of courts, that that which is authorized by the legislature, can not be a nuisance. This is clearly erroneous, in the sense in which it is generally understood. That which is authorized by the legislature, within the strict scope of the power given, can not be a public nuisance, but it may be a private nuisance, and the legislative grant is no protection against a private action for damages resulting therefrom. *People v. Manhattan Gas Co.* 64 Barb. (N. Y.) 55; *Carhart v. Auburn Gas-light Co.*, 22 Id. 297; *Cleveland v. Citizens Gas-light Co.*, 20 N. J. 201; *Fletcher v. R. R. Co.*, 25 Wend. (N. Y.) 462; *First Baptist Church v. R. R. Co.*, 5 Barb. (N. Y.) 79; *State v. Western Inland Locks Navigation Co.*, 2 Johns. (N. Y.) 283; *R. R. Co. v. Applegate*, 8 Dana (Ky.) 287; *Spencer v. London & Birmingham R. R. Co.*, 8 Sim. 183; *Walker v. Board of Public Works*, 16 Ohio St. 540; *Manhattan Gas Co. v. Barker*, 36 How. Pr. (N. Y.) 233. In *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165, SUTHERLAND, J., said: "The effect of the grant is simply to authorize the defendant to erect his dam as he might have done if the stream had been his own, without the grant. *The dam could not be indicted as a public nuisance, and abated. The only remedy for those injured is by action.*" *People v. Platt*, 17 Johns. (N. Y.) 195; *Brown v. Cayuga R. R. Co.*, 12 N. Y. 487; *Lawrence v. R.*

the act, and damage ensues, he is personally liable for the consequences, notwithstanding the statute, for he can not pretend that negligence was ordered or directed by the commissioners or board. (o)

1046. *Right of commissioners, trustees, and public officers to indemnify themselves in respect of the costs and expenses they incur out of the public funds they are authorized to administer.*—Wherever a duty is imposed by statute upon public officers, and costs incidentally arise in questioning the propriety of acts done in the fulfillment of that duty, the commissioners and public officers have a right to defray those expenses out of the funds they are authorized to administer, and they may in general levy a rate to defray such expenses. (p) And wherever necessary expenses are incurred in the execution of a trust, or in the performance of duties

(o) *Arthy v. Coleman*, 6 W. R. 35; 30 Law T. R. 101. *Newton v. Ellis*, 24 Law J., Q. B. 337.

(p) *Rex v. Commissioners, &c., for Tower Hamlets*, 1 B. & Ad. 232. *Rex v. Essex, ante.*

R. Co., 19 Q. B. 643; *Robinson v. N. Y. & Erie R. R. Co.*, 27 Barb. (N. Y.) 512; *Bradley v. N. Y. & N. H. R. R. Co.*, 21 Conn. 305; *Mahan v. R. R. Co.*, Lalor's Supp. 156; *Williams v. N. Y. Central R. R. Co.*, 16 N. Y. 97; *Lyman v. White River Br. Co.*, 2 Aiken (Vt.) 255; *Carpenter v. Horse R. R. Co.*, 11 Abb. Pr. N. Y. (N. S.) 416; *Tinsman v. Belvidere S. R. R. Co.*, 2 Dutcher (N. J.) 148; *Eastman v. Company*, 44 N. H. 143; *Lee v. Pembroke Iron Co.*, 57 Me. 481; *Nevins v. Peoria*, 6 Am. Rep. 41 Ill. 502; *Richardson v. Vermont Central R. R. Co.*, 25 Vt.; *March v. R. R. Co.*, 19 N. H. 372; *Estabrook v. R. R. Co.*, 11 Cush. (Mass.) 224; *Wilson v. City of New Bedford*, 108 Mass. 261; 11 Am. Rep. 352; *Phinze v. Augusta*, 47 Ga. 263; *Curtis v. R. R. Co.*, 14 Allen (Mass.) 55; *Morgan v. King*, 35 N. Y. 340; *Hinchman v. Paterson Horse R. R.*, 17 N. J. 75; *Louisville v. Rolling Mill Co.*, 3 Bush (Ky.) 416; *People v. Law*, 34 Barb. (N. Y.) 294; *Delaware & Raritan Canal Co. v. Wright*, 1 N. J. 469; *People v. Kerr*, 38 Barb. (N. Y.) 357; *Rickett v. Metropolitan R. R. Co.*, 2 H. L. Cas. 175; *Biscar v. Great Eastern R. R.*, 16 L. R. (Eq. Cas.) 640; *Hamden v. N. H. R. R. Co.*, 27 Conn. 158; *North Staffordshire R. R. Co. v. Dale*, 8 E. & B. 836; *Estabrook v. Peterborough R. R. Co.*, 12 Cush. (Mass.) 224; *Regina v. Train*, 2 B. & S. 640; *Eagle v. Charing Cross R. R. Co.*, 2 L. R. (C. P.) 638; *Johnson v. Atlantic R. R. Co.*, 38 N. H. 569; *Eaton v. Boston & Concord R. R. Co.*, 51 Id. 504; 12 Am. Rep. 147; *Alton, &c., R. R. Co. v. Deitz*, 50 Ill. 210. In *Tinsman v. Delaware & Belvidere R. R. Co.*, 2 Dutcher (N. J.), 148, the court places the liability of railroad companies or other companies acting under legislative authority upon the same footing with individuals using their own premises for a similar purpose. "The grantee of a franchise for private emolument, as a railroad company," says the court, "may be vested with the sovereign power to take private property for public use, on making compensation, but is not clothed with the sovereign's immunity from resulting damages. This power leaves their common-law liability for injuries

thrown on any persons, and arising out of the situation in which they are placed, such persons are entitled, without any express provision for that purpose, to make the payments required to meet those expenses out of the funds in their hands belonging to the trust. (q) But the expenses must be such as have been legitimately and properly incurred by the persons intrusted with the administration of the fund in the bona fide and necessary discharge of the duties imposed upon them. (r) If they embark in reckless litigation, or exceed the powers and authorities conferred on them by the statute, although with the best intentions, and for the public benefit, or are guilty of any willful personal misconduct in incurring the expenses they have incurred, they can not charge them on the public funds at their disposal, for funds raised under the authority of a statute are liable only for acts done strictly

(q) *Att.-Gen. v. Mayor of Norwich*, 2 Myl. & Cr. 425. *Lewis v. Mayor, &c.*, 6 Q. B. 652.
 of Rochester, 30 Law J., C. P. 169.

done in the exercise of their authority precisely where it would have stood if the land had never been acquired in the ordinary way." In this case the plaintiff was held entitled to recover for injuries sustained by him, by reason of being deprived of free access to an eddy and creek's mouth, in which he had the right to store lumber, and the court held that the fact that the creek was navigable and the legislature had the right to control it, was no defense to the action. In *Robinson v. N. Y. & Erie R. R. Co.*, 27 Barb. (N. Y.) 512, the court held that a legislative grant to construct a railroad can give no authority to invade any private rights without just compensation. It confers a franchise simply, and the title and rights of a private corporation, but no exemption for wrongs to private property. That if it so excavates and removes the banks of a stream as to cause it to overflow, it is liable for all the injuries that ensue, and that as to them, in all respects, the same rule of liability exists as against an individual doing the same acts upon his own land. It is liable for injuries resulting from diverting a river; *Cott v. Lewiston*, 36 N. Y. 214; and for injury resulting from the occupancy of a public street in front of one's premises, of which he is the owner of the fee; *Fletcher v. R. R. Co.*, 25 Wend. (N. Y.) 462; *Trustees v. R. R. Co.*, 3 Hill (N. Y.) 367; or for shutting off access to other parts of one's premises; *Miller v. Auburn, &c.*, R. R. Co., 6 Hill (N. Y.) 61.

The power may be exercised by the state in favor of any person or corporation, or in favor of itself or the general government. *United States v. Dauphin Island*, 1 Barb. (N. Y.) 24. The power may be exercised in favor of a foreign as well as domestic corporation, or in favor of a foreigner as well as a citizen. It is simply essential that the use should be public, and that there should be an apparent necessity therefor, of which the state is to be the judge. The power of the state to condemn land for the use of the general government, has been questioned in one or two cases, but the doctrine of these cases does not commend itself for its reasoning, its logic, or its good sense. There is no limitation upon the power of the state in

in pursuance of the directions of that statute, and can not be applied in satisfaction and discharge of liabilities arising from willful misconduct, gross mistake, or willful neglect of duty. "Such damages are to be paid out of the pocket of the wrong-doer, and not from a trust-fund." (s)

1047. *When expenses incurred through blunders or negligence may be charged upon a public or trust-fund.*—In respect to all acts bona fide done by commissioners or local boards, acting in the execution of the Public Health Act and divers statutes for the improvement of towns and the construction of public works, but erroneously done, and causing damage to others, the commissioners or members are liable, and the expenses they are put to in consequence thereof they have authority to discharge out of the public funds. "It is said," observes LORD CAMPBELL, "that it is a great hardship on

(s) *Duncan v. Finlater*, 6 Cl. & Fin. 908. *Heriot's Hospital Feofees v. Ross*, 12 Cl. & Fin. 513.

this respect, except that the use for which the property is taken shall be public, and that a proper compensation shall be made therefor. As to the persons, corporations, &c., in whose favor it exists, there is no limit whatever, and the state is left to be the judge as to the necessity of, and the person in favor of whom the grant may be made. In the case of *People v. Humphrey*, 23 Mich. 471, an attempt was made to condemn certain lands for the use of the general government under an act of the legislature, but the court held that the power of a state in the exercise of the right of eminent domain to appropriate individual property for the public benefit, did not extend to the condemnation of property to be turned over to the general government for its use in the erection of light-houses, or for other purposes. The court held that the right existed only for the benefit of the state itself, and that it could not be exercised in favor of any other sovereignty; and that the taking of property for the use of the general government or another sovereignty, is not among the ends contemplated in the creation of the state governments. The court fell into a grave error in supposing that the power of the state to take private property for public use, is derived from the constitution. The power is an inherent one incident to any government, and the existence of this as an inherent and incidental power of the state government, is expressly recognized by the constitutional provision which attempts to qualify the power, and not to confer it; and, as it is a mere qualification of a power already existing in the state, it is not to be enlarged beyond its evident purport, scope, and meaning. If the framers of these provisions in the constitution had intended to qualify the power as to the persons, corporations, or sovereignties in whose favor it should be exercised, it should have been set forth expressly, and not left to implication, and as in this case, an implication that has no foundation except the mere arbitrary exercise of the authority of the court. From the first formation of the general government, down to the present time, the state governments have furnished the machinery through which the general government has acquired property for its uses in the several states.

the ratepayers to be made to pay for the blunders or negligence of the board. That objection, however, seems to be met by the consideration that the members of the board are elected by the ratepayers, and are therefore their representatives; and there would be greater injustice, perhaps, if it were held that persons injured by the negligence or wrongful acts of the board had no remedy." (*t*)

1048. *Creation of nuisances in the bona fide exercise of statutory powers.*—Where certain contractors acting under the directions of the Metropolitan Commissioners of Sewers, altered a sewer communicating with the plaintiff's drain, and thereby caused a nuisance to the plaintiff, for which he brought an action against the contractors, and the jury, in answer to a question left them by the judge, found that the contractors had, in making the sewer, acted bona fide under

(*t*) Southampton and Itchin Bridge Co. v. Southampton Local Board, 8 Ell. & Bl. 812; 28 Law J., Q. B. 41.

In *Reddall v. Bryan*, 14 Md. 444, the state legislature authorized the taking of water from the state of Maryland, to supply the city of Washington; and the court held that the act was valid.

In *Gilmer v. Lime Point*, 18 Cal. 229, the state legislature authorized the United States government to take lands for fortifications, and also provided special modes for the assessment of damages, and notice to the parties to be affected thereby; and the court held the act to be valid.

And in a recent case in Massachusetts, *Burt v. Merchants' Ins. Co.*, 106 Mass. 364, the legislature provided for the taking of lands for the United States, for the erection of a new post-office, and, the question being directly raised as to the power of the state government to condemn property for the use of the general government, the act was held to be valid, and the exercise of the power within the constitutional limitation. CHAPMAN, C. J., in commenting upon the question, said: "We can not doubt the validity of the act in question in this case." And he goes on to show that by a long line of acts of the legislature, from 1790 down to the present time, the power has been exercised in favor of the general government, commencing with the purchasing of lands for an armory in Springfield, of lands for a navy yard in Charlestown, for light-houses at Castle Island, for an ordinance depot at Watertown, &c., &c., and providing for a taking of the land and an appraisement of its value, &c., in case of a failure to agree upon the terms of purchase. See *Harris v. Elliott*, 10 Pet. (U. S.) 25.

That the power may be exercised in favor of foreign corporations, see *Matter of Townsend*, 39 N. Y. 171; *Morris Canal, &c. v. Townsend*, 24 Barb. (N. Y.) 658.

The exercise of the power, being in derogation of private rights, is construed strictly, and the provisions of the law authorizing it must be substantially pursued. Any deviation therefrom, not within the letter or the spirit of the act, can not be upheld. Therefore, lands condemned for one purpose can not be used for another

the orders and directions of the commissioners, it was held that the contractors were absolved from all personal liability for the nuisance. "The object of the Legislature," observes WIGHTMAN, J., "seems to have been in such a case not to leave the complaining party remediless, but to oblige him to bring his action against the commissioners as a body in the name of their clerk, in which case the liability would not be personal; and any damages that might be recovered would be payable out of funds at their disposal under the provisions of the 125th section, which provides for the payment of the damages and costs recovered against the clerk in any such action." (*u*) Here there was no evidence of any negligence on the part of the contractors, the sewer having been properly constructed by them under the orders of the commissioners, and the nuisance to the plaintiff being the natural and necessary result of the making of the sewer.

Whenever the mischief is the natural and necessary result of the doing of the act ordered to be done, and not the result of some collateral or negligent act not ordered, the maxim *respondet superior* applies. (*v*)

1049. *Pollution of streams and injuries to docks, wharfs, towing-paths, &c., in the exercise of statutory powers.*—By the Public Health Act (11 & 12 Vict. c. 63), s. 145, it is enacted, that nothing contained in the Act shall be construed to authorize a local board of health to use, injure, or interfere with any watercourse, stream, river, dock, basin, wharf, quay, or towing-path, in which the owner or occupier of any lands, mills,

(*u*) Ward v. Lee, 7 Ell. & Bl. 430.

(*v*) Hole v. Sittingbourne, &c., Rail. Co., 30 Law J., Exch. 81.

and different one. *Lance's Appeal*, 55 Penn. St. 16; *Thacher v. Dartmouth Bridge*, 18 Pick. (Mass.) 501; *State v. Jersey City*, 25 N. J. 309; *Morehead v. Little Miami R. R. Co.*, 17 Ohio, 340. And the mode of ascertaining the value of the property must be strictly pursued. *Hanse v. Rochester*, 15 Barb. (N. Y.) 517.

The right of eminent domain may be delegated by the legislature to municipal or other corporations, either by general or special law; but in all such cases the power must be pursued strictly according to the provisions of the law. *Morehead v. R. R. Co.*, *ante*; *State v. Jersey City*, *ante*; *Woodstock v. Gallup*, 28 Vt. 587; *People v. Smith*, 21 N. Y. 595; *Shaffner v. St. Louis*, 31 Mo. 264; *Bloodgood v. R. R. Co.*, 18 Wend. (N. Y.) 9. And when such power is delegated to corporations, they may also be made the judges of the necessity for taking the property required, or other modes may be provided, as the legislature deems proper. *West v. Blake*, 4 Blackf. (Ind.) 234; *Curry v. Mt. Stirling*, 15 Ill. 320; *Com. v. Charlestown*, 1 Pick. (Mass.) 186.

mines, or machinery, or the proprietors or undertakers of any canal or navigation, shall or may be interested, without consent in writing first had and obtained. Where, therefore, a local board of health constructs drainage works and pours the filth from public sewers into streams or watercourses running through the private grounds of adjoining landowners, they can not shelter the rate payers or the public funds at their disposal from the consequences of the creation of the nuisance by showing that they acted in the exercise of the statutory powers conferred upon them. (x) Generally speaking, where local boards are authorized and required to execute drainage works in a particular district, and to make compensation to parties sustaining injury therefrom, they have no power to collect together the sewage and pour it into streams which were previously pure, so as to create a nuisance and deteriorate the value of the adjoining land. A power to take possession of streams, and to cover over open watercourses for drainage purposes, and to give compensation therefor, gives to the board no power by implication to pollute water which was previously substantially pure. (y)

Although the inhabitants of a town may have a right to open their sewers into a river in the natural course of drainage, this does not entitle them to foul the water with the contents of water-closets, and convert a sweet and limpid stream into a stinking sewer. The ordinary right of sending household-drainage into streams and natural watercourses, is like the right of drainage which exists in the case of adjoining mines upon different levels. "From the necessity of the case, every owner of a mine must submit to the inconvenience of having the water of an adjoining mine upon a higher level descend upon his mine, so long as it descends in the natural course of drainage; but that does not entitle the owner of the adjoining mine to throw upon him, in some other and more objectionable way, water which might be allowed to descend upon him in a modified form, not occasioning the same amount of injury to his property." (z)

1050. *Creation of nuisances in the exercise of the statutory pow-*

(x) Att.-Gen. v. Luton Local Board, 2 Jur. N. S. 180. Manchester, Sheff., &c., Rail. Co. v. Workop Board of Health, 23 Beav. 198.

(y) Cator v. Lewisham Board of Works, 34 Law J., Q. B. 75.

(z) Wood, V. C., Att. Gen. v. Borough of Birmingham, 4 K. & J. 542.

ers contained in the Towns Improvement Clauses Act.—By 10 & 11 Vict. c. 34, s. 24, power is given to commissioners and public bodies intrusted with the execution of the powers of the Act, to construct sewers for the drainage of towns, and to carry such sewers through inclosed and other land, making full compensation to the owners and occupiers thereof, and to cause such sewers to empty themselves into the sea or any public river, or to cause the refuse from such sewers to be conveyed to a convenient site for sale, for agricultural or other purposes, but so that the same shall in no case become a nuisance. And by s. 107 it is further enacted, “that nothing in the Act contained shall be construed to render lawful any act or omission on the part of any person which is, and but for the Act would be deemed to be, a nuisance at common law.” If, therefore, commissioners, trustees, or any body corporate, intrusted with the exercise of the powers of this statute, create a nuisance by their system of drainage, they may be restrained by injunction from continuing the nuisance. (a)

1051. *The Metropolis Local Management Act*, 18 & 19 Vict. c. 120, (b) provides (s. 86), that where any work by any vestry or district board, done, or required to be done, in pursuance of the provisions of the Act, interferes with, or prejudicially affects, any ancient mill, or any right connected therewith, or other right to the use of water, full compensation shall be made to all persons sustaining damage thereby, in manner thereafter provided; or it shall be lawful for the vestry or board, if they think fit, to contract for the purchase of such mill, or any such right connected therewith, or other right to the use of water. If any vestry or district board, in the exercise of the powers conferred upon them by this statute, cause work to be done which is negligently and unskillfully done, and damage is thereby caused to another, it is a proper case for an action or an injunction; but if the work is properly done, and the injury is the natural and necessary result of the doing of the work, it is then a proper case for the statutory compensation. (c)

(a) *Att.-Gen. v. Borough of Birmingham*, 4 Kay & J. 543. *Att.-Gen. v. Corporation of Leeds*, L. R., 5 Ch. App. 583.

(b) See 25 & 26 Vic. c. 102.

(c) *Stainton v. Woolrych*, 23 Beav. 233; 6 Law J., Ch. 300. *Coats v. Clarence Rail. Co.*, 1 Russ. & M. 181.

1052. *Of the power to take lands and streams for public purposes.*—By the Waterwork Clauses Act, 10 & 11 Vict. c. 17, it is enacted (s. 6), that where by the special Act the undertakers shall be empowered to take or use any lands or streams otherwise than with the consent of the owners or occupiers thereof, they shall, in exercising the power so given to them, be subject to the provisions and restrictions contained in the Lands Clauses Consolidation Act, 1845, and shall make to the owners and occupiers of, and all other parties interested in, any lands or streams taken or used for the purposes of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorized, or otherwise by the execution of the powers thereby conferred, full compensation for the value of the lands and streams so taken or used, and for all damage sustained by such owners, occupiers, and other persons by reason of the exercise, as to such lands and streams, of the powers vested in the undertakers, the amount, except where otherwise directed, to be determined in the manner provided by the Lands Clauses Consolidation Act.

If, therefore, a company, under the powers conferred by this statute, takes the whole stream, it must pay the whole price of it; if it injuriously affects it, compensation must be made in the ordinary way. Before an entire stream can be taken, the company must proceed to have the amount of compensation assessed, and paid or deposited, or security given, in the mode prescribed by the statute; and the court will by injunction restrain them from diverting the stream unless they have complied with the statutory requirements. (*d*)

If a company or public board, acting under the powers of the Lands Clauses Act, require only part of a building, &c., they may be compelled to take the whole, and have the value thereof assessed, and paid into court before they take possession of part. (*e*) All fixtures, whether they be tenant's or landlord's fixtures, form part of the premises which the company may be required to value and take. (*f*)

(*d*) *Ferrand v. Corporation of Brad-*
fore, 21 Beav. 412.

30 Law J., Ch. 603.

(*e*) *Giles v. Lond., Chat., &c. Rail. Co.*,

(*f*) *Gibson v. Hammersmith Rail*
Co., 32 Law J., Ch. 337.

1053. *Licenses to enter upon land authorized to be taken for public works.*—Where the owners and occupiers of land authorized to be taken for public works have licensed the entry of a public board or company for the purpose of commencing the construction of the works, they can not revoke the consent once given, and treat their licensees as trespassers, but must resort to the statutory remedy for compensation. (*g*)

1054. *Seizure and detention of goods by custom-house officers acting in the execution of statutory powers.*—Revenue-officers, acting under an authority given them by statute to examine goods and merchandise, in order to ascertain the amount of duty payable upon them, or whether they are goods that may lawfully be imported, are not liable to an action for the seizure or the unlawful detention of the goods, unless the goods are taken and kept an unreasonable time, and there has been a clear abuse of authority on the part of the officers. If they, fairly and honestly believing that goods are liable to seizure, take and detain them, and the decision of the matter is referred to the proper authorities, they are not responsible for the detention of the property, although it may turn out that their judgment in the matter was erroneous, and that the goods ought to have been examined and passed. (*h*) By the 8 & 9 Vict. c. 87, s. 116, it is enacted, that if any information or suit shall be commenced or brought to trial on account of the seizure of any vessel, boat, or goods, &c., as forfeited by any act relating to the customs, wherein a verdict shall be found for the claimant, and it shall appear to the judge or court, before whom the same shall have been tried, that there was a probable cause of seizure, such judge or court shall certify on the record that there was such probable cause, and in such case the person making the seizure shall not be liable to an action on account of such seizure.

(*g*) *Doe v. Leeds and Bradford Rail. Co.*, 16 Q. B. 796; 20 Law J., Q. B. 486. *Knapp v. Lond., Chat. and Dover Rail. Co.*, 32 Law J., Exch. 236.

(*h*) *Jacobsohn v. Blake*, 7 Sc. N. R. 784; 13 Law J., C. P. 89. As to detention for freight, see 22 & 23 Vict. c. 37 s. 2.

SECTION II.

OF STATUTORY REMEDIES FOR THE RECOVERY OF COMPENSATION FOR INJURIES AUTHORIZED BY STATUTE.

1055. *Injuries establishing a right to statutory compensation.*—Where land has been taken under the provisions of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), and the usual warrant has been issued to assess compensation for the land taken, and for severance, and for the land being otherwise injuriously affected, the claimant, the land-owner, is entitled to compensation in respect of the residue of his land being injuriously affected by the execution of the works, although the injury may be of such a nature that an action for damages would not have been maintainable in respect of it, for where the owner is turned out of his property by a company under compulsory powers of purchase, the company is bound to compensate him for all the loss occasioned by the expulsion, as in trespass for expulsion. (i) But where no land has been compulsorily taken from the plaintiff under statutory powers, but the injury complained of has arisen from something done on land which has not been taken by them from the claimant, and the injury would not have formed a ground of action against an ordinary proprietor, if done by him, such injury can not be made a ground for compensation under the statute. (j)

Where, therefore, the New River Company, in the exercise of its statutory powers, constructed some underground works on their own land which drew off the water from the plaintiff's well, it was held that the plaintiff was not entitled to compensation under the statute, as the company, in drawing off the water from the well, had not infringed any right of the plaintiff, or done anything which would have rendered

(i) *Jubb v. Hull Dock Co.*, 9 Q. B. 457. *Re Stockport, &c., Rail. Co.*, 33 Law J., Q. B. 251. See *Duke of Buccleuch v. Metrop. Board of Works*, L.

R., 3 Exch. 307; 5 Exch. 221; 5 Eng. & Ir. App. 418.

(j) See *Ricket v. Metrop. Rail. Co.*, *post.* *City of Glasgow Union Rail. Co v. Hunter*, L. R., 2 Sc. App. 78.

them liable to an action at common law, independently of the statute. (*k*) A similar decision has been made under the Public Health Act (11 & 12 Vict. c. 63), where the local board of health constructed a sewer, which caused the plaintiff's houses, which, though erected on old foundations, had within twenty years been built of a much more substantial character, to crack. (*l*) So, where the tenant of a public-house claimed compensation for the loss of profits he had incurred by reason of a railway company having, under statutory powers, purchased and pulled down the adjoining houses, it was held that he was not entitled to compensation, for if any private person had purchased and pulled down the adjoining property, no action would have lain against them. (*m*)

1056. *Of ascertaining the amount of statutory damage by arbitration.*—Most of the Acts of Parliament authorizing the execution of public works which may be productive of injury to private individuals, direct compensation to be paid to all persons who have suffered injury from the execution of the authorized works, and direct the amount of compensation in certain cases, if the amount is disputed, to be referred to arbitration. The reference to arbitration is in many cases made compulsory, for if one party refuses to appoint an arbitrator, the other may do so alone. But that is confined to disputes as to amount, and not to the question of liability to make compensation. If that is denied altogether, the question must be referred to the regular tribunals. (*n*) An arbitrator has no jurisdiction to determine the question of liability, or any question of damage distinct from the damage naturally resulting from the exercise of the statutory powers, unless the parties naturally consent to refer such matters to him to decide upon. (*o*) The award, therefore, merely settles the amount to be recovered, and if the defendant refuses to pay on the ground that he is not liable, the plaintiff must en-

(*k*) *New River Co. v. Johnson*, 29 Law J., M. C. 93. *Reg. v. Metrop. Board, &c.*, 32 Law J. Q. B., 105.

(*l*) *Hall v. Mayor of Bristol*, L. R., 2 C. P. 322.

(*m*) *Reg. v. Vaughan*, 38 Law J., M. C. 49; L. R. 4 Q. B. 190.

(*n*) *Reg. v. Metrop. Commis. of Sewers*, 1 El. & Bl. 702.

(*o*) *Re Byles*, 11 Exch. 464. *Brandon v. Brandon*, 34 Law J., Ch. 333.

force his claim by action, and not by an application to the court to enforce the award. (*p*)

The Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 144, gives a right of full compensation out of the general or special district rates to all persons sustaining damage by reason of the exercise of any of the powers of the Act, and directs that in case of dispute as to the amount, the same shall be settled by arbitration, (*q*) or be recovered in a summary way before justices, if the sum claimed does not exceed twenty pounds. Under the powers of this statute a local board made a sewer, and in so doing cut a trench through the claimant's land, and the local board contended that no damage had been thereby done to the claimant, but the claimant contended that he had sustained damage, and was entitled to compensation, and it was held that this clearly was a dispute as to the amount of compensation, to be settled by arbitration, and that if the arbitrator found the damage nominal or infinitesimally small, he might find the amount of compensation to be nil. (*r*) But when there is a dispute as to whether the act complained of was done by the local board, or as to some matter of fact which would, if found for the local board, show that there was no liability to make compensation, then the dispute is not within the jurisdiction of the arbitrator.

1057. Jurisdiction of the arbitrator.—Parties can not attend before an arbitrator and go into the inquiry, reserving to themselves the right to contest the jurisdiction of the arbitrator, on the ground that he has not complied with some bare formality, such as the enlargement of the time for making the award. If, therefore, they attend in such a case under protest, the protest is of no avail. But where the objection is a substantial one,—that the arbitrator has no jurisdiction at all over the subject-matter of the inquiry, and no power to decide upon it, *e.g.*, if the time for making his award has expired, or he has misconducted himself,—it is otherwise. (*s*)

(*p*) *Newbold v. Metrop. Rail. Co.*, 14 C. B., N. S. 405. *Reg. v. Lond. and North-West Rail. Co.*

(*q*) See *Reg. v. Wallasey Local Board*, 38 L. J., Q. B. 217.

(*r*) *Bradley v. Southampton Local Board*, 4 El. & Bl. 1018.

(*s*) *Ringland v. Lowndes*, 33 Law J., C. P. 30.

1058. *Damages recoverable before justices of the peace and not by action.*—When an Act of Parliament, authorizing the doing of an act which has been productive of injury to another, provides, that if the parties can not agree upon the amount of compensation, the same shall be settled and ascertained by order of one or more justices of the peace, &c., the parties are confined to the specific remedy given by the statute, and have no choice of any other tribunal to settle the amends in any case within the Act; (*t*) but if the powers of the Act have been exceeded, or the thing authorized to be done has been negligently or carelessly done, and the damage is the result of negligence, then an action for damages must be brought, and the matter is not within the cognizance of the statutory tribunal appointed for settling the amount of statutory compensation. (*u*) Under the Towns Improvement Clauses Act (10 & 11 Vict. c. 34), the Railway Clauses Consolidation Act (8 Vict. c. 20), the Metropolis Local Management Act (18 & 19 Vict. c. 120), and other statutes authorizing the construction of public works, it is provided that certain statutory expenses therein specified may be recovered as damages; (*x*) and by other sections of these statutes it is provided, that when damages are to be paid they are to be ascertained before justices. These clauses creating the right and providing a specific remedy, impose upon the parties seeking to avail themselves of the provisions of the statute the obligation of following the particular remedy given, and no other, (*y*) unless the statutory remedy does not extend to and cover the whole right. (*z*)

Giving an appeal to the court of quarter-sessions will not oust the Queen's courts of their jurisdiction. (*a*)

1059. *Of the statutory remedy for the recovery of compensation under the provisions of the Lands Clauses and Railway Clauses Consolidation Acts.*—The 8 & 9 Vict. c. 18, commonly called the Lands Clauses Consolidation Act, 1845, consolidates into one Act certain provisions to be thereafter incorporated

(*t*) *Boyfield v. Porter*, 13 East, 208.

(*u*) *Clothier v. Webster*, 12 C. B., N. S. 790; 31 Law J., C. P. 316. *Whitehouse v. Fellowes*.

(*x*) See *Herring v. Metrop. Board of Works*, 34 Law J., M. C. 224, as to damage by obstructing access to house.

(*y*) *Mayor, &c., of Blackburn v. Parkinson*, 28 Law J., M. C. 7.

(*z*) *Shepherd v. Hills*, *ante*; *Bogg v. Midland Rail. Co.*, *post*.

(*a*) *Leader v. Moxon*, 2 W. Bl. 924; 3 Wils. 461.

into Acts of Parliament, relative to the acquisition of lands required for undertakings or works of a public nature, and to the compensation to be made to the owners or occupiers of, or parties interested in, such lands, for any damage that may be sustained by them by reason of the execution of the works authorized by statute. If the claim for compensation by such persons is under fifty pounds, it is to be settled (s. 22) by two justices; if it exceeds fifty pounds, the claimant may elect (s. 23) to have it settled by arbitration, or by the verdict of a jury (ss. 24-49), or in cases of railways, by the trial of an issue. The General Compensation Clause (s. 68) provides that if any party shall be entitled to compensation in respect of any lands, or of any interest therein, (*b*) which shall have been taken for, or injuriously affected by, the execution of the works, and for which satisfaction has not been made, and the compensation claimed exceeds fifty pounds, such party may have the same settled by arbitration or the verdict of a jury, as he shall think fit. And if lands required or taken for the purposes of the undertaking, or injuriously affected thereby, are in the possession of a person having no greater interest therein than that of a tenant for a year or from year to year, (*c*) and such person be required to give up possession of the whole or of part of such lands before the expiration of his interest therein, (*d*) the amount of compensation is, if the parties differ, to be settled (s. 121) by two justices. The general words of the 68th section of the statute, therefore, are restricted by s. 121, so that the proceedings in cases falling within the latter section must be in the mode there prescribed. (*e*) But where no part of the land of a tenant from year to year is required to be given up, but is

(*b*) This does not extend to an agreement for sporting. *Bird v. Gt. Eastern Rail. Co.*, 34 Law J., C. P. 366; unless, perhaps, it be by deed; *ibid.*

(*c*) See *Tyson v. Mayor of London*, L. R. 7 C. P. 18.

(*d*) A notice to treat under s. 18 is not equivalent to requiring possession under this section. *R. v. Stone*, L. R., 1 Q. B. 529. But it is a statutable agreement upon which, if not duly carried out, an action for damages and a mandamus may be sustained; *Morgan v. Metrop. Rail. Co.*, L. R., 3 C. P. 553; 4 *ibid.* 97; and it is no defense to such an action that

the whole capital of the company has not been subscribed, as required by s. 16 of the Lands Clauses Act, that section only applying to lands compulsorily taken. *Guest v. Poole and Bournemouth Rail.*, L. R., 5 C. P. 553. See *Richmond v. North Lond. Rail. Co.*, L. R., 5 Eq. Ca. 352; S. C., 3 Ch. App. 679. *Harding v. Metrop. Rail.*, L. R., 7 Ch. App. 154.

(*e*) *Reg. v. Manch. &c., Rail. Co.*, 4 Ell. & Bl. 103. *Knapp v. Lond., Chat. and Dover Rail. Co.*, 32 Law J., Exch. 236. *Reg. v. Lord Mayor of London*, L. R., 2 Q. B. 292.

merely injuriously affected by the execution of the works of a railway, the claim to compensation is regulated by s. 68 of the statute, and does not come within the restrictive operation of s. 121. (*f*) The fact that the works can not be executed without the consent of some third person, who owns the land on which the works are to be made, does not render the consent of such third person, when given, equivalent to an agreement to give up his land voluntarily, but such third person will still be entitled to claim as for lands compulsorily taken. (*g*)

By another statute, 8 & 9 Vict. c. 20, commonly called the Railway Clauses Consolidation Act, consolidating into one Act sundry provisions to be introduced into Acts of Parliament thereafter passed, authorizing the construction of railways, it is provided (s. 6), that in exercising the power given to the company to construct a railway, the company shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of a railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise as regards such lands of the powers vested in the company, the amount of compensation to be ascertained and determined in the manner provided by the Lands Clauses Consolidation Act. In cases to which the Lands Clauses Act does not apply, as, for instance, where the lessee of lands taken by a company is entitled to a right of renewal, the Court of Chancery has jurisdiction to decide between the claimant and the company. (*h*)

If the claimant or the railway company prefer it, they may, at any time before the issue of the writ of the sheriff, apply to a judge of a superior court of common law for the trial of the question between them, by directing an issue in such form, and to be tried at such place, &c., as he shall direct, and the proceedings in respect of such issue shall be subject to the jurisdiction of the court, but the jury nevertheless must, where the issue relates to land purchased, and in-

(*f*) *Somers, In re*, 31 Law J., Q. B. 261. Station Rail. Co., L. R., 4 C. P. 59.
 (*h*) *Bogg v. Midland Rail. Co.*, L. R., 4 Eq. Ca. 310. *Shepherd v. Hills*.

jury done to other land held therewith, deliver their verdict separately, as provided by the 49th section of the Lands Clauses Act; 31 & 32 Vict. c. 119, ss. 41, 42, 43.

The statutory remedy provided by these Acts of Parliament is substituted in lieu of the ordinary remedy by way of action, so that parties aggrieved by anything done in the exercise of the powers granted by the statute must follow the statutory remedy, and can not resort to an action for damages. (*z*). The fact of the claimant being entitled to the compensation he seeks is a condition precedent to his right to avail himself of the machinery provided by s. 68 of the Lands Clauses Consolidation Act. If, therefore, the claimant has no title to compensation, the whole proceedings before the arbitrator or a jury are *coram non judice*, (*z*) of which the company are entitled to avail themselves in answer to an action on the award. (*l*)

In cases of railway compensations, it has been held that the occupier of a house and shop adjoining a railway is entitled to the statutory compensation for damage sustained by him in consequence of the dust and dirt from the railway works having penetrated his shop and damaged his goods, (*m*) or from the obstruction to the access of light and air to ancient windows, provided in all these cases that the act causing the injury has been authorized to be done by Act of Parliament, and has been judiciously and carefully done in the exercise of the statutory powers.

Wherever real property is depreciated in value by the construction of a railway, and the depreciation is caused by that being done which, but for the powers contained in the Act of Parliament, would have been actionable as between the landowner and the company, that is a case for compensation under the provisions of the statute, and for the adoption of the statutory remedy, to the exclusion of an action at common law. Thus, if a private way of the landowner has been

(*z*) *Watkins v. Gt. North. Rail. Co.*, 16 Q. B. 968. *Jolly v. Wimbledon, &c., Rail. Co.*, 31 Law J., C. P. 96. *Chamberlain v. West End, &c., Rail. Co.*, 31 Law J., Q. B. 201.

(*z*) *R. v. Cambrian Rail. Co., L. R.*, 4 Q. B. 320.

(*l*) See *Hooper v. Bristol Port Rail-*

way Company, 45 Law J., C. P. 299. *Beckett v. Midland Railway Company*, L. R., 1 C. P. 241.

(*m*) *Knock v. Metrop. Rail. Co., L. R.*, 4 C. P. 131. *East and West India Docks v. Gattke*, 3 Mac. & G. 155; 20 Law J., Ch. 17.

obstructed, although an easement only, (*u*) or his enjoyment thereof infringed or rendered less convenient by reason of the private way being crossed by a railroad, and obstructed by railway gates, or the means of access to his house or land from the highway has been rendered less convenient from a road being raised or lowered, (*v*) or the light coming to his house has been impeded, (*p*) a case for the statutory compensation is made out. (*q*) But in the case of injury to adjoining houses by the vibration caused by trains running in the ordinary manner, without negligence, after the line is opened for traffic, or by the noise and smoke of the trains, it is now held that, although the right of action is taken away, there are no provisions either in the Lands Clauses or Railway Clauses Act under which a person whose house is so injured can recover compensation. (*r*) And where a highway has been diverted or rendered less convenient, by being narrowed, for instance, (*s*) and premises abutting thereon have been rendered less suitable for shops or a public house, (*t*) or where a public turnpike-road is crossed by a railway, and no special damage has been sustained thereby, and no injury or inconvenience, different in kind, although it may be greater in degree, has been suffered by a complaining party than that which is common to all the Queen's subjects passing along such public highway, there is no ground for statutory compensation, for no action for damages would be maintainable. (*u*)

(*n*) *Duke of Buccleuch v. Metrop. Board of Works*.

(*o*) See *Reg. v. St. Luke's*, L. R., Q. B. 572; 7 *ibid.* 148.

(*p*) *Eagle v. Charing Cross Rail. Co.*, L. R., 2 C. P. 633; and it makes no difference that the value of his house has not been lessened, owing to the increase of value by reason of the proximity of the railway; S. C.

(*q*) *Glover v. North Staff. Rail. Co.*, 16 Q. B. 923. *Moore v. Gt. South and West. Rail. Co.*, 10 Ir. C. L. Rep. 46. *Chamberlain v. West End of Lond., &c. Rail. Co.*, 32 Law J., Q. B. 173.

(*r*) *Brand v. Hammersmith Rail. Co.*, L. R., 1 Q. B. 130; 2 *ibid.* 223; 4 Eng. & Ir. App. 171; 38 Law J., Q. B. 265; *City of Glasgow Union Rail. Co. v. Hunter*, L. R. 2 Sc. App. 78. See *Lond. and North-West Rail. Co. v. Bradley*, 6

Rail. Cas. 556; 3 Mac. & G. 336. *Reg. v. Cambrian Rail.*

(*s*) However, if the narrowing of the road sensibly interferes with the light and air coming to a house, so that it is worth less to let, as a house, and not with reference to any particular trade, &c., carried on in it, that is "injuriously affecting" it within the statute. *Beckett v. Mid. Rail. Co.*, L. R., 3 C. P. 82. *City of Glasgow Union Railway Co. v. Hunter*, L. R., 2 Sc. App. 78. So, if a roadway is substituted for a waterway, *Duke of Buccleuch v. Metrop. Board of Works*, L. R., 3 Exch. 306; 5 Exch. 221; 5 Eng. & Ir. App. 418.

(*t*) *Rex v. London Dock Co.*, 5 Ad. & E. 163.

(*u*) *Caledonia Rail. Co. v. Ogilvy*, 2 Macq. Sc. App. 23. *Ricket v. Metrop. Rail. Co.*, L. R., 2 H. of L. Ca. 175; 34

1060. *Of statutory compensations to tenants and occupiers of lands taken for public works.*—In the case of lands under lease required for railways or undertakings of a public nature, it is enacted (8 & 9 Vict. c. 18), that every lessee shall be entitled to receive compensation for damage done to him in his tenancy by reason of the severance of his land for the purposes of the undertaking, or otherwise, by reason of the execution of the works authorized by statute, and that if any such lands be in the possession of any person having no greater interest therein than as a tenant from year to year, and such person be required to give up possession before the expiration of his interest, he shall be entitled to compensation for the value of his unexpired term or interest, and for any just allowance which ought to be made to him by an in-coming tenant, and for any loss or injury he may sustain; or, if a part only of such lands be required, compensation for damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same. A lessee, therefore, who has been obliged to give up his house and business for the purpose of a railway, is entitled to compensation for the loss he sustains in giving up his business, until he can get other suitable premises for carrying it on. (x)

1061. *Notices by claimants of the nature and extent of the injury sustained, and of the amount of compensation required.*—Every owner and occupier whose land has been taken by a public company for public purposes under statutory powers, or whose land has been injuriously affected by the execution of works of a public nature authorized by statute, must give notice in writing to the railway or other company, declaring whether he desires a settlement by arbitration or by the verdict of a jury, stating in such notice the nature of his interest in the lands in respect of which he claims compensation, and the amount claimed by him, *i.e.*, such particulars of his estate or interest as will enable the company to form a proper judgment respecting the claim. (y) If he desires an arbitration

Law J., Q. B. 257 (overruling Senior v. Metrop. Rail. Co., 32 Law J., Exch. 25; and Cameron v. Charing Cross Rail. Co., 33 Law J., C. P. 313). Lond. and North-West. Rail. Co. v. Smith, 1 Mc. & G. 216. Reg. v. Metrop. Board of Works, 38 L. J., Q. B. 201.

(x) Jubb v. Hull Dock Co., 9 Q. B. 443. Chamberlain v. West End, &c., Rail. Co., 31 Law J., Q. B. 201.

(y) Heeley v. Thames Valley Rail. Co., 34 Law J., Q. B. 55. Cameron v. Charing Cross Rail Co., 33 Id. C. P. 313.

and gives the requisite notice, and the compensation claimed is not paid, or agree to be paid, he will be entitled to have the amount of the compensation settled by arbitration pursuant to the provisions of the statute. (z) If, on the other hand, he desires to have the amount of compensation settled by the verdict of a jury, and gives the requisite notice (s. 68), and the amount claimed is not paid, or agreed to be paid, the railway company is bound, within twenty-one days after the receipt of the notice, to direct the sheriff (a) to summon a jury for settling the amount of compensation in the manner provided by the statute, and in default thereof the company is liable to pay to the party injured the amount of compensation claimed, and the same may be recovered by action in any of the superior courts. (b)

Where the owner of land taken by a railway company gave notice under s. 68 of this statute of his desire to have the amount of compensation settled by a jury, and before the expiration of the twenty-one days limited by that section for the company to issue their warrant to the sheriff to summon a jury, the owner gave a second notice of his desire to have the question settled by a special jury under s. 54, which fixes no time for the issuing of the warrant, it was held that the company were bound to issue their warrant for the special jury within twenty-one days after the receipt of the first notice, or pay the compensation claimed. (c) If the company do not, within a reasonable time after notice, issue their warrant to the sheriff, an action for a mandamus under the Common Law Procedure Act, 17 & 18 Vict. c. 125, may be sustained. (d)

1062. Assessment of damages.—It is not competent to the sheriff's jury to determine the right of a claimant to compensation. It is for the court to decide upon the right or title of the party to be compensated, and for the jury to settle the amount, so that the amount has to be tried first and the title last. (e) Neither the jury nor an arbitrator has any jur-

(z) 8 & 9 Vict. c. 18, ss. 22-37.

(a) If the sheriff is interested.

(b) 8 & 9 Vict. c. 18, s. 68.

(c) Glyn v. Aberdare Rail. Co., 6 C. B. N. S. 359; 28 Law J., C. P. 271.

(d) Fotherby v. Metrop. Rail. Co., L

R., 2 C. P. 188. Morgan v. Metrop. Rail. Co., L. R., 3 C. P. 553.

(e) Reg. v. Lond. & North-West. Rail. Co., 3 El. & Bl. 465. Read v. Vict. Station and Pim. Rail. Co., 32 Law J., Exch. 170. Horrocks v. Metrop. Rail. Co., 4 B. & S. 315.

isdiction to inquire into collateral matters, creating a head of damage distinct from the damage flowing from the exercise of the statutory powers, unless the parties mutually consent to refer such matters to them for their decision. (*f*) And in an action on the award the arbitrator may be examined, to prove what was the subject-matter into which he was inquiring, and upon which his judgment was founded, but not as to the motives which induced him to arrive at the particular sum awarded. (*g*) Where the value of the claimant's estate is increased by a particular covenant, such enhanced value must be taken into account in assessing the compensation. (*h*) If part of a man's land be taken, and part of the remainder be severed from the rest, and such part have a prospective value for building purposes, although then used as agricultural land, the owner is entitled to compensation for it as if access were absolutely cut off, and without regard to the power of justices to order accommodation works, under ss. 68 and 69, which only apply to agricultural land. (*i*) If land be taken subject to restrictive rights, rendering it of little or no value to the owner, as, for instance, to a right of way, or if a churchyard which has been closed under an Order in Council be taken, the amount of compensation is assessed with reference to the value of the owner's interest therein, and not with reference to its value to the persons taking it. (*k*)

1063. *Future Damages.*—The jury have no right to assess prospective damages, unless there may be an actually existing cause of damage proved before them. The provision respecting future damage is, that the jury shall assess the sum of money to be paid by way of recompense for the future temporary or perpetual continuance of any recurring damage which shall have been occasioned by the exercise of the powers thereby granted. A cause of damage, therefore, must exist in some work of the company already done, to give the jury the power of computing the future damage. They then know what the injury is at present, how often it may accrue, and from these data they have the power of making

(*f*) *Re Byles*, 11 Exch. 464; 25 Law J., Exch. 53.

(*g*) *Duke of Buccleuch v. Metrop. Board of Works*. *Re Dare Valley Rail. Co.*, L. R., 6 Eq. Ca. 429.

(*h*) *Bourne v. Mayor of Liverpool*, 33 Law J., Q. B. 15.

(*i*) *Reg. v. Brown*, L. R. 2 Q. B. 630.

(*k*) *Stebbing v. Metrop. Board of Works*, L. R., 6 Q. B. 37.

a contingent assessment of damages. When no injury has been actually done, there is nothing in respect of which future damages can be assessed. (*l*) When the amount of damage to be sustained in future years is not capable of being ascertained, and depends upon a variety of contingencies which may or may not occur, the compensation can not be assessed at once and forever in respect of this future contingent injury. But when it is capable of being known and estimated, it ought to be brought forward, and the amount of compensation assessed at once and forever. (*m*)

The cases relating to railways seem to establish that compensation is given in respect of the calculable damage caused, or to be caused, in or by the execution of the permanent works of the company authorized by the statute, such as obstructing private ways, injuring lights, &c., and not the uncertain prospective damage or injury which may or may not result from the use of the railway after it has been constructed. (*n*) Thus, where the plaintiff and a railway company, before a railway was constructed, referred to arbitration the sum to be paid by the company for the purchase of part of the plaintiff's land, and as compensation for all injury and damage to his remaining estate by severance or otherwise, it was held that the compensation awarded related only to all damage known or contingent by reason of the construction of the railway on the land purchased, and to such other damage arising from the construction of the railway as was apparent and capable of being ascertained and estimated at the time when the compensation was awarded, that it did not embrace contingent and possible damages which might arise afterwards, and which could not at the time have been foreseen by the arbitrator, and that the plaintiff was entitled, notwithstanding the award, to claim compensation for such damages. (*o*)

1064. *Assessment of damages to which the claimant is not legally entitled—Removal of the inquisition by certiorari.*—If,

(*l*) Parke, B., *Lee v. Milner*, 2 M. & W. 841.

(*m*) *Rex v. Leeds and Selby Rail. Co.*, 3 Ad. & E. 690. *Reg. v. Aire and Calder Nav. Co.*, 30 Law J., Q. B. 337. *Croft v. Lond. and North-West. Rail. Co.*, 32 Law J., Q. B. 113.

(*n*) *Broadbent v. Imp. Gas. Co.*, 26 Law J., Ch. 231.

(*o*) *Lawrence v. Gt. North. Rail. Co.*, 16 Q. B. 643; 20 Law J., Q. B. 293. *Brand v. Hammersmith Rail. Co.*, *ante*; *Bagnall v. Lond. & N. W. Rail. Co.*, 7 H. & N. 423; 31 Law J., Exch. 153.

upon an inquisition of damages resulting from the execution of works done under the authority of an Act of Parliament, the under-sheriff has directed the jury to assess and include in their verdict damages for an item which they ought not to have included, and there is reasonable evidence that they did include such an item in making their calculation, a certiorari clearly lies, inasmuch as the jury have thus committed an excess of jurisdiction; and the excess of jurisdiction may be shown upon affidavits, and need not appear upon the face of the proceedings. Thus, where it was shown by affidavit that the under-sheriff directed the jury that they might give compensation in respect of an alleged nuisance resulting from persons standing on a railway platform, which had been constructed under statutory authority near the plaintiff's dwelling-house, and thence overlooking the plaintiff's premises, it was held that the nuisance was not a legitimate subject of compensation; that the jury had exceeded their jurisdiction in giving compensation in respect of it, and as they had given one lump sum for the damage done, the court quashed the inquisition. (p) Wherever, therefore, several items of claim are brought under the consideration of a sheriff's jury, and it is doubtful whether they are all legitimate subjects of compensation, the proper course is for the under-sheriff to direct the jury to find separately upon each item, to guard against the quashing of the whole inquisition.

1065. *Recovery of the amount of compensation assessed by a jury.*—Although the verdict of the jury and the judgment are made records, they are not made records of any superior court, nor is there any express provision for any writ of execution to issue for enforcing them. The consequence is, that an action must be resorted to for recovering the amount. (q)

1066. *Declaration in actions for railway compensations.*—The plaintiff's declaration in an action for the amount of compensation assessed by a sheriff's jury under 8 & 9 Vict. c. 18, s. 68, usually sets forth the plaintiff's possession of a house or land, that it was injuriously affected by the execu-

(p) *Re Penny*, 7 Ell. & Bl. 660; 26 Law J., Q. B. 225. *Reg. v. South Wales Rail. Co.*, 13 Q. B. 994. *Caledonian*

Rail. Co. v. Ogilvy, 2 Macq. 229. (q) *Coleridge, J., Reg. v. Lond. and North-West. Rail. Co.*, 3 Ell. & Bl. 468.

tion of the works and the construction of the railway, and that the plaintiff was entitled to compensation; whereupon he gave notice to the railway company, stating the nature of his interest in the land, and the amount of compensation claimed by him pursuant to the statute in that behalf, that the plaintiff claimed to have the amount settled by a jury, that a jury was duly impanelled and sworn, and the parties having appeared and given evidence before them, the jury assessed the amount of compensation for the injury to the house at, &c., and for the injury to (stating any other legal injury), &c., amounting in the whole to the sum of £—, and that the sheriff gave judgment for the sum to be paid to the plaintiff according to the provisions of the said statutes, and that the verdict and judgment were duly deposited with the clerk of the peace, by whom the same were kept among the records of the court of quarter-sessions, yet the defendants had not paid to the plaintiff the said sum of £—, or any part thereof. (r)

1067. *Pleadings—Defenses—Traverse of the injury to the land.*—The finding of the sheriff's jury on an inquisition under s. 68 of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18) is not conclusive; and, therefore, in an action brought on such inquisition, it is competent to the defendants to traverse the allegation that the plaintiff's property was damaged or injuriously affected by the construction of the railway, or by the exercise of the powers vested in the company, within the meaning of the Act, and that the plaintiff was entitled to compensation under the provisions of the statute in respect of the same having been damaged or injuriously affected; or to plead these facts, and to prove that the subject-matters of the claim submitted to the determination of the sheriff's jury are not such as are contemplated by the 68th section. (s)

If the sheriff's jury had no jurisdiction over the subject-matter of the inquiry, and power to award compensation to the plaintiff, the defendants can not afterwards, in an action upon the judgment, set up as a defense that there was an ex-

(r) *Chapman v. Monm. Rail. &c. Co.*, 11 Exch. 267; 27 Law J., Exch. 97.

(s) *Chapman v. Monm. Rail. &c. Co.*, *ut sup.* Reg. v. Lond. and North-West. Rail. Co., 3 Ell. & Bl. 468. *Read v.*

Vict. Station and Pim. Rail. Co., 32 Law J., Exch. 167. *Barber v. Notting. and Grantham Rail. Co.*, 33 Law J., C. P. 193. *Hooper v. Bristol, &c., Rail. Co.*, *Beckett v. Mid. Rail. Co.*

cess of jurisdiction as to some part of the claim. In an action upon the judgment, it must be taken that there was jurisdiction, and the quantum of it can not be investigated, for if that could be done the plaintiff would have to go down to trial prepared to prove each part of his claim, and such a course would be most inconvenient. Where, therefore, an action was brought upon a judgment following an inquisition found before the sheriff in a proceeding by the plaintiff to obtain compensation for an injury done to his premises by works carried on under the authority of an Act of Parliament, and the defendants sought to bar the action, and prevent the plaintiff from recovering, by proving that part of the damages was given in respect of an injury arising from the cutting off some water to which the plaintiff had no legal title, it was held that no such defense was open to the defendants in that action, and that if the sheriff's jury had improperly taken upon themselves to give damages in respect of the loss of the water, the matter should have been set right by certiorari, and the inquisition quashed. (*t*)

1068. *Remedy for subsequent damages.*—In respect of all damages which can be seen and ascertained at the time of the inquiry, there can be no further compensation. The assessment must “be once for all; finally; for all time;” (*u*) but if, after compensation has been obtained for the known calculable injury, damage has been sustained which could not have been foreseen, and this damage is the natural and necessary result of the construction of the works authorized by statute, the remedy appears to be by resort to the sheriff's jury, under s. 68 of the Lands Clauses Consolidation Act. (*x*) Thus, if some violent storm has destroyed a portion of the earthworks of a railway, or if there has been a subsidence or fall of an embankment from purely accidental causes, and the accident and its reparation have caused injury to an adjoining landowner, the claim for compensation seems to fall within the compensatory clause of the statute. “The dam-

(*t*) *Mortimer v. South-West. Rail. Co.*, 1 Ell. & Ell. 382; 28 Law J., Q. B. 129. *Corrigal v. Lond. and Blackwall Rail. Co.*, 5 M. & Gr. 245.

(*u*) *Croft v. Lond. and North-West. Rail. Co.*, 32 Law J., Q. B. 120.

(*x*) *Ware, In re*, 9 Exch. 402; 7 Rail. Cas. 780. *Glover v. North Staff. Rail. Co.*, 16 Q. B. 643. *Lond. and North-West. Rail. Co. v. Bradley*, 3 Mac. & G. 326. See *Brand v. Hammersmith Rail. Co.*

age resulting from the reparation of a mischief of this sort" observes the LORD CHANCELLOR, "appears to me to be damage strictly arising from the carrying on of the works, and as much within the Lands Clauses Consolidation Act as if it had occurred before the opening of the railway. I see no difference between the title to compensation of a person who has sustained loss by an unexpected land-slip, whether the accident happened before the line was opened, or two or three days, or two or three weeks, subsequently to that period." (y) When an Act of Parliament (z) provided that no action or proceeding should be commenced against the Metropolitan Board of Works till after notice, and that "every such action and proceeding should be brought and commenced within six months next after the accrual of the cause of action or ground of claim or demand, and not afterwards," it was held that those words referred to some hostile claim against the Board, and not to a claim of arbitration for damage to buildings caused by the works of the board. (a)

If, on the other hand, the subsequent injury results from negligence, or want of care and skill in the execution of the authorized works, or from the doing of some wrongful and unauthorized act, or for not doing what an Act of Parliament or a legal obligation requires to be done, the remedy is by action, (b) for no compensation is given, as previously mentioned, by s. 68 of the Lands Clauses Consolidation Act, or, generally speaking, by any compensation clauses in statutes authorizing the commission of injurious acts, unless the injury is the natural and necessary result of the doing of the authorized act. If the act is a wrongful act, notwithstanding the statute, the compensation clauses do not apply; (c) and if the statutory remedy does not apply, an action for damage is, as we have seen, maintainable. (d)

1059. *Remedy in cases of severance.*—The 128th section of the Lands Clauses Act (8 & 9 Vict. c. 18) provides that, before disposing of the superfluous lands, unless they be "situate

(y) *Lanc. and York. Rail. Co. v. North-West. Rail. Co.*, 31 Law J., Exch. Evans, 15 Beav. 332. 121.

(z) 25 & 26 Vict. c. 102 (s. 106).

(a) *Delany v. Metrop. Board of Works*, L. R., 2 C. P. 532; 3 Ibid 111.

(b) *Lawrence v. Gt. North. Rail. Co.*, 15 Q. B. 643. *Bagnall v. Lond. and*

(c) *Broadbent v. Imp. Gas, &c. Co.*, 26 Law J., Ch. 280.

(d) *Blagrove v. Waterworks, &c., Co* 1 H. & N. 385.

within a town, or be lands built upon or used for building purposes," the company shall offer them to the person entitled to the land from which they were originally severed, and in case of his refusal, to the owners of the land adjoining. (*e*) Under this section it has been held, that land situate within the limits of a borough, and chargeable and charged with paving, lighting and other borough rates, and with a cottage upon it, but which was at some distance from the mass of houses forming the town, was not within the meaning of the words "within a town," or "built upon or used for building purposes," although the railway had paid the price of building land for it, and that the original vendors to the company or purchasers from them might, therefore, exercise their right of pre-emption. (*f*) But if the land has been actually sold as building land and been laid out for building purposes, or has been let upon building leases, although the houses have not been actually commenced, it is not within the section, and the right of pre-emption will not arise. (*g*) This right of pre-emption accrues as soon as the company have clearly shown that the land is superfluous land, *e. g.*, by selling it to another person or otherwise permanently dedicating it to purposes other than those authorized by their Act, although the limit of time mentioned in the 127th section of the Lands Clauses Act, or the company's own Act, within which superfluous lands must be sold, has not yet arrived. (*h*) The right accrues to lessees for a long term of years of the adjoining land as well as to owners of the fee. (*i*) But it has no application to lands taken by a company for a line which has never been made. (*j*) Superfluous lands remaining unsold at the expiration of the time limited by the 127th section vest, under the provisions of that section, in the owners of the adjoining lands. (*k*)

(*e*) If more than one, see *Lond. and South-West. Rail. Co. v. Blackmore*, L. R., 4 Eng. & Ir. App. 610.

(*f*) *Carington v. Wycombe Rail. Co.*, L. R., 2 Eq. Ca. 825; 3 Ch. App. 377. *Lond. and South-West. Rail. Co. v. Blackmore*, L. R., 4 Eng. & Ir. App. 610. How in such a case the arbitration to determine the price should be conducted, *quære?*

(*g*) *Coventry v. L., B., and S. Coast*

Rail. Co., L. R. 5 Eq. Ca. 104.

(*h*) *Lord Beauchamp v. Gt. West Rail. Co.*, L. R. 3 Ch. App. 745. *Lond. and South-West. Rail. Co. v. Blackmore*, L. R., 4 Eng. & Ir. App. 610.

(*i*) *Coventry v. L., B., and S. Coast Rail. Co.*, *supra*.

(*j*) *Smith v. Smith*, 38 Law J., Exch. 37.

(*k*) See *May v. Gt. West. Rail.*, L. R., 7 Q. B. 364.

1070. *Compulsory purchase of house by railway company.*—

The 92nd section of the Lands Clauses Act, 8 & 9 Vict. c. 18, provides that no person shall be required to sell to the promoters "a part only of any house or other building or manufactory," if such person be willing to sell the whole. Where a manufactory was partly worked by water-power supplied by a reservoir, which in its turn was supplied by a goit, into which water was turned from a natural stream at some distance from the manufactory, and at the point where the goit commenced there was a weir, with shuttles to regulate the supply of water to the goit, and a mill-house for the residence of a man to see to the shuttles, and the railway company proposed to take the weir, shuttles, mill-house, and part of the goit, it was held that they must take the manufactory also. (*l*) So a vacant piece of land in front of a public-house, not separated by any fence from the street, which had been always treated as passing to the lessee of the public-house under a demise thereof, and formed the only means of approach for vehicles coming to the house, is part of the "house" within the meaning of the section. (*m*) But, although the company may be compelled to take whatever is thus necessary for the convenient or profitable occupation of the house or manufactory, they can not be compelled to take what is necessary only for the personal use or convenience of the owner for the time being. Where, therefore, the plaintiff, the proprietor of a house and six acres of land on one side of a road, bought several acres of land on the other side, upon which he kept cows and horses requisite for his family and establishment, which was a large one, and built, or found built thereon, a cottage, which he used for the residence of his grooms, it was held that the last-named land was not part of his "house" within the meaning of the section. (*n*) It makes no difference that the grounds are used partly for ornament and partly for business purposes, *e. g.*, growing plants, &c., for sale, if the company propose to take part of that which is used for ornament and can fairly be considered as part of the house, as a residence. (*o*)

(*l*) *Furniss v. Mid. Rail. Co.*, L. R., 6 Eq. Ca. 473.

(*m*) *Maron v. Lond., Chat., and Dover Rail. Co.*, *Ibid.* 101.

(*n*) *Steele v. Mid. Rail. Co.*, L. R., Ch. App. 275.

(*o*) *Salter v. Metrop. District Rail.*, L. R., 9 Eq. Ca. 432.

SECTION III.

REMEDIES BY ACTION AND BY INJUNCTION IN RESPECT OF
INJURIES FROM THE NEGLIGENT DOING OF THINGS
AUTHORIZED TO BE DONE BY STATUTE.

1071. *Limitation of actions in respect of things done under local and personal statutes.*—By 5 & 6 Vict. c. 97, s. 5, it is enacted, that the period within which any action may be brought for anything done under the authority or in pursuance of any local and personal Acts, (*p*) shall be two years, or, in case of continuing damage, then the action must be brought within one year after such damage shall have ceased, and so much of any enactment as appoints any other period of limitation is repealed.

1072. *Accrual of the cause of action and commencement of the period of limitation.*—Where the defendant, who was a surveyor of highways, dug into the plaintiff's soil, threw down fences, and erected a wall, and the Highway Act, 13 Geo. 3, c. 78, s. 81, required the action to be brought "within three months after the fact committed, and not afterwards;" and no action was brought within the three months, and after that period had expired, the surveyor raised the wall and finished it, it was held that the raising of the wall was not a fresh fact committed within the meaning of the statute, and would not extend the period of limitation beyond the three months. (*q*) But where the cause of injury was a digging in the soil of a street, and the excavation at first produced no injury to the plaintiff, but some months after it had been made, it weakened the foundations of the wall of the plaintiff's house, and caused it to fall, it was held that the falling of the wall of the house constituted the cause of action; that no action was maintainable for the digging in the street until injury to the plaintiff resulted therefrom, and, therefore, that the time of limitation ran from the falling of the wall,

(*p*) See *Cock v. Gent*, 13 Law J.,
Exch. 24.

(*q*) *Wordsworth v. Harley*, 1 B. & Ad.
391.

and not from the time of the making the excavation. (r) A continuing excavation of this sort has been said to be a continuing nuisance, constituting a continuing cause of action so long as it is permitted to exist: (s) and so is a continuing obstruction to a watercourse and flow of water. (t)

1073. *Of notice of action.*—The words in clauses of Acts of Parliament requiring notice of action to be given “in respect of anything done in pursuance of the Act, or in execution of the powers thereof,” apply to all cases where the parties are intending to act upon powers given by the statute, and not merely using it as a cloak for their own private purposes. (u) Those words do not mean acts done in strict pursuance of the Act, because in such a case a person would be acting legally, and would not require protection. They mean, that a person, to be entitled to the protection, must bona fide and really believe himself to be authorized by the Act. (x) Though he may erroneously exceed the powers the Act gives, or inadequately discharge the duties imposed upon him, yet if he acts bona fide, in order to execute such powers, or to discharge such duties, he is to be considered as acting in pursuance of the Act, and is entitled to the protection conferred upon persons so acting. (y) Whenever, indeed, any action is brought against any one for anything done by the order, direction, or authority of a person authorized to act in the matter, under the provisions of a public or a private Act of Parliament, it will generally be found necessary to give notice of action. It must be given in cases of nonfeasance, where the person, having undertaken to act in pursuance of some statute, has failed to do what he ought to have done; as well as in the cases of misfeasance, where he has acted negligently or wrongfully in the execution of the Act. (z) The notice must state positively that an action

(r) *Roberts v. Read*, 16 East, 217.
Bonomi v. Backhouse, *ante*. 34 Law J.,
 Q. B. 181. *Smith v. Thackerah*, L. R.,
 1 C. P. 564.

(s) *Holroyd, J., Howell v. Young*, 5
 B. & C. 268. *Gillon v. Boddington, Ry.*
 & M. 164.

(t) *Whitehouse v. Fellowes*, 30 Law
 J., C. P. 305.

(u) *Oakley v. Kensington Canal Co.*, 5

B. & Ad. 139. *Beechey v. Sides*, 9 B.
 & C. 809.

(x) *Hughes v. Buckland*, 15 M. & W.
 353. *Gaby v. Wilts Canal Co.*, 3 M. &
 S. 589.

(y) *Smith v. Wiltshire*, 2 B. & B. 620.
Smith v. Shaw, 10 B. & C. 284.

(z) *Joule v. Taylor*, 7 Exch. 58. See
 per *Blackburn, J.*, L. R., 6 Q. B. 84.

will be brought, and must in general state the cause of action. (a)

Notice of action is required only where the action is brought for a tort or a quasi tort, and not for a breach of a specific contract. (b)

1074. Notice of action to gas companies and trading corporations and their officers.—The right to notice of action has been extended by numerous Acts of Parliament to all sorts of trading corporations, joint stock companies, and associations called into existence by statute for a variety of local and private purposes, and purposes of gain, so that whenever an action of tort is brought against a company or association which is incorporated or regulated by statute, or derives its power from some special Act of Parliament, or against the officers of any such company or association, it will, in general, be necessary to give notice of action. This will be found to be the case in actions against many of the gas companies or their officers for things done by them under the powers or in pursuance of their several Acts of Incorporation, also against certain railway companies (c) when there has been an omission of some duty imposed upon the company by the Act, such as the non-repair of fences, or the charging or levying excessive tolls under the powers of their Act of Incorporation, (d) but when the action is brought against them for a breach of their duty as common carriers, no notice of action is requisite. (e)

Neither the Lands Clauses nor the Companies Clauses Consolidation Act, however, contain any section requiring notice of action to be given to companies in respect of things done by them under the authority of those statutes; but s. 141 of the Companies Clauses Act (8 & 9 Vict. c. 16), and s. 135 of the Lands Clauses Act (8 & 9 Vict. c. 18), entitle the company to a verdict, if before action they tender sufficient amends.

1075. Notice of action to toll and tax-collectors and revenue-officers.—Notice of action also is required to be given in

(a) *Mason v. Birkenhead Com., &c.*, 6 H. & N. 72; 29 Law J., Exch. 406.

(b) *Wightman, J., Davis v. Curling*, 8 Q. B. 293. *Fletcher v. Greenwell*, 4 Dowl. P. C. 166. *Davis v. Mayor, &c.*, of Swansea, 22 Law J., Exch. 297.

(c) *Carpue v. Lond. & Brighton Rail. Co.*, 5 Q. B. 747.

(d) *Kent v. Gt. West. Rail. Co.*, 3 C. B. 725.

(e) *Palmer v. Grand Junction Rail Co.*, 4 M. & W. 766. *Garton v. Gt. West. Rail. Co.*, E. B. & E. 837, 846.

respect of things done by toll-collectors on turnpike-roads acting in pursuance of the General Turnpike Act, (*f*) or certain special Acts of Parliament authorizing the collection of toll, (*g*) or by revenue officers, (*h*) tax-collectors, (*i*) or commissioners and other persons acting in the execution of the several Acts relating to the land-tax. (*j*) If the officer has reasonable grounds for thinking that his duty required him to do the injurious act complained of, he is entitled to notice of action. (*k*) If a toll or tax, though not legally payable, is demanded bona fide by a collector, who intends to act right, and has fair and reasonable grounds for believing that he has a right to demand the money, the collector is entitled to the statutory protection, and must have notice of action. (*l*) But if a revenue officer, toll or tax-collector, improperly and without color of right, extorts money by virtue of his office and in plain and manifest abuse of the statute under which he acts, he will then lose the statutory protection, and will not be entitled to any notice of action. If he makes an improper seizure of goods, and then takes money as a bribe to deliver them up again, there is no statutory protection. (*m*) If he makes a wholly unauthorized charge, and is guilty of manifest extortion under a threat of legal proceedings, or the pressure of a distress, (*n*) he can not shelter himself under the provisions of the statute.

1076. *Notice of action against contractors, &c., under Local Boards of Health.*—A contractor who contracts with a Local Board of Health for the digging of drains and wells and making excavations, is a person acting under the direction of the board within 11 & 12 Vict. c. 63, s. 139, and is entitled to notice of action for digging a hole in a public thoroughfare, and leaving it unguarded and without a light although the board might not be liable for the contractor's act. (*o*) So a contractor is entitled to notice of action, under the Metropolis Local Management Amendment Act, 25 & 26

(*f*) 3 Geo. 4, c. 126.

(*g*) *Waterhouse v. Keen*, 4 B. & C. 200.

(*h*) *Greenway v. Hurd*, 4 T. R. 553.

(*i*) 43 Geo. 3, c. 99, s. 70.

(*j*) 5 & 6 Wm. 4, c. 20, s. 19. *Thomas v. Williams*, 13 Law J., Exch. 87.

(*k*) *Daniel v. Wilson*, 5 T. R. 1.

(*l*) *Waterhouse v. Keen*, 4 B. & C. 211.

(*m*) *Irving v. Wilson*, 4 T. R. 486.

(*n*) *Umphelby v. M'Lean*, 1 B. & Ald.

42.

(*o*) *Newton v. Ellis*, 5 Ell. & Bl. 115; 24 Law J., Q. B. 337.

Vict. c. 102, who, in enlarging a sewer, under a contract with the Metropolitan Board of Works, has dammed it up, although he has been guilty of negligence in not pumping away the sewage water which had accumulated, and which in consequence flowed into the plaintiff's house. (*p*) But where the injury is caused by the negligence of his servant, in leaving his cart unattended in the public streets, and the horse runs away and causes damage, he is not entitled to notice. (*q*) Nor is a person who receives notice to drain his house under the 106th section of the 25 & 26 Vict. c. 102, and who in so doing commits a trespass by laying the drain-pipe in the land of another, entitled to notice. (*r*)

1077. *Notice of action against surveyors and persons acting in execution of the Highway Acts.*—The Highway Act, 5 & 6 Wm. 4, c. 50, s. 109, requires notice of action to be given for anything done in pursuance of the Act. Where, therefore, a surveyor of highways left an obstruction of gravel and sand in the highway, and had notice to remove it, and failed so to do, it was held that he was entitled to notice of action. (*s*) And where a highway board, with their surveyor, trespassed upon private grounds, and broke down a private gate in the assertion of a supposed right of way which had no existence, it was held that they were entitled to notice of action. “The defendants,” observes Lord DENMAN, “might believe that they were acting in execution of the power to remove obstructions in public roads without coming to a very irrational conclusion. The argument against it is, indeed, founded on a specific clause, which prescribes a different course of proceeding to this end, but we are not prepared to hold that officers of this description are bound to argue on a comparison of clauses in a long Act, and to decide correctly.” (*t*) Wherever, therefore, a surveyor is acting bona fide in his public capacity as surveyor, he is entitled to notice of action. (*u*)

A person acting as surveyor under an appointment in fact,

(*p*) *Poulson v. Thirst*, L. R., 2 C. P. 449. See *Wilson v. Mayor of Halifax*, L. R., 3 C. P. 114.

(*q*) *Whatman v. Pearson*, L. R., 3 C. P. 422.

(*r*) *Doust v. Slater*, 38 Law J., Q. B.

159.

(*s*) *Davis v. Curling*, 8 Q. B. 292.

(*t*) *Smith v. Hopper*, 9 Q. B. 1014.

(*u*) *Hardwick v. Moss*, 31 Law J. Exch. 207.

though an informal and illegal one, is, nevertheless, entitled to notice of action if he was acting in what he did in the bona fide belief that he had been properly appointed. (*v*) And so where a surveyor received payment under an informal assessment, made apparently under a repealed Act, but bona fide intended to act according to the duties of his office, and in pursuance of the statute authorizing him in that behalf. (*w*)

1078. *Tender of amends before action.*—The statutes requiring notice of action to be given, further provide, as we have seen, that the action shall not be maintainable, and that the jury shall give a verdict for the defendant, if there has been a tender of sufficient amends before action.

1079. *Parties to be made defendants.*—All persons who have been guilty of negligence or misconduct in the execution of public works under the authority of an Act of Parliament, or who have exceeded the powers intrusted to them, (*x*) or who have neglected a public duty imposed upon them by statute, or by the common law, are, as we have seen, liable to be sued by the party injured; but if the injury of which the plaintiff complains is the inevitable result of the execution of the authorized Act, the liability will be regulated and governed by the statute. Where an Act of Parliament imposed upon a waterworks company the duty of repairing, renewing, and keeping certain fire-plugs in proper order, it was held that it was no answer to an action for damages resulting from a breach of this duty, to show that the fire-plugs were the property of another public body which was required to pay the costs and charges of keeping them in repair. (*y*)

Sec. 138 of the Public Health Act, 1848, 11 & 12 Vict. c. 63, (*z*) provides that the Local Board of Health of any non-corporate district may be sued in the name of the clerk for the time being concerning any matter or thing whatsoever relating to any matter done by them under the provisions of the Act, and that the clerk shall be reimbursed out of the general district rate all costs and damages. Where public health Acts or local Acts for the improvement of towns,

(*v*) *Hughes v. Buckland*, 15 M. & W. 355.

(*w*) *Selmes v. Judge*, L. R., 6 Q. B. 724.

(*x*) *Reg. v. Longton Gas Co.*, 2 Ell. &

Ell. 651.

(*y*) *Bayley v. Wolverhampton Waterworks Co.*, 6 H. & N. 241; 30 L. J. Exch. 57.

(*z*) See *ante*.

and the authorization of public works to be effected through the medium of trustees or commissioners, or a board, enact that the trustees or the commissioners, or the board, shall and may sue and be sued in the name of their clerk, it is generally meant that they must so sue and be sued; so that an action for a wrong done in the execution of the Act can not be brought against individual commissioners or trustees, or individual members of the board. In some cases these statutes require the action to be brought against the clerk; (*a*) in others they require the action to be brought against the board in its statutory name, as a quasi-corporate body. (*b*) If it is sued in a wrong corporate name, the misnomer must be pleaded in abatement.

1080. *Pleadings—Plea of not guilty.*—The 5 & 6 Vict. c. 97, s. 3, repeals so much of any clause or provision in any public local, and personal Act, or local and personal Act, or in any Act of a local and personal nature, as enables any party to plead the general issue only, and to give any special matter in evidence. The plea of not guilty by statute, therefore, is not available for railway companies, gas companies, trading corporations, local commissioners, or their subordinates, or any persons acting in the execution of local Acts for the improvement, lighting, and paving of towns, unless there is some special enactment in that behalf overriding the provisions of the last-named statute. And if the defense of the want of notice of action is founded on the provisions of a local and personal Act, it must be specially pleaded, and can not be given in evidence under the plea of not guilty by statute. (*c*) Thus, a railway company, whose local and personal Act requires notice of action to be given to the company, must plead the want of such notice specially; (*d*) and persons who claim to have acted under local Acts for paving, lighting, watching, or cleansing towns, (*e*) or any of the local and personal Acts requiring notice of action to be given, must plead specially the want of such notice. If upon the face of the declaration of the cause of action there is nothing to

(*a*) *Allen v. Hayward*, 7 Q. B. 793.
Ruck v. Williams, 3 H. & N. 308.

(*b*) *Southampton, &c., Bridge Co. v. Southampton Local Board*, 8 Ell. & Bl. 814.

(*c*) *Davey v. Warne*, 14 M. & W. 208.

(*d*) *Edwards v. Gt. West. Rail. Co.*, 11 C. B. 650.

(*e*) *Law v. Dodd*, 17 Law J., M. C. 65.

show that the action is brought in respect of something done or omitted to be done, in pursuance of the statute, the plea must contain an averment to that effect, and show on the record that the action is brought for some matter or cause of action in respect of which notice of action ought to have been given. If it fails to do this, and the matter does not appear upon the record, the plea will be bad after verdict. (*f*)

1081. *Plea of tender of amends before action.*—It is not necessary for a party who pleads a tender of amends before action to pay the money into court, as the tender is not a tender of any debt, but is a matter collateral to the defense. If the plaintiff chooses to renounce the tender, and prefers the chance of what he may gain by verdict, he has no claim to the amount tendered, and if the verdict goes against him he gets nothing. (*g*)

1082. *Pleas of justification under the authority of an Act of Parliament.*—When the defence relied upon is that the act complained of was done under the authority of an Act of Parliament, the defendant may justify under the Act, unless the matter of justification is authorized to be given in evidence under a plea of not guilty. When the defendant justifies under the statute, he may plead generally that the several acts, matters, and things of which the plaintiff complains, were lawfully done by the defendant in exercise, and by virtue of the powers and authorities given for that purpose to the defendant by an Act of Parliament made, &c. intituled, &c. (*h*)

1083. *Evidence at the trial—Proof of notice of action.*—When the statute requiring notice of action to be given specially directs that no evidence shall be given of anything not included in the notice, the plaintiff must prove the giving of the notice, in order to lay a foundation for the other evidence. (*i*)

1084. *Power of the Court of Chancery to grant an injunction*

(*f*) Garton v. Gt. West. Rail. Co., E. B. & E. 837, 846.

(*g*) Jones v. Gooday, 9 M. & W. 744.

(*h*) Beave v. Mayor of Manchester, 8 Ell. & Bl. 14; 26 Law J., Q. B. 311. Watkins v. Gt. North. Rail. Co., 16 Q.

B. 961. As to the replication to this plea, see Brine v. Gt. West. Rail. Co. 31 Law J., Q. B. 101.

(*i*) Johnson v. Lord, M. & M. 444; *post*, ch. 21.

to prevent unnecessary injury from the execution of statutory powers.—The statutory right to compensation given by Act of Parliament to persons sustaining injury from the exercise of statutory powers, does not abrogate the regulating and restraining jurisdiction of the Court of Chancery, for nothing would be more pernicious than to leave the large and ample powers so frequently conferred by Act of Parliament free from all control. Persons, therefore, having such powers will be restrained from exercising them so as to inflict avoidable and unnecessary injury upon others. Thus, where a railway company, in the exercise of its statutory powers, commenced the building of a bridge across a mill-race in such a way as to diminish the full force of the current and lessen the working power of the mill, the LORD CHANCELLOR by injunction prevented the erection of any bridge over the stream with arches of less dimensions than those recommended in the report of a particular engineer. (*k*) Here it was shown that the bridge was altogether wrongly constructed, and the work negligently and unskilfully done; but where there is no proof of negligence, and the accruing injury arises naturally and necessarily from the doing of what is authorized to be done, the court can not interfere, but must remit the injured party to the statutory compensation for the damage where that is provided. (*l*)

The court will by injunction restrain public boards and commissioners from doing acts in excess of the statutory powers intrusted to them, (*m*) and from carrying out what they may be pleased to call the spirit of the Act in an arbitrary manner. (*n*)

The 68th section of the Railway Clauses Act, 1845 (8 & 9 Vict. c. 20), enacts that the company shall maintain certain works for the accommodation of the owners and occupiers of lands adjoining the railway, such as gates, fences, culverts drains, watering places for cattle in certain cases, &c.; and the 69th section enacts that if any difference arises between

(*k*) *Coats v. Clarence Rail. Co.*, 1 Russ. & M. 181.

(*l*) *Stainton v. Metrop. Board, &c.*, 23 Beav. 232; 26 Law J., Ch. 300. *Bidulph v. St. George's Vestry*, 33 Law J., Ch. 411.

(*m*) *Holt v. Corporation of Rochdale*, L. R., 10 Eq. Ca. 354.

(*n*) *Tinkler v. Wandsworth Board of Works*, 1 Giff. 417; 2 De G. & J. 261. *Rangeley v. Mid. Rail. Co.*, L. R. 3 Ch App. 306.

the company and such owners or occupiers as to the kind, number, size, maintenance, &c., of such works, it shall be determined by two justices. The Court of Chancery, therefore, will, as a rule, refuse to interfere in such cases. (*o*)

1085. *Injunction to restrain nuisances created by public bodies acting in the exercise of statutory powers.*—Where commissioners of sewers and boards of health have obtained statutory powers of drainage into rivers, streams, and natural watercourses, the power must be exercised so as not to create a nuisance or interfere with the private rights of individuals. (*p*) If a riparian proprietor has a right to enjoy a river so far unpolluted that fish can live in it, and cattle drink of it, and the town council of a neighboring borough, professing to act under statutory powers, pour their house drainage and the filth from water-closets into the river in such quantities that the water becomes corrupt and stinks, and fish will no longer live in it, nor cattle drink it, the court will grant an injunction to prevent the continued defilement of the stream, and to relieve the riparian proprietor from the necessity of bringing a series of actions for the daily annoyance. (*q*)

In deciding to the right of a single proprietor to an injunction, the court can not take into consideration the circumstance that a vast population will suffer by reason of its interference. "There are cases at law," observes Sir W. P. WOOD, V. C., "in which it has been held that where the question arises between two portions of the community, the convenience of one may be counterbalanced by the inconvenience of the other, where the latter are far more numerous. But in the case of an individual claiming certain private rights, and seeking to have those rights protected, the question simply is, whether he has those rights, and not whether a large population will be inconvenienced by measures taken for their protection." (*r*)

1086. *Injunction to prevent misuse by companies and public*

(*o*) Hood v. North-East. Rwy., L. R., 11 Eq. Ca. 116.

(*p*) Cator v. Lewisham Board of Works, 5 B. & S. 115.

(*q*) Wood, V. C., Att.-Gen. v. Borough of Birmingham, 4 K. & J. 528. Att.-

Gen. v. Metrop. Board, &c., 1 H. & M. 298.

(*r*) Att.-Gen. v. Borough of Birmingham, *ut sup.* See Raphael v. Thames Valley Rail. Co., L. R., 2 Ch. App. 147

bodies of land acquired by them under statutory authority.—Acts of Parliament compelling landowners to part with portions of their property for purposes considered beneficial to the public, are regarded as contracts made by the legislature on behalf of all persons interested under them, and the purposes for which the land is taken are of the essence of the contract, so that the landowner may obtain an injunction to restrain the company from taking the land for another and different purpose, (s) or from devoting it to such purpose, if they have already taken it. (t) “The principle is this, that when persons embark in great undertakings, for the accomplishment of which those engaged in them have received authority from the legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorized can not be allowed to exercise the powers conferred on them for any collateral object.” (u) But although this is so with regard to Acts of Parliament authorizing a company of adventurers, for their own profit, to take compulsorily the lands of others, the case is different where the legislature has entrusted an existing public body, such as the corporation of a city, with authority to take lands compulsorily for the purpose of public improvements, and not for gain, and in such case a more liberal construction as to the purposes for which the land is taken will prevail. (x) But they must still, of course, comply with the provisions entitling them to avail themselves of their compulsory powers. (y) Nor does the same strict construction prevail where land is taken, not compulsorily under a statute, but in pursuance of an option reserved by agreement inter partes. (z)

If any public body authorized to enter land and construct works in the execution of statutory powers, exceed the authority conferred upon them, and do acts *ultra vires*, the court will by injunction restrain their proceedings, (a) and

(s) *Flower v. L. B. and S. Coast Rail. Co.*, 2 Dr. & S. 330.

(t) *Bostock v. North Staff. Rail. Co.*, 3 Sm. & G. 291; 4 Ell. & Bl. 798. See *Carrington v. Wycombe Rail. Co.*, L. R., 2 Eq. Ca. 825; 3 Ch. App. 377.

(u) *Lord Cranworth*, in *Galloway v. Corporation of London*, *infra*.

(x) *Galloway v. Corporation of London*, L. R., 1 H. of L. 34.

(y) *Thomas v. Daw*, L. R., 2 Ch. App. 1.

(z) *Butt v. Imp. Gas Co.*, L. R., 2 Ch. App. 158. See *Carrington v. Wycombe Rail. Co.*, *supra*.

(a) See *Att.-Gen. v. Ely, &c., Rail.*

confine them within the limits of their jurisdiction, (b) "otherwise the result may be, that after your property has been taken and destroyed, after your house has been pulled down and a railway substituted in its place, you may have the satisfaction of discovering that the railway company was wrong, and that a pecuniary compensation is the only satisfaction you can receive for the injury." (c) Thus, where a local board of health withdrew its opposition to a railway bill, on the insertion of a clause that the bridges within their district were to have a certain gradient, and the company could not make the bridges of such a gradient without encroaching on adjoining lands, against which the adjoining proprietor obtained an injunction, and the company consequently made the bridges of a steeper gradient, the court granted a mandatory injunction to the company to alter the bridges. (d) So where by a local Act, commissioners were appointed to pave, drain, and otherwise improve a certain district, and to levy rates for that purpose, the court granted an injunction to restrain them from applying the moneys produced by such rates towards the promotion of a bill in Parliament, the object of which was the extension of their district, although the bill had received the approval of the ratepayers. (e)

And whenever public bodies, acting in the exercise of statutory powers, have failed to comply with any condition imposed by statute for the protection of the public, the Court of Chancery will, as we have seen, by injunction prevent the exercise of the statutory authority until the condition precedent has been strictly fulfilled. (f) Thus, it will restrain a railway company from using land for which, and the injury

Co., L. R., 6 Eq. Ca. 106; *Ibid.* 4 Ch. App. 194; 38 Law J. Ch. 258, as to making a more convenient road.

(b) *Tinkler v. Wandsworth District Board*, 2 De J. & G. 273. As to contracts *ultra vires*, see *Taylor v. Chichester and Midhurst Rail. Co.*, 4 H. & C. 409; L. R., 2 Exch. 356; 4 Eng. & Ir. App. 628. If the shareholders have ratified the act, see *Phosphate of Lime Co. v. Green*, L. R., 7 C. P. 43.

(c) *Dun. Nav. Co. v. North Mid. Rail. Co.*, 1 Rail. C. 154.

(d) *Att.-Gen. v. Mid. Kent Rail. Co.*, L. R., 3 Ch. App. 100.

(e) *Att.-Gen. v. West Hartlepool Improvement Commissioners*, L. R., 10 Eq. Ca. 152. See *Reg. v. Mayor of Sheffield*, L. R., 6 Q. B. 652.

(f) *Gibson v. Hammersmith Rail. Co.*, *ante*. *Cosens v. Bognor Rail. Co.*, L. R., 1 Ch. App. 594. See *Kent Coast Rail. Co. v. Lond., Chat. and Dover Rail. Co.*, L. R., 3 Ch. App. 656. The company would also be liable in trespass if they had taken the plaintiffs' land, without performing the statutory conditions; *Cranwell v. Mayor, &c., of London*, L. R., 5 Exch. 284.

to it, the compensation assessed under the Lands Clauses Act has not been paid, although the railway has been opened for public use; (*g*) although in cases where the effect of such an injunction would be to make the land useless to both parties, an injunction will be refused and a receiver appointed instead; (*h*) nor will an injunction be granted from running trains over the land until its sale, which has been ordered by the court. (*i*) The Court of Chancery has also, it seems, jurisdiction to restrain an application to Parliament to enable a company to abandon the formation of certain lines, and the statutable contracts that they have made thereunder, or to restrain an improper application to Parliament for a private Act, though such a jurisdiction can hardly ever be exercised. (*k*) "You can not restrain a man from going to Parliament on public grounds, . . . but if he is going on in violation of a plain contract, which is personal to himself, with which the public interests have nothing whatever to do, you can not under the pretense that he is going to Parliament, refuse the relief which, if there was no question about Parliament, this Court would be bound to give." (*l*)

(*g*) *Walker v. Ware, &c., Rail. Co.*, L. R., 1 Eq. Ca. 195. *Field v. Carnarvon and Llanberris Rail. Co.*, L. R., 5 Eq. Ca. 190. *St. Germans (Earl of) v. Crystal Palace Rail.*, L. R., 11 Eq. Ca. 568. *Stretton v. Gt. Western Rail.*, L. R., 6 Ch. App. 751. The vendor, however, has no lien for the costs of the arbitration; *Ferrers (Earl of) v. Staff. and Utt. Rail. Co.*, L. R., 13 Eq. Ca. 524.

(*k*) *Pell v. Northampton and Banbury*

Rail., L. R., 2 Ch. App. 100. *Munnus v. Isle of Wight Rail.*, L. R., 8 Eq. Ca. 653; 5 Ch. App. 414.

(*i*) *Lycett v. Staff. and Uttox. Rail.*, L. R., 13 Eq. Ca. 261.

(*h*) *Steele v. North Metrop. Rail. Co.* L. R., 2 Ch. App. 237. *Re Lond., Chat. and Dover Rail. Ex parte Hart-ridge*, L. R., 5 Ch. App. 671.

(*l*) *Per Bacon, V. C., Telford v. Met. Board of Works*, L. R., 13 Eq. Ca. 594.

CHAPTER XVII.

OF LIBEL AND SLANDER (*a*).SECTION I. — *Of libel and written slander.*

- 1087. Of the distinction between slander by word of mouth and slander in a published writing.
- 1088. Oral slander rendered actionable by being printed and published—Exemption of the author, and liability of the publisher.
- 1089. What writings are libellous and actionable.
- 1090. Of malice.
- 1091. Privileged writings and communications.
- 1092. Defamatory writings in courts of justice.
- 1093. Defamatory petitions to the Queen, to Parliament, or to ministers or officers of state respecting the conduct of magistrates and officers.
- 1094. Criminatory communications by public officers acting in discharge of a public duty.
- 1095. Criminatory pastoral letters, and printed communications from clergymen to their parishioners.
- 1096. Defamatory letters respecting clergymen.
- 1097. Privileged confidential communications between relations respecting the character of a person proposing marriage.
- 1098. Privileged confidential communications between friends to prevent an injury.

- 1099. Privileged communications by persons having a pecuniary interest involved in the matter of the communication.
- 1100. Reckless and inconsiderate communications.
- 1101. Disclosures made *bonâ fide* in the course of an investigation set on foot by the plaintiff himself.
- 1102. Communications between subscribers to charities.
- 1103. Privileged communications respecting the character of servants.
- 1104. Comments in excess of the privilege.
- 1105. Of the effect of addressing privileged communications to a wrong party by mistake.
- 1106. Reports of trials containing defamatory matter.
- 1107. Publications of *ex parte* statements and of proceedings preliminary to a trial.
- 1108. Publication of speeches and proceedings in Parliament.
- 1109. Defamatory reports of proceedings at public meetings, vestry meetings, &c.
- 1110. Reviews and criticisms in public papers.
- 1111. Criticisms by one public journalist upon another.
- 1112. Criticisms upon handbills and advertisements.
- 1113. Criticisms upon sermons and clergymen.

(*a*) See Starkie on Slander and Libel, 3d ed. (1869).

1114. Comments upon the public character of public men.

1115. Disparaging criticism by one tradesman upon the goods of a rival tradesman.

SECTION II.—*Of verbal slander.*

1116. When defamatory words are actionable.

1117. Defamatory words not actionable without special damage.

1118. Defamatory words actionable *per se* without proof of any special damage.

1119. In what cases actionable words are rendered not actionable by precedent or subsequent words.

1120. Defamatory words imputing to the plaintiff that he is afflicted with a contagious disorder.

1121. Defamatory words concerning tradesmen and professional men.

1122. Words imputing misconduct, or gross ignorance or incapacity, to professional men.

1123. Words imputing official misconduct to a person in an office of profit or trust.

1124. Words rendered actionable by reason of special damage.

1125. Slandorous denunciations from the pulpit causing loss of custom, situation, or employment.

1126. Effect of a dismissal of a slandered servant, being a wrongful dismissal on the part of the master.

1127. Effect of the slander being disbelieved by the master.

1128. Special damage not being the immediate and natural consequence of the words spoken—Unauthorized repetition of verbal slander.

1129. Special damage directly resulting from the repetition of oral slander.

1130. Circumstances rebutting the presumption of malice.

1131. Privileged communications—Proof of malice.

1132. Privileged charges of felony made *bona fide*, with reasonable grounds for suspicion.

1133. Privileged statements and comments by advocates in the course of judicial proceedings, or in the conduct of a cause.

1134. Defamatory statements by a party in open court conducting his own cause.

1135. Privileged comments and charges by judges and magistrates in the exercise of the duties of their office.

1136. Of the interpretation and application of the words used.

1137. Slander of title.

SECTION III.—*Of actions for libel and slander.*

1138. Consolidation of actions for the same slander.

1139. Parties to be made plaintiffs.

1140. Parties to be made defendants.

1141. Declarations for libel and slander.

1142. Of the innuendo or defamatory sense attributed to the writing or words on the face of the declaration.

1143. Statement of special damage in actions for verbal slander.

1144. What may be given in evidence under the plea of not guilty

1145. Plea that the libel was inserted without malice or gross negligence, and that an apology was published—Payment of money into court.

1146. Pleas of justification.

1147. Evidence for the plaintiff—Printed placards—Proof of publication.

1148. Publication in newspapers.

1149. Proprietorship of newspapers containing libels.

1150. Proof of the utterance of the

- words charged in actions for verbal slander.
- 1151. Proof of the singing of libelous songs.
 - 1152. Application of the libel to the plaintiff.
 - 1153. Proof of the defamatory sense of the words used.
 - 1154. Admissibility of evidence of surrounding circumstances to explain and point the libel—Interpretation of the words used.
 - 1155. Proof of subsequent libels to explain and point the libel charged in the declaration.
 - 1156. Proof of successive libels to show malice.
 - 1157. Evidence of malice.
 - 1158. Proof of injury to the plaintiff.
 - 1159. Evidence of special damage.
 - 1160. Proof of the trade, or profession, or official character of the plaintiff.
 - 1161. Proof that the words were spoken concerning a tradesman or professional man in the way of his trade or profession.
 - 1162. Evidence on the part of the defendant—Traverse of material allegations.
 - 1163. Proof of the truth of the charge or accusation.
 - 1164. The damages recoverable in actions for defamation.
 - 1165. Evidence in aggravation of damages.
 - 1166. Mitigation of damages.
 - 1167. Proof of libels by the plaintiff on the defendant.
 - 1168. Evidence of offers of apology in mitigation of damages.
 - 1169. Of the judge's direction to the jury.
 - 1170. Setting aside verdict—Arrest of judgment.
 - 1171. Indictments for libel and slander.
 - 1172. When the truth of the matter may be given in evidence.
 - 1173. Evidence for the defense.

SECTION I.

OF LIBEL AND WRITTEN SLANDER.

1087. *Of the distinction between slander by word of mouth and slander in a published writing.*—Slander in writing or in print has always been considered in our law a graver and more serious wrong and injury than slander by mere word of mouth, inasmuch as it is accompanied with greater coolness and deliberation, indicates greater malice, and is in general propagated wider and further than oral slander. Hence words of a depreciatory character, which, if spoken only, would not be actionable, may become so by being put into writing, or print, and published. "There is a very material distinction," observes GOULD, J., "between libels and words. A libel is punishable both criminally and by action, when mere speaking the words would not be punishable in either

way." For speaking the words "rogue" and "rascal" of any one, an action will not lie; but if these words were written and published of any one, an action would lie. (b) Merely to call a man a swindler, or a cheat, or dishonest person by word of mouth, is not actionable, (c) unless it be spoken of him in his trade or business, so as to have damaged him with his customers; (d) but if such words are published in writing or printing, they are actionable per se. (e) Verbal reflections upon the chastity of a young lady are not actionable, unless they have prevented her from marrying, or have been accompanied by special damage; but if they are published in a newspaper, they are at once actionable, and substantial damages are recoverable. (f)¹

Before, therefore, a person gives general notoriety to oral calumny, by circulating it in print, he must be prepared to prove its truth to the letter; for he has no more right to take away the character of the plaintiff, without being able to prove the truth of the charge that he has made against him, than he has to take his property without being able to justify the act by which he possessed himself of it. "Indeed," observes BEST, C. J., "if we reflect on the degree of suffering occasioned by loss of character, and compare it with that

(b) *Villiers v. Mousley*, 2 Wils. 403; 5 Co. 125b.

(c) *Savile v. Jardine*, 2 H. Bl. 532.

(d) Bac. Abr. SLANDER, B.

(e) *Janson v. Stuart*, 1 T. R. 748.

(f) Bl. Com., by Christian, 125, n. 6.

¹ A libel is a publication calculated to bring a person into disrepute, or has a tendency to injure him in the estimation of others, impair his reputation, degrade him socially or to bring him into disrepute or to excite against him public hatred, contempt or ridicule; *Chenery v. Goodrich*, 98 Mass. 224; *Lansing v. Carpenter*, 9 Wis. 540; *State v. Jeandell*, 5 Harr. (Del.) 475; *Com. v. Clapp*, 4 Mass. 163; Mr. Townshend, in his work on Slander and Libel, page 77, defines a libel thus: "Libel is a wrong occasioned by writing or effigy," but this definition is very incomplete and unsatisfactory, and does not cover the fields of libel, in any essential measure. In order to amount to a libel the publication need not be in words, it is enough if it is in signs, pictures, paintings or caricatures, calculated to produce any of the results before enumerated; *State v. Southwick*, 9 Johns. (N. Y.) 214; *State v. Farley*, 4 McCord (S. C.) 314; *White v. Nichols*, 3 How. (U. S.) 266; PARSONS, Ch. J., in *Com. v. Clapp*, *ante*, defines a libel as "a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule." In order to constitute a libel, the matter need not be *printed*, it is enough if it is *written*, if the writing passes into the hands of or is read by others; *Joannes v. Bennett*, 5 Allen (Mass.) 169.

occasioned by loss of property, the amount of the former injury far exceeds that of the latter." (g)¹

1088. *Oral slander rendered actionable by being printed and published*—*Exemption of the author, and liability of the publisher*.—Oral slander uttered under circumstances not rendering it actionable, may, therefore, become actionable by being printed and published, and the publisher may become responsible in damages for publishing and circulating in writing what would not be actionable so long as it was circulated only by word of mouth. In cases of this sort, the author who has spoken the words is exempt from all legal responsibility, while the man who prints them and circulates them in writing, and all who aid and assist therein, are liable to an action for damages. (h) "What has been said by word of mouth is known only to a few persons, and, if the statement be untrue, the imputation cast upon any one may be got rid of; the report is not heard of beyond the circle in which all the parties are known, and the veracity of the accuser, and the previous character of the accused will be properly estimated. But if the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least cre-

(g) *De Crespigny v. Wellesley*, 5 Bing. 406. 35. *Thorley v. Lord Kerry*, 4 Taunt. 354.

(h) *M'Gregor v. Thwaites*, 3 B. & C.

¹ The fact that the matters alleged as libellous, are commonly reported as true, and are generally circulated in the community and believed to be true, is no justification. The person who seeks to give publicity to matters disparaging to the character of another, by publishing them, must be sure that he can prove the *truth* of the charge, for he will not be permitted to show that it is a matter of common rumor. Rumors concerning a person's character or acts, are not evidence by which to establish the guilt of the person of the acts imputed to him. Rumor is many tongued, and busy, but it is too frail, and unreliable to raise even a suspicion, in a court of law, that its slanderous allegations are true; *York v. Johnson*, 116 Mass. 482; *Schenck v. Schenck*, 20 N. J. 208; and a person can not shield himself from liability for a libellous publication by putting it in the form of rumors, or hearsay. It is as libellous to publish of one "they say he is a thief" or "it is commonly reported that he is a thief, &c." as that "he is a thief," and nothing will justify or excuse it, except strict proof of the truth of the allegation, in whatever form it is put, and the fact that the person publishing it *believed* it to be true, is no justification or defense. Unless it is true, *in fact*, the law will imply malice, and liability both civil and criminal will attach therefor; *Smart v. Blanchard*, 42 N. H. 137; *Littlejohn v. Greeley*, 13 Abb. Pr. (N. Y.) 41.

dit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible completely to remove." As to the question of the publisher of a libel being allowed to exonerate himself from the responsibility of the act by naming the author, "Of what use is it," observes BEST, J., "to send the name of the author with a libel that is to pass into a part of the country where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character, whether he is a person entitled to credit for veracity or not; whether his statement was made in earnest or by way of joke; whether it contains a charge made by a man of sound mind or the delusions of a lunatic." (*i*)

It is no defense, therefore, to an action for a libel to show that a ludicrous narrative in a newspaper concerning the plaintiff was only a repetition of a story told by the plaintiff of himself; "for there is a great difference between a man's telling a ludicrous story of himself to a circle of his own acquaintance, and a publication of it to all the world through the medium of a newspaper." (*j*)¹

1039. *What writings are libellous and actionable.*—All publications in writing or in print, imputing to another disgraceful, or fraudulent, or dishonest conduct, (*k*) or which are injurious to the private character or credit of another, (*l*) or tend to render a man ridiculous or contemptible in the relations of private life, are libellous, and an action for damages is maintainable against the writer and publisher, unless the publication ranges within that class of communications which are termed privileged communications, presently mentioned, or unless the libeller can prove the truth of the libel.²

(*i*) *De Crespigny v. Wellesley* 5 Bing. 403. (*k*) *Digby v. Thompson*, 4 B. & Ad. 821.

(*j*) *Cook v. Ward*, 6 Bing. 415.

(*l*) *Fray v. Fray*, 34 Law J., C. P. 45.

¹ As to what constitutes a publication, see *Snyder v. Andrews*, 6 Barb. (N. Y.) 43; *Van Cleef v. Lawrence*, 2 City Hall Rec. (N. Y.) 41; *Baldwin v. Elphinstone*, 2 W. Bl. 1037; *Rex v. Amphlett*, 4 B. & Cr. 35; *Keene v. Ruff*, 1 Clarke (Iowa), 482; *Miller v. Butler*, 6 Cush. (Mass.) 71; *Thorn v. Maser*, 1 Den. (N. Y.) 120; *Hayes v. Leland*, 29 Me. 233; *Sutton v. Smith*, 13 Miss. 120; *Mayne v. Fletcher*, 4 M. & Ry. 312; *Layton v. Harris*, 3 Har. (Del.) 406; *Weir v. Hass*, 6 Ala. 381; *Viele v. Gray*, 18 How. Pr. (N. Y.) 567.

² Anything written or published of a person, which defames his character with-

To impute to a landlord that, in putting in a distress, he was colluding with an insolvent tenant, is libellous,¹ (*m*) It is a libel, also, to describe a man in writing as an "infernal vil-

(*m*) *Haire v. Wilson*, 9 B. & C. 645.

out legal excuse, is libellous. This law recognizes the value of personal character, and throws around it all safeguards essential for its preservation or vindication and whoever by writing, signs, pictures, effigies, or other physical means, does that which tends to defame another by bringing him into contempt, ridicule or disrepute, socially or morally, with his fellows, or which injures him in his office, trade, profession, or business, does an unlawful and unwarrantable act, unless he can vindicate his act by showing that it did not *in fact* defame such person, because of its truth or fitness as applied to the individual affected thereby. Thus to charge a person with having voted twice for the same officers at the same election; *Walker v. Winn*, 8 Mass. 248; with endeavoring to extort money from another; *Robertson v. McDougall*, 4 Bing. 670; to charge a person with dishonesty and instigating calumnies; *Clark v. Binney*, 3 Pick. (Mass.) 379; to charge a woman with unchastity; *Badwell v. Osgood*, 3 Id. 379; to charge a person with being corrupt in office, even though he is not in office when the libel is published; *Cramer v. Riggs*, 17 Wend. (N. Y.) 209; to publish of a person "he is a miserable fellow, and it is impossible for a newspaper article to injure him to the extent of six cents, for the community could hardly dispise him worse than they do now;" *Brown v. Remington*, 7 Wis. 462; to charge a person with official misconduct, or malfeasance, or misfeasance; *Turrell v. Dullaway*, 17 Wend. (N. Y.) 426; to insinuate that a person has been insane; *Howse v. Stanford*, 4 Sneed (Tenn.) 520; to charge a person with being a drunkard, a cuckold and a tory; *Giles v. State*, 6 Ga. 276; to charge a person with being a drunkard, and making extortionate charges; *Sanderson v. Caldwell*, 45 N. Y. 398; to publish an obituary notice of a living person couched in monical language; *Com. v. Batchelder*, *Thacher's Cas.* (Mass.) 191; *McBride v. Ellis*, 9 Rich. (S. C.) 313; to charge a person with blackmailing *may* be libellous; *Edsall v. Brooks*, 3 Robt. (N. Y.) 287; to charge a person with having been dismissed from office for blackmailing; *Edsall v. Brooks*, *ante*; a resolution expelling a member from a medical society, reciting that he lacks the requisite qualifications, and obtained admission by false pretences; *Fawcett v. Charles*, 13 Wend. (N. Y.) 473; to publish a person, "he is a lying, slanderous rascal;" *Snowden v. Lindo*, 1 Cr. C. C. (U. S.) 569; to charge that a person has defrauded another, or with maliciously accusing another of an offense; *Kerr v. Force*, 3 Id. 8; to publish of a man, "I look upon him as a rascal, and have for many years;" *Williams v. Carnes*, 4 Humph. (Tenn.) 9; that he has circulated scandalous and scurrilous reports; *Calby v. Reynolds*, 6 Vt. 489; that he is thought no more of than a horse-thief or counterfeiter; *Nelson v. Musgrave*, 10 Mo. 648; to assail the integrity or capacity of a judge; *Robbins v. Treadway*, 2 J. J. Marsh. (Ky.) 540; to publish of a person who is an applicant for office, or for a situation that he is a slanderer, ignorant and thoughtless; *White v. Nicholls*, 3 How. (U. S.) 266; that he had illicit intercourse with his wife before he was married to her; *Dexter v. Spear*, 4 Mass. (U. S.) 113; that the writer *believes* a person to be guilty of a crime; *Kerr v. Force*, *ante*; to charge a maltster with using dirty, filthy water; *White v. Delavern*, 17 Wend. (N. Y.) 49; to charge a person with smuggling; *Stilwell v. Barter*, 19 Id. 487; with kidnapping; *Nash v.*

lain," (*n*) or an "itchy old toad," (*o*) or, as being in insolvent circumstances and unable to pay his debts, (*p*) or as being a mere man of straw, (*q*) unfit to be trusted with money, (*r*) or as being guilty of ingratitude to his friends and benefactors, although the facts upon which the charge is founded are also stated, and they do not support the charge, (*s*) or of misconduct in an office of trust, or of general misconduct, corruption, or neglect of duty in the management of business that has been intrusted to him to execute.

Every publication in writing, imputing insanity to the plaintiff, (*t*) or holding him up to public hatred, contempt, or ridicule, or having a tendency to make him feared, or his society shunned and avoided, is a libel. To publish in writing, therefore, of a man that he has been guilty of gross misconduct, and has insulted two females and a gentleman in the most barefaced manner, is a libel. (*u*) It is a libel, also, to publish of a person soliciting relief from a charitable society that she prefers unworthy claims, and that she has squandered away the funds of the benevolent in printing circulars abusive of the society's secretary (*v*); or to impute in writing to the captain of a ship that his ship is unseaworthy, as the imputation reflects upon the personal character and professional conduct of the captain. "It is like saying of an innkeeper or tea-dealer that his wine or his tea is poisoned." (*w*) To impute to a physician of character and eminence that he is concerned in vending quack medicines

(*n*) Bell v. Stone, 1 B. & P. 331.

(*o*) Gould, J., Villiers v. Mousley, 2 Wils. 403.

(*p*) Metrop. Saloon Omnibus Co. v. Hawkins, 4 H. & N. 146; 28 Law J., Exch. 201. See Cox v. Lee, L. R., 4 Exch. 284, per Kelly, C. B.

(*q*) Eaton v. Johns, 1 Dowl. N. S. 612.

(*r*) Cheese v. Scales, 10 M. & W. 488.

(*s*) Cox v. Lee, L. R., 4 Exch. 284.

(*t*) Morgan v. Lingen, 8 L. T. R., N. S. 800.

(*u*) Clement v. Chivis, 9 B. & C. 176.

(*v*) Hoare v. Silverlock, 12 Q. B. 624.

(*w*) Ingre v. Lawson, 8 Sc. 478.

Benedict, 25 Wend. (N. Y.) 645; with *poverty*, when crouched in such language as to expose him to ridicule; Moffat v. Cauldwell, 5 Sup. Ct. Rep. (N. Y.) 256; and generally any charge published of another which injures him in his office, trade, occupation, or business, or which exposes him to the contempt or ridicule of society, or which tends to disgrace him or render him infamous. In order to constitute a libel, it is not necessary that the words or charge should be printed, or generally circulated, it is enough if it is in writing, and only shown to *one* person; Wyatt v. Gore, Halt. 299; Keene v. Ruff, 1 Iowa, 482; even though that be the plaintiff's wife; Schenck v. Schenck, 1 Spenser (Ala.) 208.

is also libellous; and, therefore, if a vendor of pills falsely advertises his pills as being prepared and furnished by a physician in practice, without the authority of the latter, he is guilty of a libel upon the physician. (*x*) But merely to write of a person that he has done something in bad taste or manner, (*y*) or that he has kept company unworthy of his position in society, or of his position in his profession, is not actionable. (*z*)

To publish falsely in placards or newspapers, or through the medium of letters or writings, of a publican, that his license has been refused, (*a*) or of a tradesman, that he knowingly sells bad articles, or of a gunsmith or manufacturer, that he is a bad workman and unable to turn out a good gun or other article, is actionable; but mere puffs between rival tradesmen, the one depreciating the other's wares and exalting his own above them, are defensible. (*b*) It is a libel, also, to say in writing of the publisher of a newspaper that he is a "libellous journalist," for the words either mean that the plaintiff has been habitually publishing libels in his paper, or that he has permitted them to be published from base and malicious motives. To show, therefore, that the plaintiff has been guilty, on one occasion only, of publishing a libel, is not enough to justify the use of the term "libellous journalist," but the evidence would go in mitigation of damages. (*c*)

Where a man complains of a libel, written respecting an illegal transaction in which he is engaged, the illegality of the transaction is an answer to his complaint; but fraud ultra that transaction is not, on that account, to be imputed to him with impunity. (*d*) If, therefore, a man is charged in writing with having cheated at dice, he is entitled to recover damages for the libel, although gambling and playing at dice are illegal. (*e*)

(*x*) *Clark v. Freeman*, 11 Beav. 117. As to injunctions against the publication of libels, see *Dixon v. Holden*, L. R., 7 Eq. Ca. 488. *Springhead Spinning Co. v. Riley*, L. R., 6 Eq. Ca. 561, *Mulkern v. Ward*, L. R., 13 Eq. Ca. 619.

(*y*) But see *Jenner v. A'Beckett*, L. R., 7 Q. B. 11.

(*z*) *Clay v. Roberts*, 11 W. R. 649; 9 Jur. N. S. 580.

(*a*) *Bignell v. Buzzard*, 3 H. & N. 217; 27 Law J., Exch. 355.

(*b*) *Harman v. Delaney*, 2 Str. 898. *Evans v. Harlow*, 5 Q. B. 624.

(*c*) *Wakley v. Cooke*, 4 Exch. 518.

(*d*) *Best, C. J., Yrisarri v. Clement*, 3 Bing. 441.

(*e*) *Greville v. Chapman*, 5 Q. B. 744.

1090. *Of malice.*—Malice is said to be the gist of an action for defamation or slander, but the word is not used in the popular sense, but in the sense the law puts upon the expression. In every case of ordinary libel, not being a privileged communication, the law implies malice from the very fact of the publication of the defamatory matter. "Malice is common acceptance," observes BAYLEY, J., "means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse. If I maim cattle without knowing whose they are, or if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act done intentionally. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I meant to produce an injury or not, and if I had no legal excuse for the slander, there shall be a remedy against me for the injury it produces. And the law recognizes the distinction between these two descriptions of malice,—malice in fact, and malice in law, in actions of slander." (*f*)

Where, therefore, the circumstances under which the communication was made do not present any justifiable occasion for speaking or writing the defamatory matter, or show it to have been done either in pursuance of some duty, or for the purpose of endeavoring to enforce a right, the communication is deemed in law to be malicious; and the circumstance of the jury having negatived actual malice in such cases does not get rid of the effect of legal malice, and does not render the communication justifiable. (*g*)¹

(*f*) *Bromage v. Prosser*, 4 B. & C. 255.

(*g*) *Maule, J., Wenman v. Ash*, 13 C. B. 845.

¹ If an imputation made against another is false and without probable cause, the law implies malice. *White v. Nicholls*, 3 How. (U. S.) 266; *Dexter v. Spear*, 4 Mass. (U. S.) 115; *Hotchkiss v. Oliphant*, 2 Hill (N. Y.) 410; *Purdy v. Carpenter*, 4 How. Pr. (N. Y.) 361; *Hunt v. Bennett*, 19 N. Y. 173; *Kerr v. Force*, 3 Cranch C. C. (U. S.) 8. But this must be understood only of words that are libellous *per se*. In all other cases *express* malice must be proved. Malice, in its ordinary sense implies personal ill-will, but in a *legal* sense, when used as a legal term, it does

1091. Privileged writings and communications.—When a communication is fairly made by one person to another in the discharge of some public or private duty, whether legal,

not necessarily have that significance, but rather signifies an act done with an evil intention, a wrongful motive, wilfully, unlawfully, and against the just rights of another. BAYLEY, J., in *Bromage v. Prosser*, 4 B. & C. 455, gave, what seems to me to be the most accurate definition of the term, when used as a legal term. He said: "Malice, in common acceptation, means ill-will against a person, but in its legal sense it means, a wrongful act done intentionally, without just cause or excuse." And he proceeds to illustrate the matter thus: "If I give a perfect stranger a blow likely to cause death, I do it of malice, because I do it intentionally without just cause or excuse. If I maim cattle, without knowing whose they are; if I poison a fishery without knowing who is the owner, I do it of malice, because it is a wrongful act and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse." And, generally, it may be said that malice is always inferred in all cases, criminal or civil, where an unlawful act is done for which no legal excuse is shown. *Com. v. York*, 9 Met. (Mass.) 104; *Com. v. Bonner*, 9 Id. 410. Therefore, where there is an apparent legal excuse, if *malice* is of the *gist* of the action, it must be shown, but where there is no legal excuse it is inferred; and even though there is not malice *in fact*, yet there is malice in law, which will sustain the action. *Hart v. Reed*, 1 B. Mon. (Ky.) 166.

In actions for words written or spoken that are not actionable *per se* but only become so by reason of their imputing something that affects the plaintiff in his trade, calling, or profession, the declaration or complaint must set forth particularly *in what manner* it was connected by the speaker with that trade, calling, or profession, and the special damage resulting therefrom; and, unless the words clearly import such an application, or are shown to have been so used, an action will not lie. *Ayre v. Craven*, 2 Ad. & El. 8.

To charge a merchant with using false weights is actionable. *Griffiths v. Lewis*, 7 Ad. & El. (Q. B.) 61.

Words which reflect upon a person in his profession or trade are actionable if special damage is alleged and proved. Thus, to charge a clergyman with obtaining money by fraud; *Pemberton v. Calls*, 10 Ad. & El. (N. S.) 461; of a physician, that he is no scholar; *Cawdrey v. Highley*, Cro. Cas. 270; or that he is an adulterer; *Ayre v. Craven*, 2 Ad. & El. 2; of a barrister that he is a dunce; *Peard v. Jones*, Cro. Cas. 382; *Cowdry v. Chickly*, Cro. Cas. 270; or a quack; *Allen v. Eaton*, Vin. Abr. Actions, pl. 10; or an emperic and mountebank, and a base fellow; *Goddard v. Hasselfoot*, Viner's Abr. pl. 12; or to charge a professional man or mechanic, or any person whose avocation requires skill and responsibility, with lack of skill or want of responsibility, or unfitness for the place or want of ability, are actionable; *Blunden v. Eustace*, Cro. Jac. 504; but, when spoken of a mechanic they must clearly and unequivocally apply to his trade; but otherwise, when spoken of a professional man or person whose duties require the exercise of talent and ability. The rule was well illustrated in *Blunden v. Eustace*, *ante*. In that case the plaintiff was a surveyor and measurer of lands by profession, and relied upon his profession for his maintenance, and the court held that to say of him, "Thou art a cozening and shifting knave, and a cheating knave," were actionable, as they touched him in his profession. So, to say of a magistrate or other judicial officer

moral, or social, or in the conduct of his own affairs in matters where his interest is concerned, "the occasion," observes PARKE, B., "prevents the inference of malice, which the law

that he is a partial magistrate or judge, is actionable; but no action lies by him for words spoken of him in his official capacity, unless they charge him with that which is *quasi* corrupt. *Kemp v. Haufgae*, Cro. Jac. 90.

It is libellous to write of a person soliciting relief from a charitable society that she prefers unworthy claims which it is hoped the members will reject, and that she has squandered away money already obtained by her from the benevolent in printing circulars, abusive of the society's secretary, or that her friends in giving up their advocacy of her, had stated that they had realized the fable of the "Frozen Snake," such words being generally understood as meaning ingratitude to friends. *Hoare v. Silverlock*, 12 Ad. & El. (Q. B.) 624.

Express malice may be shown, by proof that the imputation is false, and it is sufficient to establish such malice, if it is proven that a *material* part of the imputation is false. *Blagg v. Sturt*, 10 Ad. & El. (Q. B.) 899. See also *Robinson v. May*, 2 Smith (English) 3, where it was held that "absence of all ground for the representation is proof of express malice." In *Blagg v. Sturt*, *ante*, LORD DENMAN said: "We are of opinion that proof of falsehood, in a *part* of the statement, is evidence for the jury, to renew the presumption of malice, *where the occasion of the publication has been given in evidence to rebut it*." So, while for the sake of public justice charges and communications which would otherwise be slanderous are protected if made *bona fide*, in the prosecution of an inquiry into a suspected crime, and are not made in *stronger language or before more persons than is necessary*. *Toogood v. Spyring*, 1 C. M. & R. 181; *Lay v. Lawson*, 4 Ad. & El. 795; *Wright v. Woodgate*, 2 C. M. & R. 573; *Martin v. Strong*, 5 Ad. & El. 535; *Fowler v. Homer*, 3 Camp. 294; *Kine v. Sewell*, 3 Mees. & Welb. 297; *Blake v. Pifold*, 1 Moo. & R. 198; *Finden v. Westlake*, Moo. & M. 461; *Bromage v. Prosser*, 4 B. & C. 247; and it is for the jury to say whether the charge was made in an unwarranted and unreasonable manner, or in an unfit place before more persons than was necessary, or in language too strong. *Ravenga v. Mackintosh*, 2 B. & C. 693; *Padmore v. Lawrence*, 11 Ad. & El. 382. Malice is a question which must go to the jury, but the question whether there is reasonable and probable cause, is a question which may or may not be for the jury, according of the particular circumstances of the case. *James v. Phelps*, 11 Ad. & El. 488. But if there are *any facts in dispute* the question *must* be submitted to the jury. *Blackford v. Doe*, 2 B. & Adolphus, 184.

LORD TENTERDEN, C. J., in discussing this question in the case last cited, to illustrate the rule adopted by him, which was recognized by the court as correct in *James v. Phelps*, *ante*, referred to the case of *Ravenga v. McIntosh*, and said, "An attempt has been made to draw a general rule from this case, which is in its own circumstances very peculiar and specific. There, it was clear from the plaintiff's case, that the defendant had no demand whatever upon the plaintiff, for the sum for which he arrested him; the defendant therefore *prima facie* had no reasonable or probable cause for making that arrest. *But his defense was* that he acted honestly in arresting, *because he proceeded upon the opinion given him by his legal adviser, and to show that he gave in evidence the opinion, founded on a statement made by himself. Such a defense necessarily introduced a question of fact, whether he did act honestly on the faith of the opinion which he had obtained, believing*

draws from unauthorized communications, and affords a qualified defense, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or

that the party might lawfully be arrested. That question, was unavoidably left to the jury."

As to what constitutes *reasonable and probable cause*, it was said in *Delegal v. Highley*, 3 New Cas. 950, that it "must be that which exists in the minds of the party at the time of the act in question," and this definition is referred to by COLERIDGE, J., in *James v. Phelps*, *ante*, with approval. This being the case, whenever there is any dispute as to the facts, it becomes necessarily a question of fact for the jury to find, whether the defendant acted reasonably *bona fide* under the circumstances, whether he *honestly believed* in the truth of his charge, and made it under that belief, and in a reasonable manner in view of all the facts and circumstances of the case. A man may not, simply because he honestly suspects another of having committed a crime against himself, go about the community proclaiming it, publicly or privately, and claim exemption from an action *because* of such belief, however honest. His privilege extends no further than to such communications as are *necessarily and reasonably* made in furtherance of justice, to secure the apprehension and conviction of the person. For all that is said or done by him *beyond* that, liability attaches.

The rule is, that words which *may* injure a person in his trade or profession, but which do not *necessarily* produce that result are not actionable without a special damage is alleged and proved. They must be spoken with reference to the actual trade or profession. Thus in *Lumby v. Allday*, Cr. & J. 301, it was alleged in the plaintiff's declaration, that he was a clerk in a gas company, and that the defendant intending to have it believed that he was of a bad character, unfit for his situation, and an improper person to be employed by the company, and to cause him to be deprived of his situation, used words which charged him with incontinence. The plaintiff had a verdict, but upon motion in arrest it was held that the action would not lie: BAYLEY, J., in giving the judgment of the court, said, "*Every authority which I have been able to find, either shows the want of some general requisite, as honesty, fidelity, capacity, &c., or connects the imputation with the plaintiff's trade, office, or business.* As at present advised, therefore, I am of opinion that the charge proved in this case is not actionable, *because the imputation it contains does not imply the want of any of those qualities which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk.*"

So it has been held that to charge a clergyman with adultery; *Parrat v. Carpenter*, May. 64, Cro. Eliz. 502; *Hunt v. Jones*, Cro. Jac. 499; *Hartley v. Harring*, 8 T. R. 130; *Moore v. Meaghen*, 1 Taunt. 39; a schoolmistress with being a prostitute; *Wharton v. Brook*, 1 Vint. 21; *Witherhead v. Armitage*, 2 Lev. 233; 2 Shaw. 18; are not actionable unless special damage is alleged and proved, and the doctrine of these cases is expressly confirmed in *Ayre v. Craven*, 2 Ad. & El. 8, and in *Lumley v. Allday*, Cro. & J. 305. Where words spoken are *prima facie* privileged, and therefore requiring proof from the plaintiff of express malice, the conduct of the defendant after speaking the words may be given to establish such malice; as that he pleaded their truth in justification, and then gave no evidence in support of the plea, and refused to admit the falsity of the words; *Simpson v. Robinson*, 12 Ad. & El. (Q. B.) 511; *overruling Milen v. Andrews*, Mas. & M. 336; and *Wilson v. Robinson*, 7 Ad. & El. (Q. B.) 68. See also in effect sustaining the same principle

exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within

that putting a plea upon the record asserting the truth of the charge, and then putting in no evidence to sustain it, may be considered as evidence of malice. *Warwick v. Faulkes*, 12 M. & W. 507. See also *Pearson v. Lematre*, 5 M. & G. 700; but in such a case if the plea was honestly entered, and there is otherwise an absence of any acts to show malice on the part of the defendant, and the communication is privileged, neither the entry of such a plea will be regarded as evidence of malice, nor will the fact that the defendant attempted to find testimony to sustain his plea, but failed to do so, be allowed to be shown in aggravation of the wrong; *Ormsby v. Douglass*, 37 N. Y. 477.

Indeed, in *Wilson v. Robinson*, referred to *ante*, where such evidence was held not proper to be considered by the jury upon the question of malice, the judgment of LORD DENMAN was predicated upon the ground, *not* that such evidence should never be considered by the jury, but that the fact whether it was proper to be submitted to them *depended entirely upon the circumstances of the case. If the communication is prima facie privileged and a plea of justification is entered in good faith*, and it is shown by evidence on the part of the defendant that the occasion of the communication was such as to make it privileged, the mere fact that the defendant had abandoned the plea of justification, would not *of itself* be evidence of malice. Indeed, LORD DENMAN expressly intimates that if there is any evidence beyond the communication itself to establish express malice, the fact of the abandonment of the plea might properly be considered *in aggravation of damages*, but in that case there was no proof of malice except it could be inferred from the fact of the abandonment of the plea, and the defendant expressly proved that the document was privileged, while in *Simpson v. Robinson*, *ante*, the defendant not only abandoned his plea, but refused to acknowledge its falsity when the plaintiff offered to accept an apology and nominal damages. Under such circumstances, the filing of the plea and its abandonment, was clearly evidence of malice, and it was upon that ground that the court predicated its judgment. It did not hold that in *all* cases the abandonment of the plea was to be submitted to the jury as *per se* evidence of malice, but that, whenever the facts and circumstances were such as to render its abandonment evidence of express malice, it might be considered by the jury in determining that question.

A communication imputing corruption in office to one who fills the office, can not be regarded as privileged, because it relates to such person in his office, and the party writing supposed he was making it to a competent tribunal. He is bound at his peril to know whether it is made to such a tribunal, and if it is not, it is not privileged; *Blagg v. Sturt*, 10 Q. B. 899; and this is but a repetition of the doctrine laid down in *Weston v. Dobinet*, Cro. Jac. 432, where the court held that words spoken in the course of justice were not actionable, but, that if a *scandalous bill is exhibited to a court that has no jurisdiction over the subject-matter of it, an action will lie*. If a person has spoken slanderous words of another, and being called on by the person of whom the words were spoken, in answer to an inquiry as to whether he used the words, says that he did, and that they are true, the fact that the words were given in response to an inquiry by the plaintiff will not render them privileged, as to that portion of them re-affirming the slander. *Griffiths v. Lewis*, 7 Ad. & El. (Q. B.) 61.

any narrow limits." (*h*) "The rule," observes LORD CAMPBELL, "is, that if the occasion be such as repels the presumption of malice, the communication is privileged, and plaintiff must then, if he can, give evidence of actual malice; if he gives no such evidence, it is the office of the judge to say that there is no question for the jury, and to direct a nonsuit or a verdict for the defendant: otherwise there might be a question for the jury in every case where a master, however fairly, gives the character of a servant; and if they conceived that there was malice lurking in the mind of the master, they might give a verdict for the plaintiff on the ground merely of the communication having taken place; and this would apply to all cases in which the occasion has been said to repel the presumption of malice." (*i*) "A communication of this sort," observes ALDERSON, B., "is not strictly what is called a privileged communication, but is rather a communication privileged by the occasion, and if it was made bona fide the particular expressions ought not to be too strictly scrutinized, provided the intention of the defendant was good." (*j*)

Whether the circumstances under which a communication was made constitute it a privileged communication or not is a question which the court has assumed the jurisdiction of determining. (*k*) But if there is any dispute about those circumstances, the question must be submitted to a jury. It is essential to the existence of the privilege and protection that the communication, under whatever circumstances made, should be believed to be true by the party making it; for a person can not shelter himself under the privilege if he believes the charge imputed untrue, unless he at the same time, declares his belief of its untruth. If a man knowingly makes a false charge, there is at once actual malice, and the privilege is blown to the winds.

Where the auditors of a public company, employed in accordance with the provisions of the articles of association,

(*h*) *Toogood v. Sparing*, 1 C. M. & R. 193. *Somerville v. Hawkins*, 10 C. B. 583. *Croft v. Stevens*, 7 H. & N. 570; 31 Law J., Exch. 143. *Whiteley v. Adams*, 33 Law J., C. P. 94. *Cowles v. Potts*, 34 Law J., Q. B. 247.

(*i*) *Taylor v. Hawkins*, 16 Q. B. 321. (*j*) *Woodward v. Lander*, 6 C. & P. 550. (*k*) *Stace v. Griffith*, L. R., 2 P. C. Cas. 420.

made a report reflecting upon the conduct of the company's manager, and the directors had the report printed and circulated among the shareholders, and it was used at an adjourned meeting, it was held that, the directors having done nothing contrary to the usual practice, the communication was privileged, and that, in the absence of express malice, no action lay against the directors for such publication. (1) "Independently of any authority," says MELLOR, J., "I am quite prepared to hold that a company having a great number of shareholders all interested in knowing how their officers conduct themselves, are justified in making a communication in a printed report relating to the conduct of their officers to all shareholders, whether present or absent, if the communication be made without malice, and bona fide." "I think," further observes HANNEN, J., "that the failure of the directors to report to the shareholders a statement made by the auditors upon their own responsibility of what they found to be the state of the accounts, might have led the directors into a position of great difficulty."¹

(1) Lawless v. Anglo-Egyptian Cotton Co.,¹ L. R., 4 Q. B. 262; 38 Law J., Q. B. 129.

¹ A privileged communication is one made at such a time, on such an occasion, and under such circumstances, that the inference of malice *prima facie* arising from a statement prejudicial to the plaintiff's character, is thereby rebutted, and imposes upon the plaintiff the burden of showing malice in fact—that the defendant was actuated by motives of personal spite or ill will, independent of the occasion on which it was made. PARKE, B., in Wright v. Woodgate, 2 Cro. M. & R. 573. Such communications, in order to be privileged, must have been made in good faith and for a justifiable purpose, in the discharge of a duty public or private, legal or moral, or in the prosecution of his own rights or interests, and without any design to defame the person to whom they relate, even though they are untrue. White v. Nichols, 3 How. (U. S.) 266; Coffin v. Coffin, 4 Mass. 1, 31.

Privileged communications are divided into four classes:

1. Where a person acts in the prosecution of his own rights, or in the *bona fide* discharge of a public or private duty, legal or moral.

2. Anything said or written by a master in giving the character of a servant who has been in his employ.

3. Publications made in the ordinary mode of parliamentary proceedings; and

4. Words used in the course of legal proceedings, pertinent thereto, before a tribunal having jurisdiction over the matter litigated.

DANIELS, J., in White v. Nicholls, 3 How. (U. S.) 266. The ground upon which such communications are held to be privileged, is that owing to the rights and duties of the person making the communication, there is no presumption of malice, consequently can be no recovery unless *express* malice is shown. Ormsby v. Douglass, 37 N. Y. 477. Where the publication or communication was made in good

1092. *Defamatory writings in courts of justice.*—An action for defamation will not lie for anything sworn or stated in the course of a judicial proceeding before a court of competent

faith or not, is a question for the jury. Thus where a person applies to a magistrate for a warrant for another for felony with which he accuses him, if the application is made with probable cause, and in good faith, the communication made to the magistrate is privileged, but if it was made without probable cause, and *mala fide*, an action lies. *Burlingame v. Burlingame*, 8 Cow. (N. Y.) 141; *Bunton v. Wesley*, 4 Bibb. (Penn.) 38. And the same is true of words spoken in the discharge of an official duty—they are only privileged when spoken in the discharge of that duty, without wantonness or malice. *Goodenow v. Tappan*, 1 Ham. (Ohio) 60. The occasion of using such words, if in the discharge of an official duty, is *prima facie* an excuse, unless there is something in the occasion itself that rebuts the presumption, and the plaintiff is charged with the burden of proving express malice. *Sands v. Robinson*, 12 Sm. & M. (Miss.) 704.

Where a communication is privileged, unless the plaintiff introduces proof of malice beyond the publication itself, the court should not submit the question to the jury. If there is no evidence tending to show that the publication or communication is not *bona fide*, it is the duty of the court to non-suit the plaintiff. *Taylor v. Hawkins*, 16 Ad. & El. (U. S.) 307. It is only for the jury to pass upon the question of malice, when there is evidence beyond the communication or publication itself, tending to show it. Then it is for them to say whether the words used were used colorably or *bona fide*. *Wright v. Woodgate*, 2 Cro. M. & R. 573. It is not enough that the evidence is as consistent with malice as its absence, but it is necessary that the evidence should be such as *is more consistent with its existence than with its non-existence*. It is not necessary that it should be such as *necessarily* leads to the conclusion that malice exists, but such as tends more to warrant a conclusion of its presence than its absence. MAULE, J., in *Somerville v. Hawkins*, 16 L. T. 283. When this condition exists, the plaintiff is entitled to have the question go to the jury, otherwise it is purely a question of law for the court.

A person who discharges a person from his employ, under the honest belief that such person has been guilty of dishonest conduct, whether the conduct amounts to a felony or not, may, upon being inquired of, state the reason for such dismissal, and no action will lie therefor, unless express malice, beyond the speaking of the words, is proved; *Toogood v. Spyring*, 1 Cro. M. & R. 181; *Taylor v. Hawkins*, 16 Ad. & El. 307; and if, when about to discharge such person from his employ, he calls a third person to hear the reason therefor, and states the reason in his presence, which, except for the privilege would be actionable, the calling of such third person will not deprive the defendant of the privilege; *Taylor v. Hawkins*, *ante*; but the communication must be made with honesty of purpose, and if made in answer to inquiries to some person who has an interest in the inquiry, rather than as mere matter of gossip; *Toogood v. Spyring*, *ante*. But in all cases where the claim of privilege is set up in defense, it must appear that the circumstances were such as to call for it and forbid any influence of malice; *Elam v. Badger*, 23 Ill. 498; and the privilege must not be exceeded. Thus, where a committee is appointed by a corporation to investigate the conduct of his officers and agents their report as well as their conclusions from the evidence may be privileged, but they would not be justified in printing and circulating the report in the form of a

jurisdiction, such as defamatory bills or proceedings filed in Chancery, or in the ecclesiastical courts, or affidavits containing false and scandalous assertions against others. (*m*)

(*m*) *Ram v. Lamley*, Hutt. 113. *Wes-ton v. Dobniet*, Cro. Jac. 432. *Astley v. Younge*, 2 Burr. 809.

book; *Phila. &c. R. R. Co. v. Quigley*, 21 How. (U. S.) 202; and all such reports must be such as are made in *good faith* and required to protect the interests of the corporation and the public against fraudulent representations; *Gassett v. Gilbert*, 6 Gray (Mass.) 94; *Burrows v. Bell*, 7 Id. 301.

A complaint made to a police officer charging a person with theft, if made *bona fide*, under an honest belief that it is true, is not actionable, but if made *mala fide*, it would be. *Smith v. Kerr*, 1 Edm. Sel. Cas. (N. Y.) 190; *Whitney v. Adams*, 15 C. B. (U. S.) 392; *Reed v. McLenden*, 44 Ga. 136. So where a newspaper publishes the evidence taken before an investigating committee, or upon the trial of cause, the publisher is not chargeable with libel unless he comments upon the evidence, and makes statements in reference thereto not fairly within the privilege. *Terry v. Fellows*, 21 La. An. 375.

The publishers of a newspaper owe certain duties to the public, and have a right to discuss fairly all matters of public interest, and to criticise the public acts of officials. But, while they have this right, they are bound to exercise it fairly, in good faith and without wantonness or a reckless disregard of private rights. If they make charges without probable cause, and from improper motives, they can not claim any privilege therefor, neither can they attack the character of private citizens, except subject to the peril of being mulcted in damages, in case they are not prepared to fully sustain the truth of the charge made. *Snyder v. Fulton*, 34 Md. 128; *Usher v. Severance*, 20 Me. 9; *Hotchkiss v. Oliphant*, 2 Hill (N. Y.) 510; *Powers v. Dubois*, 17 Wend. (N. Y.) 63; *Turrill v. Delaway*, 17 Id. 426; *Cramer v. Riggs*, 17 Id. 209; *Cooper v. Stone*, 24 Id. 434.

In reference to candidates for office it may be said that, their character may be canvassed, but not calumniated. *Seeley v. Blair*, Wright (Ohio) 358, 683; *Wilson v. Fitch*, 41 Cal. 363. So words spoken or written in a legal proceeding pertinent thereto are privileged. *Marsh v. Ellsworth*, 2 Sweeney (N. Y. Sup. Ct.) 589; *Garr v. Selden*, 4 N. Y. 91; *Lee v. White*, 4 Sneed. (Tenn.) 111; *Reid v. McLendon*, 44 Ga. 136; but otherwise if the court did not have jurisdiction over the subject-matter of the action. *Millan v. Burnside*, 1 Brev. (S. C.) 295.

In order to constitute a privilege that will excuse a libel, the person charged therewith must be able to establish a legal excuse therefor, either by showing that it was published in pursuance of a duty public or private, in good faith and under such circumstances as to deprive the publication of any inference or presumption of malice. If the duty is exceeded, if the privilege is abused, liability attaches, and even though otherwise within the privilege, if *express malice* or *mali fide* can be shown, the privilege will be of no avail. Private character is of too much value in the eye of the law to be made the mere sport of libellers or slanderers, and it holds them up to a rigid accountability if, under the guise of privilege, they step aside to make wanton or unwarranted attacks upon private citizens or public officers. *Rector v. Smith*, 11 Iowa, 302; *McCabe v. Cauldwell*, 18 Ab. Pr. (N. Y.) 377; *Littlejohn v. Greeley*, 13 Id. 41; *Aldridge v. Printing Co.*, 9 Minn. 133; *Shackett v. Jackson*, 10 Cush. (Mass.) 25; *Hunt v. Bennett*, 19 N. Y. 173; *Taylor v. Church*, 1 E. D. S. (N. Y.) 179.

Therefore, if a man goes before justices of the peace and exhibits articles against the plaintiff containing divers false and scandalous charges concerning him, the plaintiff can not have an action for a libel in respect of any matter contained in such articles, for the party preferring them "has pursued the ordinary course of justice in such a case; and if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain, for fear of infinite vexation." (*n*) There is a large collection of cases where parties have from time to time attempted to get damages for slanderous and malicious charges contained in affidavits made in the course of a judicial proceeding, but in no one instance has the action been held to be maintainable; (*o*) but the libeller may be punished, and the abuse repressed by a prosecution for perjury, the result of which is to make the libeller infamous if he is convicted. (*p*)

Where the cause of action against a defendant was, that he falsely and maliciously, and without any reasonable or probable cause, went before a Commissioner for taking oaths in the Court of Chancery, and swore an affidavit stating of the plaintiff, in his character of an auctioneer, that he conducted his business fraudulently and improperly, and that he was not, in the deponent's opinion, a fit and proper person to be intrusted with the sale of certain property then the subject of a suit in the Court of Chancery, and the court, upon the evidence before it, decided that the plaintiff was not a fit and proper person to conduct the sale, it was held that the affidavit, being made in the course of a judicial proceeding, could form no ground of action. (*q*) But if the court has no jurisdiction in the matter, and no right to entertain the pro-

(*n*) Cutler v. Dixon, 4 Co. 14 b.

(*o*) Henderson v. Broomhead, 4 H. & N. 579; 28 Law J., Exch. 360.

(*p*) As to a certificate from a military officer that his inferior officer left his

quarters without permission, see Keighly v. Bell, 4 F. & F. 763.

(*q*) Revis v. Smith, 18 C. B. 126; 25 Law J., C. P. 195.

Mercantile agencies may give information to any of its members in reference to the pecuniary, moral or social standing of a person, if given in *good faith*, but it may not print such information in a book for circulation among its members unless it is prepared to establish the truth of the statements made therein. Taylor v. Church, 1 E. D. S. (N. Y.) 279; Beardsley v. Tappan, 5 Bl. C. C. (U. S.) 497; Com. v. Stany, 1 Penn. Leg. Gaz. (Penn.) 114; Sunderlin v. Bradstreet, 46 N. Y. 188.

ceeding, and the charge is recklessly and maliciously made, it will not be regarded as a privileged communication. (r)¹

1093. *Defamatory petitions to the Queen, to Parliament or to ministers or officers of state respecting the conduct of magistrates and officers.*—As all persons have an interest in the pure administration of public justice, and as it is the duty of all persons who witness misconduct on the part of magistrates to try by all means in their power to bring such misconduct to the notice of those whose duty it is to inquire into and punish it, it has been held that petitions and memorials prepared bona fide, and forwarded to the proper authorities, complaining of the conduct of magistrates, and containing statements and allegations honestly believed to be true, are privileged communications; but if they are made on frivolous grounds, or with knowledge of their being untrue, or without knowledge of their truth or falsehood, and without in-

(r) Buckley v. Wood, 4 Co. 14 b. Lewis v. Levy, Ell. Bl. & Ell. 554; 27 Law J., Q. B. 282.

¹ Hartstock v. Reddick, 6 Blackf. (Ind.) 255; Usher v. Severance, 20 Me. 9; Kidder v. Parkhurst, 3 Allen (Mass.) 393; McLaughlin v. M'Makin, Bright. (Penn.) 132; Milan v. Burnside, 1 Brev. (S. C.) 295.

As to proceedings in a court of justice, it is held that a publication thereof when the tribunal whose proceedings are published is legally competent to investigate the matter, are privileged, as well as charges made before such a court, pertinent to the matter on trial, and so, too, any comments upon the same warranted by the testimony published are included within the privilege, but comments resting upon inferences not fairly warranted by the proof, are not. Fry v. Bennett, 3 Bass. (N. Y.) 200; Edsall v. Brooks, 26 How. Pr. (N. Y.) 426; Stanley v. Webb, 4 Sandf. (N. Y.) 21. Proceedings before a grand jury are held not to be proceedings before a court of competent jurisdiction, and are not privileged; Rector v. Smith, 11 Iowa, 302; McCabe v. Cauldwell, 18 Abb. Pr. (N. Y.) 377. Statements made in a petition to the governor for the removal of a public officer, are *quasi* judicial, and if pertinent thereto, are privileged; but, if the parties petitioning step aside from the real facts, and make a wanton attack upon the public or private character of the officer, the privilege is abused, and liability attaches for all such excess; Larkin v. Noonan, 19 Wis. 82; and this is the rule in reference to words charged to be libellous in any judicial proceeding. If they were pertinent to the issues, they are privileged, otherwise not; Warner v. Paine, 2 Sand. (N. Y.) 195; Garr v. Selden, 4 N. Y. 91; Marsh v. Ellsworth, 36 How. (N. Y.) 520; Bailey v. Dean, 5 Barb. (N. Y.) 297; an *ex parte* affidavit made to obtain the arrest of a person on a criminal charge, is, if made *bona fide*, and pertinent to the charge, privileged as to the affiant, but the privilege does not extend to its publication in a newspaper. Cin. & C. Co. v. Timberlake, 10 Ohio St. 548; Klinch v. Colby, 45 N. Y. 427. Reid v. McLendon, 44 Ga. 156.

quiry, when inquiry would have made the truth apparent, and would have shown the allegation of misconduct false, the calumniator will be deemed to have acted from malicious motives, and his statements will not be privileged. (s) Petitions to the Crown upon matters respecting which it can not directly interfere, and petitions to Parliament, although the petitioners, besides presenting them to the House, print them and distribute them amongst the members, fall within the same rule. All these are protected, that men may not be prevented by the dread of a prosecution or action from making communications which may be beneficial to the public. (t)

Defamatory statements respecting the conduct of public officers, contained in an application for the redress of a grievance, or to expose some public abuse, made bona fide to one of the king's ministers, who is supposed to have authority to afford redress, do not render the person making the application liable to an action. Thus, where the creditor of an officer in the army sent a petition to the secretary-at-war, inclosing bills of exchange accepted by the officer, and containing statements derogatory to the character of the officer as a man of honor, and concluded with a prayer that the officer might be ordered to discharge the debts due on the bills, it was held, that although neither the secretary-at-war nor the king had power to order the money to be paid, yet that if the jury thought that the petition contained only an honest statement of facts, according to the understanding of the person who sent it, and that it was addressed to the secretary-at-war, bona fide, for the purpose of obtaining redress, and not for the purpose of slandering the plaintiff, they ought, under a plea of not guilty, to find a verdict for the defendant. (u) "Inasmuch as the defendant," observes MAULE, J., "might, reasonably enough, conceive that the public officer to whom he addressed himself, had power to assist him in obtaining payment of a just debt, the occasion justified the communication, however mistaken the defendant might be as to the extent of the jurisdiction of the person to

(s) *Harrison v. Bush*, 5 Ell. & Bl. 354 ;
25 Law J. Q. B. 25. *Sturt v. Blagg*, 10
Q. B. 906.

(t) *Lake v. King*, 1 Saund. 132.
(u) *Fairman v. Ives*, 5 B. & Ald

whom he was addressing himself." (v) But if the statements contained in the application be wholly or partly false, that may be sufficient to renew the presumption of malice, which *prima facie* the nature of the communication would rebut. (x)¹

1094. *Criminatory communications by public officers acting in discharge of a public duty.*—A criminatory communication made by a clerk of the peace to the justices at quarter sessions is privileged, provided it is confined to a statement of facts, pertinent to a matter which it is his duty to investigate, and contains nothing but what the clerk of the peace believes to be true; but if he imputes improper motives to others, and accuses them of attempts to extort money by misrepresentation; if irrelevant calumny is introduced into it, or it contains strictures upon the motives and conduct of others, which the facts stated do not warrant, he will exceed his privilege, and subject himself to an action for damages. (y) But no action will lie for statements made by a superior military or naval officer of his inferior in the course of his duty, even though made maliciously and without reasonable or probable cause. (z)²

1095. *Criminatory pastoral letters, and printed communications from clergymen to their parishioners.*—There is nothing in the position of a rector of a parish, or a vicar, curate, or any other minister of religion, which entitles him to publish or circulate defamatory letters in his parish, and such letters, though written and published under the gravest sense of duty, or the sincerest desire to improve the morals of the community, are actionable, if they cast serious imputations on the character or conduct of private persons. Where the schoolmaster of a national school, established in a parish of which the defendant was rector, had been dismissed by the trustees

(v) *Wenman v. Ash*, 13 C. B. 845.

(x) *Blagg v. Sturt*, 10 Q. B. 905.

(y) *Cooke v. Wildes*, 5 Ell. & Bl. 340;
24 Law J., Q. B. 367. *Popham v. Pick-*
burn, 31 Law J., Exch. 133.

(z) *Dawkins v. Lord Pavlet*, L. R.
5 Q. B. 94 (diss. Cockburn, C. J.).

Quære, if the statements may be false to
the knowledge of the officer making
them, *Ibid.*

¹ *White v. Nicholls*, 3 How. (U. S.) 266; *Larkin v. Noonan*, 19 Wis. 82; *Cook v. Hill*, 3 Sandf. (N. Y.) 341; *Thorn v. Blanchard*, 5 Johns. (N. Y.) 508; *Harris v. Harrington*, 2 Tyler (Vt.) 109.

² *Burrows v. Bell*, 7 Gray (Mass.) 301; *Phila. &c. R. R. Co. v. Quigley*, 7 Mow. (U. S.) 202; *Garrett v. Gilbert*, 6 Gray (Mass.) 94.

of the school from his situation, and had then obtained possession of a dissenting chapel, and opened a school there, it was held that the rector had no right to circulate letters in the parish, injuriously reflecting upon the conduct of the schoolmaster and the tendency of his teaching, under the pretext that he was watching over the souls of his parishioners, and exerting himself for their spiritual welfare. The parson in his case had, in a pastoral letter to divers parishioners, stigmatized the schoolmaster as not being a rightly-disposed Christian, as being imbued with a spirit of opposition to authority and the commands of Scripture, and designated his school as a schismatic school, upon which God's blessing could not rest; and he warned the rich against supporting it with subscriptions of money, and the poor against sending their children to it to be educated; and it was held that the libel was not privileged, and that there was evidence of malice for a jury. "What was there," observes MAULE, J., "in the position of the defendant, as rector of the parish, which entitled him to circulate a defamatory letter, not only in his own, but in the adjoining parish, and so endeavor to prevent persons from subscribing and sending their children to the plaintiff's school? It is difficult to understand how the slightest right to do so can be suggested. As rector he might, no doubt, visit and remonstrate with any of his flock; but when a meritorious individual is about to set up a school, of which he disapproves, because he thinks it may rival the school in which he takes an interest, that he should on that account cast serious imputations on that individual, and still be considered as having published a privileged communication, certainly seems a strange and inconvenient doctrine. We think that there was sufficient evidence for the jury to infer malice, and that in determining the question of malice, the particular nature of the libel itself can not be excluded from the consideration of the jury. . . . In this case the terms of the letter itself are not without the character of malice. The endeavor to make the plaintiff's conduct a matter of spiritual delinquency; to represent it as something opposed not only to some wordly rule, but unchristian-like, and contrary to what would be done by a person who had faith in and a willingness to obey scriptural precepts, are

matters on the face of the libel which make it proper that the jury, looking at the libel itself, should say whether or not there was actual malice." (a)

1096. *Defamatory letters respecting clergymen*, addressed to the bishop of the diocese, will be privileged, if there was fair and reasonable cause, for a resort to the bishop, but not if they were written on light and frivolous grounds. Where a parishioner wrote a letter to the bishop of the diocese, informing him of reports current in the parish derogatory to the character of the clergyman, and throwing scandal upon the Church, and praying that an inquiry might be instituted, it was left to the jury to determine whether the letter was written with the malicious intention of slandering the plaintiff to the bishop, and giving currency to idle rumors, or with the honest intention of obtaining an inquiry. (b) If the writer of the letter has means at hand for ascertaining whether the rumors are true or false, and neglects to avail himself of them, and chooses to remain in ignorance when he might have obtained full information, there would be no pretence for any claim of privilege.¹

1097. *Privileged confidential communications between relations respecting the character of a person proposing marriage*.—Where the defendant, being the son-in-law of a widow lady, to whom the plaintiff was paying his addresses, wrote a letter to the lady charging the plaintiff with various acts of gross misconduct, and warned her against listening to his addresses, it was held that the communication was privileged. "If no explanation," observes ALDERSON, B., "had been given of the circumstances under which the letter was written, the law would, from the contents, infer it to have been published with a malicious motive against the plaintiff. But when it is shown that the parties were standing in circumstances of confidence and near relationship towards each other, I think the defendant's conduct justifiable, if he really believed in the truth of the statements which he made, though such statements were, in fact, erroneous, for it is for the common good of all, that communications between parties situated as

(a) *Gilpin v. Fowler*, 9 Exch. 627; 23 Law J., Exch. 152. (b) *James v. Boston*, 2 C. & K. 8.

¹ *O'Donoghue v. M'Govern*, 23 Wend. (N. Y.) 26.

these were, should be free and unrestrained. The whole question is, whether this is a bona fide letter." (c)

1098. *Privileged confidential communications between friends to prevent an injury.*—If a confidential communication is honestly made between friends, purely to prevent an injury, and not for the purpose of slandering, the occasion justifies the act, and the communication is privileged. (d) But no moral duty will justify the repetition and communication in writing of all the idle gossip a man hears to the prejudice of his neighbor. If a person is, under certain circumstances, under the pressure of a moral obligation to disclose the truth, he is, under all circumstances, under the pressure of a moral obligation to abstain from circulating and propagating falsehoods. No person, therefore, ought to hazard statements or assertions in writing injurious to the character of another, until he has by inquiry, where the means of inquiry exist, satisfied himself they are founded in truth. The benefit to one man by the disclosure of the information, supposing it to be true, is counterbalanced by the injury done to another if it should turn out to be false.

Where the defendant has received a letter from his friend, the mate of a ship, containing a long narrative of dangers which the mate had incurred from the drunkenness of the captain, and asking for the defendant's advice, and the defendant honestly believing in the truth of his friend's statement, handed the letter to the shipowner, who dismissed the captain, and the latter sued the defendant for damages, the court were equally divided in opinion as to whether the communication was privileged or not; TINDAL, C. J., and ERLE, J., being of opinion that the occasion and circumstances under which the communication took place, and the purity of motive of the defendant in making it, rendered it a privileged and protected communication; while CRESSWELL, J., and COLTMAN, J., were of a contrary opinion. "It was not contended," observes CRESSWELL, J., "that any legal duty bound the defendant to communicate to the shipowner the contents of the letter he had received, nor was the communication made in the conduct of his own affairs, nor was

(c) *Todd v. Hawkins*, 2 M. & Rob. 21.

(d) *Holroyd, J., Fairman v. Ives*, 5 B. & Ald. 64r.

his interest concerned. The authority for the publication, if any, must therefore be derived from some moral duty, public or private, which it was incumbent upon him to discharge. I think it impossible to say that the defendant was called upon by any public duty to make the communication; neither his own situation, nor that of any of the parties concerned, nor the interests at stake, were such as affect the public weal. Was there any private duty? There was no relation of principal and agent between the shipowner and the defendant; nor was any trust or confidence reposed by the former in the latter; there was no relationship or intimacy between them; no inquiries had been made; they were, until the time in question, strangers; and the duty, if it existed at all, as between them, must, therefore, have arisen from the mere circumstance of their being fellow-subjects of the realm. But the same relation existed between the plaintiff and the defendant. If the property of the shipowner on the one hand was at stake, the character of the captain was at stake on the other; and I can not but think that the moral duty, not to publish defamatory matter which he did not know to be true, was quite as strong as the duty to communicate to the shipowner that which he believed to be true." (e) Here, however, the defendant had no means of ascertaining the truth or falsehood of the information, and the responsibility of acting upon it, without due inquiry, ought to rest with the shipowner. And if the defendant had been possessed of any personal interest in the subject-matter to which the letter related; if he had been a part owner of the ship, or an underwriter on the ship, or had any property on board, the communication of the letter to the shipowner would have fallen clearly within the rule relating to excusable publications; and so, if the danger disclosed by the letter either to the ship or the cargo, or the ship's company, had been so immediate as that the disclosure to the shipowner was necessary to avert such danger, then, upon the ground of social duty, by which every man is bound to his neighbor

(e) *Cresswell, J., Coxhead v. Richards, Bell v. Parke, 10 Ir. C. L. R. 284.*
2 C. B. 605. *Bennett v. Deacon, Id. 633.*

the defendant would have been not only justified in making, but would have been bound to make, the disclosure. (f) ¹

1099. *Privileged communications by persons having a pecuniary interest involved in the matter of the communication.*—Communications made by a person immediately concerned in interest in the subject-matter to which it relates for the purpose of protecting his own interest, in the full belief that the communication is true, and without any malicious motive, is a privileged communication, and protected from liability in an action for libel. Where a letter was written confidentially to certain bankers, conveying charges injurious to the professional character of a solicitor in the management of certain concerns which they had intrusted to him, and it appeared that the writer of the letter was himself interested in the affairs which he supposed to be mismanaged, and wrote the letter bona fide under the impression that his statements were well founded, it was held that the communication was privileged. "If a communication of this sort," observes LORD ELLENBOROUGH, "which was not meant to go beyond those immediately interested in it, were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted." (g)

Among the various communications which have been held to be protected, in consideration of the private interest of the person making them, may be enumerated notices of the commission of an act of bankruptcy by the plaintiff, given by a creditor whose pecuniary interests required the information to be given, (h) and communications respecting the character of servants. ²

(f) Tindal, C. J., *Coxhead v. Richards* 2 C. B. 596. *Wilson v. Robinson*, 7 Q. B. 68. Willes, J., *Amann v. Damm*, 8 C. B., N. S. 602. (g) *M'Dougall v. Claridge*, 1 Campb. 266. (h) *Blackham v. Pugh*, 2 C. B. 611.

¹ *Sunderlin v. Bradstreet*, 46 N. Y. 188; *Taylor v. Church*, 1 E. D. S. (N. Y.) 279.

² In *Sunderlin v. Bradstreet*, 46 N. Y. 188, the court laid down the rule that a communication is privileged when made in good faith to one having an interest in the information sought; and that the same rule prevails even though the information is volunteered, if it is communicated to one having an interest therein, and stands in such a relation to the person making it, that it is a proper or reasonable duty on his part to give the information. As to the rule in such cases see *Phila. &c. R. R. Co. v. Quigley*, 21 How. (U. S. 202; *Burrows v. Bell*, 7 Gray (Mass.).

1100. *Reckless and inconsiderate communications.*—But it is not sufficient in every case of a confidential communication made by a person having an interest in the subject-matter thereof, to show that it was made bona fide and without malice. A man has no right, as we have seen, to make himself the medium of propagating scandalous and defamatory accusations, unless he himself honestly believes them to be true, and his belief is not an honest belief, if it is formed in a reckless and inconsiderate manner. If he has the means by inquiry of ascertaining whether the charge is true or false, and neglects to make inquiry, and exercises no effort to arrive at the truth, his belief can hardly be said to be an honest belief; for whoever publishes and circulates in writing opinions and statements unfavorable to another, ought to be prepared to show that he had some reasonable grounds for it. There is a wide distinction between reckless assertions made by a man who assumes to have a knowledge of the facts he communicates, and honest communications made with a view to inquiry and information by a person interested in knowing the truth. (i) If a question is asked concerning the character of another, the person interrogated is not justified in giving a damaging answer, unless he has some fair and reasonable foundation for it.¹

1101. *Disclosures made bona fide in the course of an investigation set on foot by the plaintiff himself* are also privileged and protected. If, therefore, the plaintiff, or another person at the plaintiff's request, writes to the defendant asking for information on some point affecting the plaintiff's character, and the defendant merely relates bona fide what he has heard, the communication is privileged. (k) Where the defendant,

(i) James v. Boston, 2 Car. & K. 7.

(k) Hopwood v. Thorn, 8 C. B. 316.
Warr v. Jolly, 6 C. & P. 497.

301; Gassell v. Gilbert, 6 Id. 94; Washburn v. Cook, 3 Den. (N. Y.) 110; Lewis v. Chapman, 16 N. Y. 369; Farnsworth v. Storrs, 5 Cush. (Mass.) 412; Elam v. Badger, 23 Ill. 498; O'Donoghue v. M'Govern, 23 Wend. (N. Y.) 26; Van Wyck v. Aspinwall, 17 N. Y. 190; Gray v. Pentland, 4 S. & R. (Penn.) 420; Taylor v. Church, 8 N. Y. 452; Lawler v. Earle, 5 Allen (Mass.) 22; Hatch v. Lane, 105 Mass. 394; Knight v. Gibbs, 3 N. & M. 469.

¹ Hill v. Miles, 9 N. H. 9; Powers v. Dubois, 17 Wend. (N. Y.) 63; Simmons v. Halster, 13 Minn. 249; Kemlee v. Sass, 12 Mo. 499; Edsall v. Brooks, 2 Robt. (N. Y.) 79; Woodburn v. Miller, Cheves (S. C.) 194; Sheckell v. Jackson, 5 Cush (Mass.) 25.

having given notice of dismissal to his footman and cook, they separately went to him and asked his reason for discharging them, when he told each, in the absence of the other, that (he or she) was discharged because both had been robbing him: whereupon each brought an action for the words so spoken to the other, it was held that the statement was privileged. (*l*)

Answers to inquiries, therefore, made by persons interested in making the inquiry are privileged, if they are given bona fide in the discharge of any legal, moral, or social duty, as where the writer is, by his situation, bound to protect the interests of the inquirer, and they are believed to be true by the parties who give them. Thus, the answer to an inquiry addressed by a landlord to his tenant, respecting the character of a person proposing to be appointed game-keeper, or to take a farm, is privileged by the occasion, if made bona fide. (*m*) But if a person is supposed to have libelled or slandered another, and the party aggrieved asks him if he has done so, and he replies that he has, and repeats it, such a communication is not privileged; (*n*) and per WIGHTMAN, J., "If the reports had originated elsewhere than with the defendant, and he had been merely called upon for information, and had given it, the case would have been different."

1102. *Communications between subscribers to charities.*—Words spoken by one subscriber to a charity in answer to inquiries by another subscriber, respecting the conduct of a medical man employed by the charity, in his attendance upon the objects of the charity, are not, merely on account of those circumstances, a privileged communication. "There may be a thousand subscribers to a charity," observes Lord DENMAN. "Such a claim of privilege is too large." (*o*)

1103. *Privileged communications respecting the character of servants.*—One of the most ordinary and common instances of the application in practice of the privilege of protection to confidential communications of a criminatory character, is that of a former master giving the character of a discharged

(*l*) *Manby v. Will*, 18 C. B. 544.

(*m*) *Cockayne v. Hodgkisson*, 5 C. & P. 543.

(*n*) *Griffiths v. Lewis*, 7 Q. B. 64.

(*o*) *Martin v. Strong*, 5 Ad. & E. 538.

servant, which, if given with honesty of purpose to a person who has any interest in the inquiry, is a privileged communication, although made in the presence and hearing of a stranger. (*p*) Even though the statement be untrue in fact, the master will be held justified by the occasion in making the statement, unless it can be shown to have proceeded from a malicious mind. Malice may be established by various proofs: one may be that the statement is false to the knowledge of the person making it, and if there is any evidence of willful untruth in the statements as to character there is evidence of malice to be submitted to a jury. Generally speaking, anything said or written by a master when he gives the character of a servant, is a privileged communication, if made bona fide in answer to inquiries that have been addressed to him. It is not essential that the person making the communication should be put into action in consequence of a third party's putting questions to him. He may, when he thinks that another is about to take into his service one whom he knows ought not to be taken, set himself in motion to induce that other to seek information and put questions to him. The answers to such questions given bona fide, with the intention of communicating such facts as the other party ought to know, will, although they contain slanderous matter, come within the scope of a privileged communication. But in such a case it will be a question for the jury, whether the defendant has acted bona fide, intending honestly to discharge a duty, or whether he has acted maliciously, intending to do an injury to the servant. When he volunteers to give the character, stronger evidence that he acted bona fide will be required than in the case where he has given the character after being requested so to do. (*q*)¹

(*p*) *Toogood v. Spyring*, 1 C. M. & R. 193. *Weatherston v. Hawkins*, 1 T. R. 110.

(*q*) *Pattison v. Jones*, 8 B. & C. 578. See *Fryer v. Kinnersly*, 33 Law J., C. P. 97.

¹ *White v. Nicholls*, 3 How. (U. S.) 266; *Fowles v. Bowen*, 30 N. Y. 20; *Smith v. Higgins*, 16 Gray (Mass.) 251.

In *Dale v. Harris*, 109 Mass. 193, the defendant kept a shop in Lowell for the sale of dry goods, and the plaintiff was in his employ as a clerk. Having discovered, as he believed, a loss of about \$1,800 in the shop, he told the city marshal of his loss and his suspicions that the plaintiff was the thief. The marshal went with him to the store, and there, in the presence of the marshal and other

If the employer has received credible information of the misconduct of a servant after the latter has left his situation, it is his duty to disclose the fact in answer to inquiries as to character, in order that a proper investigation may be made by the persons interested in knowing the truth. (r) If a good character is given to a servant, and then circumstances are discovered which show that the character was not deserved, it is the duty of the person who has given the good character to communicate the discovery to the person to whom such character has been given, and the communication, if made bona fide, is privileged and protected. (s) But if it appear from the terms and language of the communication and the surrounding circumstances of the case that there was any malicious or spiteful feeling actuating the master when making the communication, then it is not protected. If, therefore, it be proved that the bad character given of the servant is false, and that the master knew it at the time he gave it, there is evidence of express malice, and the privilege is annihilated. If the master characterises his servant as a "bad-tempered, lazy, impertinent fellow," and the servant brings forward persons with whom he has previously lived who give him a good character, and contradict the allegation of his bad temper, laziness, and impertinence, it is incumbent on the master to give some general evidence, showing that he had a reasonable ground for using the language he did use, and that the statement was not totally unfounded and wholly devoid of truth. If he fails to give some general evidence of this sort, the charge against the servant will be considered reckless and unfounded, and there will be evidence of malice for a jury. (t)

Where a libel imputed to the plaintiff incompetency and unskillfulness in a particular transaction in which the plain-

(r) Child v. Affleck, 9 B. & C. 403.

(s) Gardner v. Slade, 13 Q. B. 801.

(t) Rogers v. Clifton, 3 B. & P. 591.

Acc. in the case of a governess, Fountain v. Boodle, 3 Q. B. 11.

he repeated his suspicions. The court charged the jury that what was said by the defendant to the marshal alone, or what might be said to any individual who sought information with a view to employing the plaintiff, if made in good faith, would be privileged, but that as to such a charge not made confidentially, but in the presence and hearing of others, liability would attach unless the truth of the charge was established. The plaintiff had a verdict for \$2,100, which was upheld on appeal.

tiff had been employed by the defendant, it was held that it was not competent to the plaintiff to give evidence of general competency and skillfulness, without meeting the specific instance relied upon by the defendant. (u)

Where the plaintiff, being secretary of an association called the Brewers' Company, was dismissed for alleged misconduct, and the defendant, who was a director of the company, and also a director of another company, called the London Necropolis Company, of which the plaintiff was auditor, called the attention of the directors of the last-named company to the plaintiff's misconduct and dismissal from the secretaryship of the other company, alleging that he had been charged with obtaining money from the solicitors of the company by false pretences, and taking up a bill of his own with it, it was held that the defendant might properly, in his character of director of the Necropolis Company, make the communication he did, although it charged the plaintiff with the actual commission of the offense imputed to him, or amounted to an assertion on the defendant's part that he believed the charges to be true; for it was both his duty and interest to make the communication; and it was held that, in order to render the defendant liable in damages, actual malice must be shown, in the shape of proof that the defendant was not actuated by a justifiable motive, but by some evil intention towards the plaintiff. (x)

1104. *Comments in excess of the privilege.*—"The proper meaning of a privileged communication," observes PARKE, B., "is only this, that the occasion on which the communication was made, rebuts the inference of malice, prima facie arising from a statement prejudicial to the character of the plaintiff, and puts it on him to prove that there was malice in fact, *i. e.*, that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made." (y) This may be established by the language of the communication itself, by showing that it was made in virulent and abusive terms, and that the

(u) *Brine v. Bazalgette*, 3 Exch. 694.

(x) *Harris v. Thompson*, 13 C. B. 348.

See *Lawless v. Anglo-Egyptian Co.*,

ante.

(y) *Wright v. Woodgate*, 2 Cr. M. & R. 577.

words used were stronger than the occasion justified. (g) When the communication is in writing, the jury are entitled to look at and read the writing, in order to judge of its true character.

"Any one, in the transaction of business with another, has a right to use language, bona fide, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly, or by its consequences, be injurious or painful to another; but he has no right to make defamatory comments on the motives or conduct of the party with whom he is dealing." Where, therefore, the defendant claimed a sum of money from the plaintiff, and the plaintiff's clerk wrote, by direction of the plaintiff, to the defendant, telling him that the plaintiff denied his liability, whereupon the defendant wrote to the clerk, alleging facts in support of his claim, and added, "this attempt to defraud me is as mean as it is dishonest," it was held that the comment was not privileged, and was libellous and actionable. (a)¹

1105. *Of the effect of addressing privileged communications to a wrong party by mistake.*—It does not appear to have been expressly decided whether an honest mistake, made in sending a privileged communication to the wrong person, destroys the privilege, and subjects the party making the communication to an action; or how it would be if a gentleman asked by letter for the character of a servant, should, bona fide write an answer, stating acts of dishonesty and immorality committed by the servant, and, by mistake, address the letter to another person, different from the inquirer, although of the same name. (b)

1106. *Reports of trials containing defamatory matter.*—"Newspapers and other publications," observes TINDAL, C. J., "which narrate what passes in courts of justice, are, to a certain extent, privileged. No one can read their accounts of judicial proceedings without being sensible that, on several occasions, they do, to a certain extent, serve the cause of

(z) *Brown v. Croome*, 2 Stark. 297.
Godson v. Horne, 1 B. & B. 7. Blagg
v. Sturt, *ante*.

(a) *Tuson v. Evans*, 12 Ad. & E. 733.
 (b) *Harrison v. Bush*, 5 Ell. & Bl. 350.

¹ *Fry v. Bennett*, 3 Bos. (N. Y.) 200; *Van Wycke v. Guthrie*, 4 Duer (N. Y.), 208; *Stanley v. Webb*, 4 Sand. (N. Y.) 21; *Edsall v. Brooks*, 26 How. Pr. (N. Y.) 426; *Gasset v. Gilbert*, 6 Gray (Mass.) 94.

public justice. They ought, therefore, to be privileged, but their privilege must be restrained to occasions in which they publish fairly what passes in court. Everybody knows that the statement of counsel is *ex parte*, and that he is often instructed to make allegations which it is afterwards impossible to support in proof. If, therefore, after a cause has been tried, a defamatory statement by counsel, which the evidence has not at all supported, is published in a newspaper, the publication is not privileged, because it is not a fair account of what passed in court." (c) The cases in which reports of legal proceedings, whether *ex parte* or not, have been held to be libellous and actionable are, where the account published has been false or highly colored, or where the reporter has added comments, allegations, and opinions of his own, reflecting upon the character or conduct of others, (d) or where the matters given in evidence and published are of a grossly scandalous, blasphemous, or immoral character. (e)

1107. *Publications of ex parte statements and of proceedings preliminary to a trial.*—"We are not prepared," observes Lord CAMPBELL, "to lay down for law, that the publication of preliminary inquiries before magistrates is universally lawful, nor that the publication of such inquiries is universally unlawful. One of the resolutions of this court, in *Duncan v. Thwaites*, (f) lays down the doctrine that the report of a preliminary examination before a magistrate is unlawful, where the party accused has been committed or held to bail for an indictable offense; there the actual pendency of a prosecution was a main ingredient in the decision; but where the party accused has neither been committed nor held to bail, but absolved by the magistrate, we think we are at liberty to hold that an impartial and correct report of the proceedings is lawful. In the cases relied upon to establish the general doctrine that reports of preliminary proceedings before magistrates are not lawful, it will be seen that there were either vituperative comments accompanying the state-

(c) *Saunders v. Mills*, 6 Bing. 218. *Hoare v. Silverlock*, 9 C. B. 20; 19 Law J., C. P. 215. *Beauchamps (Ld.) v. Croft, Dyer*, 285a. *Curry v. Walter*, 1 E. & P. 525. *Lewis v. Walter*, 4 B. & Ald. 614.

(d) *Stiles v. Nokes*, 7 East, 492. *Lewis v. Clement*, 3 B. & Ald. 710. *Andrews v. Chapman*, 3 C. & K. 288.

(e) *Rex v. Carlile*, 3 B. & Ald. 169

(f) 3 B. & C. 556.

ment of the evidence, or some aggravation attending the publication of the report, or some peril which was likely to be caused to the person complaining of it." (g)¹

The privilege is not confined to the publication of the proceedings of the superior courts. The dignity of the court can not be regarded, and "no distinction can be made for this purpose between a court of pie poudre and the House of Lords."

A magistrate, upon any preliminary inquiry respecting an indictable offense, may, if he thinks fit, carry on the inquiry in private, and the publication of any such proceedings before him would undoubtedly be unlawful; but while he continues to sit foribus apertis, admitting into the room where he sits as many of the public as can be conveniently accommodated, and thinking that this course is best calculated for the investigation of truth and the satisfactory administration of justice (as in most cases it certainly will be), the court in which he sits is to be considered a public court of justice, provided the magistrate has jurisdiction over the matters brought before him, and authority to inquire into them. But "if magistrates publicly hear slanderous complaints respecting matters over which they have no jurisdiction, a report of what passes before them is as little privileged as if they were illiterate mechanics assembled in an ale-house." (h)

1108. Publication of speeches and proceedings in Parliament.—Information printed merely for the use of members of Parliament and circulated among them, is privileged; but writings containing defamatory matter, though printed for the use of members, can not lawfully be circulated amongst those who are not members of Parliament. (i) However, the 3 & 4 Vict. c. 9, enacts, that a defendant in any civil or criminal proceeding brought for the publication of any report, paper, vote, or proceeding published under the authority of either House of Parliament, may, on the production of a cer-

(g) *Ld. Campbell, C. J., in Lewis v. Levy, Ell., Bl. & Ell. 557; 27 Law J., Q. B. 289.*

(h) *27 Law J., Q. B. 288. M'Gregor v. Thwaites, 3 B. & C. 24.*

(i) *Stockdale v. Hansard, 9 Ad. & E. 1.*

¹ *Pinro v. Goodlake, 15 L. T. (U. S.) 576. See Gazette Co. v. Timberlake, 10 Ohio St. 548; Stanley v. Webb, 4 Sandf. (N. Y.) 21; Sneckall v. Jackson, 10 Cush. (Mass.) 25.*

tificate from the speaker of either House, duly verified, stating that such report, paper, &c., was published by the authority of the House, apply to the court, or judge of the court, in which the proceedings are pending, and have them stayed. By the 2nd section it is provided, that any suit or criminal proceeding for the publication of a copy of such authorized report, paper, &c., may be stayed on the production of the original report, paper, &c., and of an affidavit verifying the correctness of the copy. And by the 3rd section it is enacted that in any civil or criminal proceeding for the publication of any extract or abstract of such report, paper, &c., the defendant may give evidence under the general issue that the extract or abstract was published bona fide and without malice, and, on the jury being satisfied of that, shall be entitled to a verdict.

A member of Parliament may make what reflections he pleases upon the character of others from his place in the House of Commons, but if he prints and publishes his speeches (except, perhaps, bona fide for the information of his constituents), (*k*) he will be responsible in damages if they are of a libellous character. (*l*) However, a faithful report by a public newspaper of an entire debate in either House of Parliament, containing matter disparaging to the character of an individual, as having been spoken in the course of the debate, is not actionable at the suit of the party whose character is thus called in question; but the publication is privileged on the same principle as an accurate report of proceedings in a court of justice is privileged, viz., that the advantage of publicity to the community at large outweighs any private injury resulting to the individual from the publication. (*m*)

1109. *Defamatory reports of proceedings at public meetings, vestry meetings, &c.*—The principle which protects newspaper proprietors and others, who publish a fair and correct statement of what takes place in courts of justice, does not extend to protect the publication of reports, speeches, and proceedings at vestries and public meetings, or meetings of

(*k*) See *Wason v. Walter*, L. R., 4 Q. 26 Law J., Q. B. 107; 7 Ell. & Bl. 233. B. 95.

(*l*) *Rex v. Greevey*, 1 M. & S. 280. 73.
(*m*) *Wason v. Walter*, L. R., 4 Q. B.

Rex v. Ld. Abingdon, 1 Esp. 226; cited

commissioners appointed to be holden by statute for public purposes. "At such meetings," observes LORD CAMPBELL, "things may be said very relevant to the subject in hand, but very calumnious; and in what an unhappy situation the caluminated person would be, if the calumny might be published, and yet he could not bring an action and challenge the printer and publisher of the libel to prove its truth." (n)

1110. *Reviews and criticisms in public papers.*—"Every man," observes LORD ELLENBOROUGH, "who publishes a book commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right; but if he follows the author into domestic life for the purpose of slander, that will be libellous. Authors are liable to criticism, to exposure, and even to ridicule, if their compositions are ridiculous, otherwise the first who writes a book upon any subject will maintain a monopoly of sentiment and of opinion respecting it, which would tend to the perpetuity of error." "The critic does a great service to the public who writes down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and their money upon trash. I speak of fair and candid criticism, and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider an injury, because it is a loss which the party ought to sustain. It is the loss of fame and profit to which he was never entitled." (o)

"The editor of a public newspaper," observes LORD KENYON, "may fairly and candidly comment on any place or species of public entertainment, but it must be done without malice or view to injure or prejudice the proprietor in the eyes of the public. If fairly done, however severe the

(n) *Davison v. Duncan*, 7 Ell. & Bl. 231; 26 Law J., Q. B. 106; 7 H. & N. 89. *Exch.* 133. See *Cox v. Feeney*, 4 F. & F. 13.

(o) *Carr v. Hood*, cited in *Tabart v. Tipper*, 1 Campb. 357.

• *Lewis v. Fenn*, Anth. N. P. (N. Y.) 75; 5 John. (N. Y.) 1.

censure, the justice of it screens the editor from legal animadversion; but if it can be proved that the comment is malevolent, and exceeds the bounds of fair opinion, then it is a libel and actionable." (p) And the same rule applies to an article in a newspaper upon a debate in either House of Parliament upon a subject of public interest. It must be honest, and fair, *i. e.*, the writer must believe it to be true or just, and it must be made with a reasonable degree of judgment and moderation. (q)

IIII. *Criticisms by one public journalist upon another.*—It is competent to one public writer to criticise another and ridicule his sentiments and opinions, but he is not justified in making calumnious remarks on the private character of the individual, or in imputing to him sordid and dishonest motives, or base and dishonorable conduct. In that respect, the editor of a newspaper enjoys a right of protection in common with every other subject. (r) A paragraph in one newspaper charging another with being a vulgar, ignorant, and scurrilous journal, is not actionable; but it is otherwise if it asserts that it is in low circulation, and calls the attention of advertisers to the fact, as the plain object of it is to damage the sale of the paper and diminish the profits from advertising. (s)

Works of art are as much the subjects of criticism as the writings of an author. Any man has a right," observes LORD TENTERDEN, "to express his opinion of them; and however mistaken, in point of taste, that opinion may be, or however unfavorable to the merits of the author or artist, the person entertaining it is not precluded by law from its fair, reasonable, and temperate expression, although through the medium of ridicule. If it is unfair and intemperate, and written for the purpose of injuring the artist in his profession, it is actionable." (t)

IIII. *Criticisms upon handbills and advertisements.*—If a man circulates a printed handbill, or posts it up in a public thoroughfare, or advertises in the public papers, the hand-

(p) *Dibdin v. Swan*, 1 Esp. 26.

(q) *Wason v. Walter*, *ante*.

(r) *Ld. Ellenborough, Stuart v. Lovell*,

2 Stark. 97. *Campbell v. Spottiswoode*, 32 Law J., Q. B. 185.

(s) *Heriot v. Stuart*, 1 Esp. 436.

(t) *Soane v. Knight*, M. & M. 74.

bill, or the advertisement, is as much open to fair and candid comment and criticism as any published book or pamphlet. But those who criticise it must not go out of their way to impute motives, and make reflections upon private character not fairly warranted by the terms and tendency of the writing of advertisement. (*u*)

III3. *Criticism upon sermons and clergymen.*—The law permits comments to be made upon the sermons delivered by clergymen from their pulpits, provided the comments are fairly, justly, and truly made. A clergyman also may be fairly characterised as a remarkably bad preacher, or as a preacher of erroneous doctrines, and if the parson sustains an injury from the criticism, it is an injury for which there is no redress at law by damages. But the preaching of a sermon in the ordinary mode of a clergyman's duty in the parish church does not make the sermon public property, so as to invite observation upon it, and authorize the same freedom of criticism and comment from the press in general, as is extended to the publication of a literary work. (*x*) And all reflections upon the private character or conduct of the clergyman, calculated to bring him into disrepute with his parishioners, are libellous and actionable. However, what he does in the vestry room, and allows to be done in the church during Divine service, is a matter of public interest, and therefore, any comments upon it, unless stronger language is used than the occasion justifies (which is a question for the jury), are not actionable. (*y*)

III4. *Comments upon the public character of public men.*—There is a wide difference between publications relating to public and private individuals. Every person has a right to comment upon those acts of public men which concern him as a subject of the realm, if he do not make his commentary a vehicle for malice and the indulgence of some private spite or pique. "You have a right to comment on the acts of a minister, upon the public acts of a general, upon the public judgments of a judge, upon the public skill of an actor, but

(*u*) *Paris v. Levy*, 30 Law J., C. P. 344. *Hearne v. Stowell*, 12 Ad. & E. 719.
 II. (*x*) *Gathercole v. Miall*, 15 M. & W. 698.
 (*y*) *Kelly v. Tinling*, L. R., 1 Q. B. 698.

you have no right to impute to them such conduct as disgraces and dishonors them in private life." (z)¹

1115. *Disparaging criticisms by one tradesman upon the goods of a rival tradesman* are not actionable, unless it be proved that they have been maliciously and fraudulently made, and were false to the knowledge of the party at the time they were made. Thus, where a mineral oil merchant got a chymist to test the quality of a mineral oil he had imported, and to compare it with the oil sold by a rival oil-merchant, and then printed and circulated the chymist's report, which spoke disparagingly of the plaintiff's oil in comparison with the oil of the defendant, it was held that his report was no libel upon the plaintiff if it was the result of a bona fide examination and comparison of the two oils, and contained nothing that was false to the knowledge of the defendant at the time he published and circulated it. (a) But where a gunsmith published an advertisement in a newspaper of his being the inventor of a short gun which shot as far as other longer guns, and another gunsmith inserted a counter advertisement cautioning persons against these guns, and stating that the inventor durst not engage with any artist in town, and had made no such experiment, &c., it was held that this was a libel, for though any one in the trade might contradict the fact asserted respecting the short gun, no one had a right to indulge in any general reflections upon the character of the inventor and his conduct of his business; but the advice to all persons to be cautious was a reflection on the inventor's honesty as leading people to suppose that he would deceive them, and the allegation that he would not engage with any other artist was setting him below the rest of the trade. (b)²

(z) *Parmiter v. Coupland*, 6 M. & W. B. 6.

108.

(b) *Harman v. Delaney*, 1 Barnard,

(a) *Young v. Macrae*, 32 Law J., Q. 289; 2 Str. 898.

¹ In *Snyder v. Fulton*, 34 Md. 128, the court laid down what seems to be the true rule in reference to comments upon the acts of public officers, and what indeed seems to be the generally accepted doctrine. "The editor of a newspaper," said the court, "has a right *honestly* to discuss all matters of public interest, and to comment on and *criticise fairly* the public acts of official persons." But such privilege does not include the right to make wanton, reckless and unfounded charges against either public or private citizens; any person doing so, does it at his peril, if they are untrue and unfounded. See also *Wilson v. Fitch*, 41 Cal. 363.

² *Boynton v. Remington*, 3 Allen (Mass.) 397.

SECTION II.

OF VERBAL SLANDER.

1116. *When defamatory words are actionable.*—The old cases respecting the liability of persons for the utterance of verbal slander are of the most unsatisfactory and contradictory character. “They are,” observes PRATT, C. J., “very odd cases.” (c) At one period the court seem to have regarded actions for slander, by word of mouth, with great disfavor, and to have done all they could to discourage them; at another time they favored the action, because men’s tongues were growing more and more virulent and dangerous, and people were apt to take the law into their own hands, and revenge themselves on the slanderer if they failed to obtain redress in a court of justice. (d) In some cases we find judges complaining of the growth of actions for verbal slander, saying that they would spoil all communications between man and man, and repress all expression of opinion, so that one would be afraid to speak disparagingly of the accommodation afforded by a particular inn, or of the wine sold therein, or of the surveys furnished by a particular surveyor. (e) At another period we find judges lamenting the the frequency of scandals and the license given to the tongue of the slanderer, and expressing their surprise that cases are to be found in the books in which a clergyman failed to obtain compensation in damages for an imputation of adultery, (f) and that a schoolmistress had been declared incompetent to maintain an action for verbal charges of prostitution. (g)

“The opinions of later times,” observes HOLT, C. J., “have been in many instances different from those of former days in relation to actions for words, and judgments have

(c) Button v. Heyward, 8 Mod. 24.

(d) Harrison v. Thornborough, 10 Mod. 198.

(e) King v. Lake, 2 Vent. 28. Crofts v. Brown. 3 Bulstr. 167.

(f) Parrot v. Carpenter, Cro. Eliz. 502; Noy, 64.

(g) Per Twisdem, J., Wharton v. Brook, 1 Vent. 21. Wilby v. Elston, 8 C. B. 142. Ld. Denman, C. J., Ayre v. Craven, 2 Ad. & E. 7.

gone different ways; . . . but for my part, wherever words tend to take away a man's reputation, I will encourage such actions, because so doing will contribute much to the preservation of the peace." (*h*)

III7. *Defamatory words not actionable without special damage.*—As the law at present stands, mere vituperation and abuse by word of mouth, however gross, is not actionable, unless it is spoken of a professional man or tradesman in the conduct of his profession or business. Thus, to call a man a scoundrel, or blackguard, or a swindler, or a rogue, or to say of a man, "You are a fellow, a disgrace to the town, and unfit for decent society, on account of your conduct with whores," is not actionable. (*i*) Neither is it actionable to call a man a blackleg, unless it be shown that by the use of the term the defendant intended to impute to the plaintiff that he is a cheating gambler; (*k*) nor to say of a young lady that she is a notorious liar, an infamous wretch, and has been all but seduced by a notorious libertine. (*l*) Words imputing to a lady that she gets her living by imposture and prostitution, and that she is a swindler, are not actionable without special damage; (*m*) nor the words, "He is a rogue, and has robbed and cheated his brother-in-law of upwards of £2000." (*n*)

III8. *Defamatory words actionable per se without proof of any special damage.*—But words imputing an indictable offense are actionable per se without proof of any special damage, as they render the accused person liable to the pains and penalties of the criminal law. Such are words imputing felony, bigamy, (*o*) forgery, the receipt of stolen goods, knowing them to be stolen; (*p*) the careless or unskilful administration of mercury, or any other poisonous or dangerous drug, and thereby causing death; (*q*) the keeping of a bawdy-house, (*r*) or the doing of any other criminal or indictable offense. But words conveying only a vague sort of suspicion in the mind of the speaker, (*s*) uttered bona fide

(*h*) *Baker v. Pierce*, 6 Mod. 24. *Fortescue, J., Button v. Heyward*, 8 Mod. 24.

(*i*) *Lumby v. Allday*, 1 Cr. & Jerv. 301. *Savile v. Jardine*, 2 H. Bl. 531.

(*k*) *Barnett v. Allen*, 3 H. & N. 376; 27 Law J. Exch. 412.

(*l*) *Lynch v. Knight*, 9 H. of L. Ca. 577.

(*m*) *Wilby v. Elston*, 8 C. B. 142.

(*n*) *Hopwood v. Thorn*, Id. 313.

(*o*) *Heming v. Power*, 10 M. & W. 570.

(*p*) *Alfred v. Farlow*, 8 Q. 854.

(*q*) *Edsall v. Russell*, 5 Sc. N. R. 801.

(*r*) *Brayne v. Cooper*, 6 M. & W. 250.

(*s*) *Tozer v. Mashford*, 6 Exch. 539.

with a view of obtaining information, or by way of warning, or spoken in grief and sorrow for the news, (t) will not create any cause of action, as the circumstances rebut the presumption of malice; nor any words of mere suspicion or opinion, which do not convey any positive imputation of guilt; (u) but if a man says of another, "I am thoroughly convinced you are guilty of stealing, &c., &c.," this is equivalent to a positive averment of the fact. (x)¹

(t) *Crawford v. Middleton*, 1 Lev. 82. Defamation, F. 13.

(u) *Com. Dig. Action on the case for* (x) *Peake v. Oldham*, Cowp. 275.

¹ In order to make words actionable by reason of their slanderous nature or imputation, they must either be slanderous *per se*, or because they damage him specially. Words slanderous *per se* so as to be actionable, must either impute to him some infamous crime, or must be spoken of him in his office, trade, occupation or business, and be of such a character as to injure him therein. *Kimmis v. Stiles*, 44 Vt. 351. And they must be spoken of him to some third person. Words spoken to the plaintiff alone are never actionable. *Broderick v. James*, 3 Daly C. P. (N. Y.) 48.

Neither is it actionable *per se* to say of a married woman "she has a venereal disease, and has given it to C. W. a married man," because the words of themselves do not import that she had committed adultery, nor can they be extended to cover such a charge by an innuendo. But to say of a married woman that she has held illicit intercourse with a man, or words that convey the charge directly, as "C. W. has the venereal disease," and in answer to a question as to where he got it, "I don't know, but he has been with —," a married woman, is actionable *per se*. *York v. Johnson*, 116 Mass. 482. Thus it will be seen that in order to make words actionable *per se* they must impute a crime to the person to whom they are spoken, in such terms that, without the aid of innuendo, the nature of the offense charged is obvious. Thus it has been held actionable *per se* to say of another "He has sworn false to my injury, six or seven hundred dollars." *Jacobs v. Tyler*, 3 Hill. (N. Y.) 572; *Magee v. Stark*, 1 Humph. (Tenn.) 506.

Thus to say of a person, "he is a thief," is actionable *per se*, as it imputes larceny without the aid of an innuendo. *McNamara v. Shannon*, 8 Bush. (Ky.) 557. But to say of a person, "he is a thief, he picked my corn and carried it away," is not actionable, because the application of the term is qualified, and nullifies itself, because growing corn is not the subject of larceny, and this seems to be the rule, even though by statute the taking of growing corn is made a misdemeanor. *Stitzell v. Reynolds*, 67 Penn. St. 54.

So it is actionable *per se* to say of another, "he is a perjurer." *Green v. Long* 2 Cal. (N. Y.) 91. But to say of another, "he has sworn falsely," is not actionable *per se*, because, without the aid of an innuendo, it does not impute an indictable offense, and is not actionable at all unless alleged precisely and shown to have been intended to charge the person with having sworn falsely in an action and upon a material matter. *Kimmis v. Stiles*, *ante*; *Vaughan v. Havens*, 8 Johns. (N. Y.) 109; *Watson v. Hampton*, 2 Bibb. (Penn.) 319; *Sherwood v. Chace*, 11 Wend. (N. Y.) 38; *Crookshank v. Gray*, 20 Johns. (N. Y.) 344; *Power v. Miller*, 2 McCord (S. C.) 230; *Ross v. Rouse*, 1 Wend. (N. Y.) 475; *Stafford v. Green*, 1 Johns. (N. Y.) 505;

III9. *In what cases actionable words are rendered not actionable by precedent or subsequent words.*—Simply to call a man "thief" is *prima facie* actionable, as it imputes felony, but if it appears that the word was used as a mere term of abuse,

Shaffer v. Kintzer, 1 Binn. (Penn.) 537; *Robertson v. Lea*, 1 Stew. (Ala.) 138; *Ward v. Clark*, 2 Johns. (N. Y.) 10; *Harvey v. Boies*, 1 Penn. 12; *Packer v. Spangler*, 2 Binn. (Penn.) 20. "He will be a bankrupt in six months;" *Else v. Ferris*, Anth. (N. Y.) 23. To say of a physician, "he has killed the child by giving it too much calomel;" *Johnson v. Robertson*, 8 Port. (Ala.) 486. To say of a person, "he removed my land-mark;" *Young v. Miller*, 3 Hill, (N. Y.) 21; "You have been cropped for felony;" *Wiley v. Campbell*, 5 Monr. (Ky.) 396. To charge a person with forgery of a deposition; *Atkinson v. Riding*, 5 Blackf. (Ind.) 39. To charge a person who has the custody of goods, with stealing them; *Gill v. Bright*, 6 Monr. (Ky. 130. To say to a person "you are a thieving fellow, you stole and ran away;" *Alley v. Neeley*, 5 Blackf. (Ind.) 200. To call one a "thief," or a "murderer;" *Dudley v. Robinson*, 2 Ired. 141. To charge a person with adultery where the offense is punishable as a felony; *Smalley v. Anderson*, 2 Monr. (Ky.) 56. To charge a person with arson; *Wallace v. Young*, 5 Monr. (Ky.) 155. With kidnapping another and hurrying him into slavery; *Nash v. Benedict*, 25 Wend. (N. Y.) 645. Saying to a witness, while giving his evidence in court, "I believe you swear false, it is false what you say;" *Cole v. Grant*, 3 Harr. 327. Or, "It is false. I believe it is false. That is false;" *Id.* To charge a partner with "pilfering" goods from the store; *Beckett v. Sterett*, 4 Blackf. (Ind.) 499. To charge a person with robbing the mail; *Jones v. Chapman*, 5 Id. 88. To charge a person with passing a forged check knowingly; *Thom v. Moser*, 1 Den. (N. Y.) 488. "You will steal," spoken in such a way as to show that the speaker intends to convey an idea that the person designated has stolen; *Cornelius v. Van Slyck*, 21 Wend. (N. Y.) 70. "You swore false at the trial of your brother J.;" *Fowle v. Robbins*, 12 Mass. 498. "I will venture anything he has stolen my book;" *Nye v. Otis*, 8 Mass. 122. "He swore to a lie, on a trial before Squire T.," Squire T. being a justice of the peace;" *Canterbury v. Hill*, 4 S. & P. (Ala.) 224. To charge a postmaster with embezzling letters; *Cheadle v. Buel*, 6 Ham. (Ohio) 67. "I lost my watch, and I have reason to think that T. took it, and that her mother concealed it;" *Miller v. Miller*, 8 Johns. (N. Y.) 74. "I saw A. taking corn from B's. crib twice, and looking around to see if anyone saw him;" *Jones v. McDowell*, 4 B. bb. (Penn.) 188. "Tell him he is riding a stolen horse, and has a stolen watch in his pocket;" *Davis v. Johnston*, 2 Bailey (S. C.) 579. Calling a man a "hog thief;" *Hagg v. Wilson*, 1 N. & M. (S. C.) 216. "I can prove that C. burnt J's. gin house," or "C. was in a condition about the gin house, previous to its burning, which caused everybody in the settlement to believe that he burnt the house;" *Waters v. Jones*, 3 Port. 442. "I have every reason to believe he burnt the barn," or "I believe he burnt the barn;" *Logan v. Steele*, 1 Bibb. (Penn.) 593. And thus generally all words which *in themselves*, without the aid of an innuendo, impute a crime or misdemeanor, punishable in the temporal courts by corporeal punishment, are actionable *per se*, the law implying malice without any other proof thereof than the bare speaking of the words. Words not actionable *per se*, may yet be actionable by reason of the special damage they produce, or by reason of their having been spoken of or concerning a person in his trade, business, occupation or calling. *Demarest v. Haring*, 6 Cow. (N. Y.) 76.

and that there was in point of fact no imputation of actual theft conveyed by it, there is no cause of action. Thus, where the defendant said of the plaintiff, "he is a damned thief, and so was his father before him," but it appeared that the words were uttered in the heat of anger during a conversation respecting the plaintiff's refusal to pay over some money which he had received as executor, Lord ELLENBOROUGH directed a non-suit, saying that it was manifest from the whole conversation that the words as used did not impute a felony. (y) The jury ought not to find for the plaintiff, if from the accompanying words or the surrounding circumstances they believe that the defendant did not intend to impute actual theft to the plaintiff. (z)

Where the defendant said of the plaintiff, "thou art a thief, for thou hast taken my beasts under an execution, and I will hang thee," it was held that there was no actionable slander, for the reason given for the plaintiff's being a thief, manifestly showed that he was no thief at all, and that no theft had been committed. (a)¹

(y) *Thompson v. Bernard*, 1 Campb.

47. *Cristie v. Cowell*, 1 Peake, N. P. C. 5.

(z) *Mansfield, C. J., Penfold v. West.*

cote, 2 B. & P. N. R. 335.

(a) *Wilk's case*, 1 Roll. Abr. 51. *Brittridge's case*, 4 Rep. 19, Bac. Abr. SLANDER, R.

¹ In order to render words spoken or written, actionable, it must appear that they were spoken or written in a slanderous or libellous sense. That is, that they were not qualified or spoken in such a sense as to show that they were not intended to convey the meaning ordinarily given to the words, and they must have been understood by those who heard them, in a slanderous sense; *Stoddard v. Linville*, 3 Hawks. (N. C.) 474; *Kennedy v. Gifford*, 19 Wend. (N. Y.) 296; *Dorland v. Patterson*, 23 Wend. (N. Y.) 422; *McKee v. Ingalls*, 4 Scam. (Ill.) 30; *Dyers v. Morris*, 4 Mo. 214; they must contain and import an express implication of some punishable offense; *Brite v. Gill*, 2 Mon. (Ky.) 363; *Chaddock v. Briggs*, 13 Mass. 248; or be such as import a slanderous meaning, for if they are not intended to convey a slanderous meaning and are not so understood by those to whom they are addressed, they are not actionable; *Pegram v. Styrom*, 1 Bailey (S. C.) 595; *Sprout v. McDowell*, Const. (S. C.) 35; or, if words that, unexplained, would be actionable, are at the time of their speaking so qualified or explained as to show that they impute no legal crime, or are not intended to convey a slanderous meaning, no action lies for their speaking; *Pegram v. Styron*, *ante*; *Trabue v. Mays*, 3 Dana (Ky.), 138; but, even though the words are spoken in reference to a transaction in itself innocent, and are so understood by some who were present at their speaking, yet if others were present who did not so understand them, and no explanation is made, they are actionable; *Phillips v. Barker*, 7 Wend. 439. It was formerly the practice of courts to construe words *mitiori sensu* and if they were

1120. *Defamatory words imputing to the plaintiff that he is afflicted with a contagious disorder* are actionable per se. Thus, to say seriously and positively of a person that he has got the leprosy, or the pox, is actionable, without proof of any special damage, because it causes him to be shunned and avoided by society. (b) The imputation must refer to the time present, and not to the time past, for words are not actionable which merely impute to the plaintiff that at some previous period he had the disease. (c)¹

(b) *Bloodworth v. Gray*, 7 M. & Gr. 334; 8 Sc. N. R. 9. *James v. Rutlegh*, 475. 4 Rep. 17b. (c) *Carlslake v. Mapledoram*, 2 T. R.

susceptible of *two* meanings, they would give them the milder one, and if in that sense they were not actionable, the action failed, even though in the ordinary sense in which the words were used, they would be actionable. *Coote v. Gilbert*, Hobart, 77 Vt. 100. But this rule originated from a disposition to discourage actions for slander, and as it was clearly unjust and unreasonable, it was long since exploded, and the better and more sensible rule adopted, that words are to be taken in their ordinary acceptation, and according to their usual and natural import, unless qualified or explained in such a way as to clearly indicate that they were spoken and understood in a different sense; *Gibson v. Williams*, 4 Wend. (N. Y.): 320; *Button v. Hayward*, 8 Mod. 24; *Bush v. Sommer*, 20 Penn. St. 159; *Duncan v. Brown*, 15 B. Mon. (Ky.) 186; *Backus v. Richardson*, 5 Johns. (N. Y.) 176; *Woodbury v. Sackrider*, 2 Abb. Pr. (N. Y.) 405; *Holt v. Schofield*, 6 D. & E. 691; *Edgerly v. Swain*, 32 N. H. 478; *Gosling v. Morgan*, 32 Penn. St. 273; *Joralemon v. Pomeroy*, 2 N. J. 271; *Van Rensselaer v. Dale*, Johns. Cas. (N. Y.) 279; and in all cases where the words are susceptible of two meanings, it is for the jury to say in which sense they were used; *Welsh v. Eakle*, 7 J. J. Marsh (Ky.) 424. It is not necessarily the case that words are actionable, because they were understood by those who heard them, as imputing a crime, but they are to be construed in the light of all explanatory circumstances known to the speaker and the hearers, and the sense in which they would, in view of such circumstances, naturally be understood. Thus, where a shoe dealer said "I have missed a pair of shoes and you took them," it was held, that the fact that the plaintiff was known to have taken one pair, and possibly two, home with him for trial, which fact was known to the persons present, was proper to be considered in determining whether the defendant intended to impute a theft of the shoes. *Dixon v. Stewart*, 33 Iowa, 125.

¹ *Mons v. Field*, 9 R. S. 216; *Pike v. Van Wormer*, 5 How. Pr. (N. Y.) 171; *Joannes v. Burt*, 6 Allen (Mass.) 236; *Williams v. Haldridge*, 22 Barb. (N. Y.) 398; *Goldman v. Starns*, 7 Gray (Mass.) 281; *Watson v. McCarthy*, 2 Kelly (Ga.), 57; *Hewitt v. Mason*, 24 How. Pr. (N. Y.) 366. *Kennedy v. McLaughlin*, 5 Gray (Mass.) 3; *Hampton v. Wilson*, 4 Dev. (N. C.) 468; *Sanford v. Bennett*, 24 N. Y. 20; *Knight v. Foster*, 39 N. H. 576; *Smally v. Anderson*, 4 Monr. (Ky.) 367; *Clarke v. Munsell*, 6 Met. 373; *Curtis v. Mussey*, 6 Gray (Mass.) 261; and the fact that similar reports existed in the community, or had been published in the newspapers, is not admissible in evidence, in defense; *Watson v. Buck*, 5 Cow. (N. Y.) 499; *Kennedy v. Gifford*, 19 Wend. (N. Y.) 296;

1121. *Defamatory words concerning tradesmen and professional men*, spoken of them in the way of their trade or profession, will sustain an action when such words would not be actionable when spoken of a person having no trade or profession. (*d*) Words imputing to a tradesman fraudulent conduct in the transaction of business, such as the use of false weights, are actionable per se, without proof of special damage; (*e*) and so are words imputing to a tradesman that he is in the constant habit of cheating and defrauding his customers, and those who deal with him, (*f*) and words imputing bankruptcy or insolvency to a person engaged in trade, such as "if he does not come and make terms with me, I will make a bankrupt of him, and ruin him." (*g*) And it is not necessary that the office or trade should be one of which the court can take judicial notice, for it is actionable, without special damage, to say of a gamekeeper that he kills foxes. (*h*)¹

(*d*) Per. Cur. *Harman v. Delaney*, 2 Str. 898. Denman, C. J., *Robinson v. Marchant*, 7 Q. B. 918.

(*e*) *Griffiths v. Lewis*, 7 Q. B. 65.

(*f*) *Reeve v. Holgate*, 2 Lev. 62.

(*h*) *Foulger v. Newcomb*, L. R., 2 Exch. 327.

(*g*) *Brown v. Smith*, 13 C. B. 599. Ld.

Mapes v. Weeks, 4 Wend. (N. Y.) 659; *Maberly v. Preston*, 8 Mo. 462; nor is it any defense that the defendant merely spoke the words as a report; *Wheeler v. Shields*, 2 Scam. (Ill.) 348; and gave the author; *Skinner v. Grant*, 12 Vt. 456; *Jones v. Chapman*, 5 Blackf. (Md.) 88. But in some cases it has been held that such facts may be shown in mitigation. *Anthony v. Stevens*, 1 Mo. 254; *Kennedy v. Gregory*, 1 Binn. (Penn.) 85; *Romayne v. Duane*, 3 Wash. (U. S.) 246; *Calloway v. Middleton*, 2 A. K. Marsh. (Ky.) 72; *Leister v. Smith*, 2 Root (Conn.) 24; *Young v. Hemans*, *Wright* (Ohio), 124.

¹ To say of any person whose business necessarily leads to dealing on credit, that "he keeps false books," is actionable; *Rathburn v. Emigh*, 6 Wend. (N. Y.) 407; as of a blacksmith, *Burtch v. Nickerson*, 17 John. (N. Y.) 207; or a merchant; *Backus v. Richardson*, 5 John. (N. Y.) 476. So any words, the natural effect of which is to injuriously affect the business of a person, as of a physician, that he killed a person by an overdose of calomel, or giving him too much medicine; *Johnson v. Robertson*, 8 Port. (Ala.) 476; *Sumner v. Utley*, 7 Conn. 258; or of a merchant, anything which implies that he is not entitled to credit; *Small v. Catlin*, 3 Wend. (N. Y.) 291; *Davis v. Davis*, 1 N. & M. (S. C.) 290; *Mott v. Comstock*, 7 Cow. (N. Y.) 654; or to anyone to whom credit is important; *Phillips v. Hoeffler*, 1 Penn. St. 62; *Ostram v. Calkins*, 5 Wend. (N. Y.) 263; *Lewis v. Hawley*, 2 Day (Conn.) 495; or his fitness for his trade or business; as of a lawyer, that he is not a man of integrity, and will take fees on both sides *Chipman v. Cook*, 2 Tyler (Vt.) 456; or with divulging his clients' secrets; *Riggs v. Denniston*, 3 Johns. Cas. (N. Y.) 198; or a minister with being the father of a bastard child; *Demarest v. Haring*, 6 Cow. (N. Y.) 76; or with drunkenness; *Chaddock v. Briggs*, 13 Mass. 208. And so, generally, it may be stated, that

But "if one tradesman will pretend to be a greater artist than others, it is lawful for them to support their own credit in the same way;" and, consequently, it is not actionable for one tradesman to depreciate the wares and merchandise of another in comparison with his own. So long as it is a mere puff by one of two rival tradesman, recommending his own articles in preference to those of another, it is defensible on account of the interest the defendant has in the matter; but to say generally of a tradesman that he is in the habit of selling goods which he knows to be bad, is actionable. (i)¹

1122. *Words imputing misconduct, or gross ignorance, or incapacity, to professional men*, in the discharge of their professional duties, are actionable per se, without proof of any special damage; such as words imputing to a practicing physician that he is a quack or a mountebank, (k) or that he has killed a patient through ignorance of the first principles of his profession; (l) or words imputing to a surgeon or accoucheur the want of a proper qualification for his profession or business, or the want of skill, or of any professional requisite, or that his character is so bad amongst his profes-

(i) Evans v. Harlow, 5 Q. B. 633.

54.

(k) Goddard v. Haselfoot, 1 Roll. Abr.

(l) Tutty v. Alewin, 11 Mod. 221.

words occasioning actual damage, even though not defamatory, may, nevertheless, be actionable; but in order to render them so, the damage must be the *immediate* result of the speaking of the words. Bentley v. Reynolds, 1 McMullen (Ga.) 16; Davis v. Farrington, Walker (Miss.) 304; Wilcox v. Edwards, 5 Blackf. (Ind.) 183; Else v. Ferris, Anth. (N. Y.) 23; Davis v. Ruff, Cheves (S. C.) 17; Williams v. Hill, 19 Wend. (N. Y.) 305.

¹ In Boynton v. Remington, 3 Allen (Mass.), 397, the plaintiff, who was a dealer in coal, advertised genuine Franklin coal for sale by him. The defendant, who was also a coal-dealer, published an advertisement as follows:—"Caution! The subscribers, the only shippers of the true and original Franklin coal, notice that other coal-dealers, in Lowell, than our agent, advertise Franklin coal. We take this method of cautioning the public against buying of other parties, except if they hope to get the genuine article, as we have neither sold, or shipped any Franklin coal to any party in Lowell, except our agent." The court held that the publication of this notice did not constitute an actionable libel, because it did not impute to the plaintiff anything which held him up to the contempt or ridicule of society, nor did it allege that the plaintiff did not sell genuine Franklin coal. If there had been a denial that the plaintiff sold the genuine Franklin coal, the only ground of liability would have been that the plaintiff was perpetrating a *fraud* upon his customers.

sional brethren that they will not meet him; (*m*) or to say of a master mariner in command of a vessel that he was frequently drunk, and in that state had to be carried on board his vessel. (*n*) But words conveying an imputation against a medical man not necessarily connected with his profession, such as a general imputation of adultery, are not actionable; (*o*) but if the statement be, that he has seduced or committed adultery with one of his patients, it would be otherwise.

Words imputing to a barrister that he has willfully and corruptly deceived his client, and revealed the secrets of his cause, or that he has given vexatious counsel, and seeks only to fill his own pockets, without regard to the interests of his clients, are actionable; (*p*) and so are words imputing to a practicing attorney that he is well known to be a corrupt man, and to deal corruptly in his profession; (*q*) or words imputing to him that he betrays the secret of his clients, or that he is ignorant of his profession, and is no lawyer, and that fools only go to him for law, or that he is guilty of malpractice, or is a cheat, a rogue, or a knave in his profession. (*r*) But mere vituperative language or general abuse of a professional man is not actionable, unless it has reference to his conduct in his profession. Thus, to call an attorney a cheating knave is not actionable, but to say that he cheats his clients is actionable. (*s*) In all actions founded on words imputing to a professional man conduct which disgraces and injures him in his profession, it must be averred and proved that the plaintiff was in the exercise and practice of his profession at the time of the utterance of the slander; for if he has ceased to exercise his profession or employment at the time the words are spoken, the words are not actionable, on the ground that they were spoken of him in his profession. (*t*)

To say of a beneficed clergyman that he is drunk in church, or that he preaches false doctrine, lies, and malice,

(*m*) *Southee v. Denny*, 1 Exch. 196.

(*n*) *Irwin v. Brandwood*, 33 Law J., Exch. 257.

(*o*) *Ayre v. Craven*, 2 Ad. & E. 2.

(*p*) *Snag v. Gray*, 1 Roll. Abr. 57.
King v. Lake, 2 Vent. 28.

(*q*) *Birchley's case*, 4 Rep. 16a. pl. 6.

(*r*) *Banks v. Allen*, 1 Roll. Abr. 54.
Baker v. Morfue, 1 Sid. 327. *Day v. Buller*, 3 Wils. 59.

(*s*) *Alleston v. Moor, Het.* 167.

(*t*) *Bellamy v. Burch*, 16 M. & W. 590.

and ought to be degraded, (*u*) or that he is an old rogue, and a contemptible fellow, hated and despised by his parishoners, (*x*) or that he has preached a seditious sermon, and has moved the people to sedition, (*y*) is actionable; words also imputing fraudulent and dishonest conduct to a beneficed clergyman in some clerical matter, (*z*) or accusing him of incontinence, or the preaching of false doctrine, are actionable, as they tend to injure him in his professional character, and if true, to subject him to a deprivation of his benefice, and to a degradation of orders, and consequently to a loss of temporal emolument. But if, at the time of the speaking of the words, the plaintiff is not beneficed, and is not in the actual receipt of professional beneficial emolument as a preacher, lecturer, curate, or the like, there is no actual damage, and an action for slander is not maintainable. "If the plaintiff be in orders merely, and not in possession of any temporal advantage, as having professional occupation, the only remedy appears to be in the Ecclesiastical Court." (*a*) And whenever the words imply only general abuse, and do not affect the plaintiff in his professional and clerical character, they are not actionable without proof of special damage. (*b*)

1123. *Words imputing official misconduct to a person in an office of profit or trust* are actionable per se. Thus, to say publicly of a man who is in the enjoyment of an office of honor, profit, or trust, that he is wanting in integrity in his office, or that he habitually neglects his official duties, or that he is a corrupt man, and takes bribes, is actionable; but if the words merely impute to him want of ability and general unfitness for his post, the words are not actionable without proof of special damage. (*c*) Whenever words are sought to be made actionable on the ground that they were spoken of a man in office, it must be shown that they were spoken of him in his character or conduct in his office, and that they impute to him the want of some qualification for, or miscon-

(*u*) *Dodd v. Robinson*, Aleyn. 63.
Cranden v. Waldon, 3 Lev. 17; 1 Roll.
 Abr. 58.

(*x*) *Musgrave v. Bovey*, 2 Str. 946.

(*y*) *Brittridge's case*, 4 Co. 19b.

(*z*) *Pemberton v. Colls*, 10 Q. B. 461;

16 Law J., Q. B. 403.

(*a*) *Gallwey v. Marshall*, 9 Exch. 295;

23 Law J., Exch. 78.

(*b*) *Pemberton v. Colls*, *ut supra*.

(*c*) *Bac. Abr. SLANDER B.*

duct in his office; for if they impute to him only general misconduct and unfitness for his situation, they will fail to support an action, without proof of special damage. (*d*)

1124. *Words rendered actionable by reason of special damage.*—If any special damage has been sustained by the plaintiff by reason of the utterance of slanderous words, an action for damages is then maintainable. Thus, to say of a spinster that she is in the family way, or that she has had a child, is not per se actionable; but if the girl is about to be married, and she loses her marriage in consequence of the utterance of the slander, a very grave cause of action arises. (*e*) If, in consequence of the utterance of slanderous words by the defendant, the plaintiff has lost a situation, or been refused employment, there is special damage resulting from the wrongful act, capable of sustaining an action. Thus, where the plaintiff was chaplain to a peer, and the defendant falsely alleged of him that he had had a bastard, whereby he lost the chaplaincy, it was held that the plaintiff was entitled to maintain an action for compensation in damages on the ground that the chaplaincy was a temporal preferment. (*f*) So the loss of a married woman of the society, comfort, and attention of friends by reason of slander, is a sufficient “temporal” damage to sustain an action, (*g*) although the loss of her husband’s society and conjugal attentions only, has been held insufficient, (*h*) unless the slander amounts to an imputation of adultery on the wife, and the husband leaves her in consequence of such imputation. (*i*) But words spoken of a married woman imputing want of chastity to her, whereby she was not allowed to continue a member of a religious society do not constitute sufficient temporal damage. (*k*)¹

1125. *Slanderous denunciations from the pulpit causing loss of custom, situation, or employment.*—If a priest or clergyman,

(*d*) Lumby v. Allday, 1 Cr. & J. 301.
Hopwood v. Thorn, 8 C. B. 313.

(*e*) Davis v. Gardiner, 4 Co. 16b. pl.

11.

(*f*) Payne v. Beaumorris, 1 Lev. 248.

(*g*) Davies v. Solomon, L. R. 7 Q. B.

(*h*) Lynch v. Knight, 9 H. of L. Ca. 577.

(*i*) Per Ld. Campbell and Ld. Cranworth, Id. 591, 596.

(*k*) Roberts v. Roberts, 33 Law J., Q. B. 249.

¹ And loss of the hospitality of friends, will sustain the action. Williams v. Hill, 19 Wend. (N. Y.) 305. As to special damage, see Sewell v. Catlin, 3 Wend. (N. Y.) 291; Davies v. Davies, 1 N. & M. (S. C.) 270.

or minister of any religious denomination, singles out any particular member of his congregation, and denounces him for misconduct in his trade or profession, or in the execution of any office of trust, or if he defames him generally, and slanders him in the face of the congregation, whereby he loses a situation, or is dismissed from his employment, and sustains special damage, the priest or clergyman will be answerable in damages, if he can not prove the truth of the charge he makes; for no minister of religion has a right to propagate slander under the guise of disseminating religious truth or repressing vice. (l)

1126. *Effect of the dismissal of a slandered servant, being a wrongful dismissal on the part of the master.*—Where the plaintiff had been hired by his master by the year, and his master wrongfully dismissed him, in consequence of some slanders respecting him, circulated by the defendant, which were not actionable without special damage, it was held that, as the dismissal was a wrongful act on the part of the master, for which he was answerable in damages to the plaintiff, there was no special damage resulting to the plaintiff capable of sustaining an action against the defendant. “The supposed special damage,” observes LAWRENCE, J., “was the loss of the advantage to which the plaintiff was entitled under his contract with his master; but he could not be considered in law as having lost them, for he still had a right to claim them of his master, who, without a sufficient cause, had refused to continue the plaintiff in his service.” “The special damage,” further observes Lord ELLENBOROUGH, “must be the legal and natural consequence of the words spoken, and here it is an illegal consequence, a mere wrongful act of the master, for which the defendant was no more answerable than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horsepond, by way of punishment for his supposed transgression.” (m)

1127. *Effect of the slander being disbelieved by the master.*—If the dismissal of the servant has been caused by the utterance of the slander against him, the special damage results

(l) *Gilpin v. Fowler*, 9 Exch. 625; 23 Law J., Exch. 152. *Barnabas v. Traunter*, 1 Vin. Abr. 396.

(m) *Vicars v. Wilcocks*, 8 East, 3.

from the slander, so as to render an action maintainable, although the master did not believe in the slander, and did not dismiss the servant because he thought him guilty of the charge made against him, or considered him untrustworthy. Thus, where the plaintiff set forth that she was a straw bonnet-maker, in the employ of a Mrs. Enoch, and that the defendant, who was the landlord, came to her mistress, and told her that the plaintiff tapped at the windows, and conducted herself shamefully and disgracefully, so that the house looked like a bawdy house, and Mrs. Enoch dismissed the plaintiff, but stated in her evidence that she did not dismiss her because she believed what the defendant told her, but because he was her landlord, and she was afraid he would be offended if she did not send the plaintiff away after what he had said, it was held that the dismissal was the consequence of the slanderous words, and that damages were recoverable in respect thereof, although the mistress to whom the slander was uttered, did not believe it. (*n*)

1128. *Special damage, not being the immediate and natural consequence of the words spoken.*—Unauthorized repetition of verbal slander.—Whenever proof of special damage is necessary to maintain an action of slander, it must appear that the special damage is the immediate and natural consequence of the words spoken. (*o*) If, therefore, the use of slanderous words by the defendant, not actionable per se, would have wholly failed to produce any injurious consequences, unless aided by the act of another, the injury resulting from that act of the other is not to be ascribed to the defendant. The unauthorized repetition of slanderous words is not the necessary consequence of the original uttering of the words; and the original utterer, therefore, is not responsible in damages for the subsequent repetition of the slander by persons who had no authority from him to repeat what he had said.

Thus, where the substance of the plaintiff's allegation of special damage was, that by reason of the defendant's false representations to divers persons, one John Bryer refused to trust the plaintiff, and the evidence was, that the words were addressed to one Edward Bryce, and that Bryce, at a subsequent time and place, and without any authority from the

(*n*) Knight v. Gibbs, 1 Ad. & E. 46.

(*o*) Vicars v. Wilcocks, 8 East, 3

defendant repeated the representations to Bryer, so that the repetition of the words, and not the original statement, occasioned the damage, it was held that the action was not maintainable. "Every man," observes TINDAL, C. J., "must be taken to be answerable for the necessary consequence of his own wrongful acts; but such a spontaneous and unauthorized communication can not be considered as the necessary consequence of the original uttering of the words, for no effect whatever followed from the first speaking of the words to Bryce. If he had kept them to himself, Bryer would still have trusted the plaintiff. It was the repetition of them by Bryce to Bryer, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage. We therefore think that, as each count in the declaration alleges as the only grievance the original false speaking of the words, the allegation that, 'by reason of the committing of such grievance, Bryer refused to give the plaintiff credit,' is not made out by the evidence." (*p*)

But where the utterer of the slander directs it to be repeated in any particular quarter, or mentions it to a person whose known duty it is to repeat it, he is responsible for the repetition of it. It is then his act, and is the natural and necessary result of the utterance of the words. (*q*)

1129. *Special damage directly resulting from the repetition of oral slander.*—Whenever loss of situation, or employment, or any other special damage is the direct consequence of the utterance of oral slander, the utterer is responsible, whether he is himself the original author of the scandal, or merely repeats what he has heard some one else say. A man can not by law justify the repetition of slander by merely naming the person who first uttered it; he must also show that he repeated it on a justifiable occasion, and believed it to be true. "As great an injury may accrue from the wrongful repetition as from the first publication or utterance of slander. The person who repeats it may give greater weight to the

(*p*) Ward v. Weeks, 4 M. & P. 808; 7 Bing. 211. Parkins v. Scott, 1 H. & C. 153; 31 Law J., Exch. 331. (*q*) Kendillon v. Maltby, Car. & M 402.

calumny, and may be actuated by greater malice than the original utterer." (r)

1130. *Circumstances rebutting the presumption of malice.*—If the circumstances connected with the utterance of the words rebut the presumption of malice, there is no cause of action. Thus, where the plaintiff brought an action against one for falsely and maliciously saying of him that he had heard he was hanged for stealing a horse, and on the evidence it appeared that the words were spoken in grief and sorrow for the news, HOBART, J., caused the plaintiff to be non-suited, for it was not said maliciously. (s)¹

1131. *Privileged communications—Proof of malice.*—We have already seen that many communications and statements of a slanderous character are privileged. Where the plaintiff proved that he had been in the service of the defendant, and had been dismissed on a charge of theft, and that he afterwards came to the defendant's house and had some communication with the defendant's servants, when the defendant said to them, "I have dismissed that man for robbing me; do not speak to him any more in public or in private, or I shall think you as bad as him," it was held, that the statement being honestly made by a master as a warning to his servants, was a privileged communication, and that it was incumbent on the plaintiff to give some evidence of malice in order to raise a question for the jury. (t) And where a vestry meeting was held for the purpose of nominating and electing constables, and hearing and deciding upon any objections that might be brought forward against any of the candidates for the office, and the defendant, a ratepayer, made a statement imputing perjury to the plaintiff, who was one of the candidates, and said that he was a person not to be believed on his oath, it was held that the statement was privileged and protected if it was bona fide and honestly made in full belief of its truth, and that it was incumbent on the plaintiff to bring forward evidence of his general character for truthfulness, in order to raise the question as to

(r) *McPherson v. Daniels*, 10 B. & C. 273. *Lewis v. Walter*, 4 B. & Ald. 615. *Tidman v. Ainslie*, 19 Exch. 63.

(s) *Crawford v. Middleton*, 1 Lev. 82. (t) *Somerville v. Hawkins*, 10 C. B. 590.

¹ *Dixon v. Stewart*, 33 Iowa, 125; *McKee v. Ingalls*, *ante*.

whether the defendant in making the statement had been actuated by any malicious motive. (*u*) But although a man who makes a charge against another, may be justified by the occasion in making it, yet he may make the charge in such a way, accompanied by such expressions and under such circumstances, as furnish proof that it was made maliciously. (*x*) When once a confidential relation is established between two persons with regard to an inquiry of a private nature, in which they are mutually interested, whatever takes place between them relative to the same subject at subsequent interviews, may be as much privileged as what passed at the original interview. (*y*)¹

II32. *Privileged charges of felony made bona fide, with reasonable grounds for suspicion.*—For the sake of public justice, charges and communications which would otherwise be slanderous, are protected if bona fide made in the prosecution of an inquiry into a suspected crime. “It is argued,” observes COLERIDGE, J., “that the charge ought to be true, or ought to be made only before an officer of justice. But the exigencies of society could never permit such a restriction. If I stop a party suspected, must I not say why I do so? The presence of other parties would not do away with the privilege.” It is for the jury to say whether the circumstances warranted the charge made by the defendant, whether it was made bona fide, or before more persons than was necessary, or in language stronger than the occasion justified. (*z*)²

II33. *Privileged statements and comments by advocates in the course of judicial proceedings, or in the conduct of a cause.*—“If a counsel (or an attorney acting as an advocate) speaks scandalous words against one in defending his client’s cause, an action lies not against him for so doing; for it is his duty to speak for his client, and it shall be intended to be spoken

(*u*) Kershaw v. Bailey, 1 Exch. 743.

Wallace v. Carroll, 11 Ir. C. L. R. 485.

(*x*) Senior v. Medland, 4 Jur. N. S. 1039.

(*z*) Padmore v. Lawrence, 11 Ad. & E. 382.

(*y*) Beatson v. Skene, 5 H. & N. 855.

Amann v. Damm, 8 C. B., N. S. 597.

¹ White v. Nicholls, 3 How. (U. S.) 266; State v. Burnham, 9 N. H. 34; Swan v. Tappan, 5 Cush. (Mass.) 104; Perkins v. Mitchell, 31 Barb. (N. Y.) 467.

² O’Donoghue v. McGowen, 23 Wend. (N. Y.) 26; Thorn v. Blanchard, 5 Johns. (N. Y.) 508; Bunton v. Worley, 4 Bibb. (Penn.) 38.

according to his client's instructions." (a) The freedom of speech at the bar is the privilege of the client vested in the counsel who represents him. It would be impossible properly to conduct a cause in court unless considerable latitude were allowed to the advocate, and if any evil follow therefrom, it must be endured for the sake of the greater good which attend it: A counsellor, therefore, hath a privilege to enforce anything which is informed unto him for his client and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false." (b) It is pertinent to the cause for counsel to comment both on the facts proved and on those which he might expect to prove, and he may indulge freely in any calumnious imputation which the facts before the court, whether true or false, appear to warrant. "It would be impossible," observes ABBOTT, J., "that justice could be well administered if counsel were to be questioned for the too great strength of their expressions; but they ought not to avail themselves of their situation maliciously to utter words wholly unjustifiable." Where, therefore, an attorney was mixed up in the concoction of a pretended cause of action, and in suing for a sum of money, when he knew that there was no legal claim and that the action must fail, and the counsel of the defendant said that the action was founded in the knavery of the attorney, that it was one of the most profligate things ever done by a professional man, and that the attorney was a fraudulent and wicked attorney, it was held that these observations and expressions of opinion were privileged. "Perhaps," observes Lord ELLENBOROUGH, "the words were too strong, and, in the exercise of a candor fit to be adopted, might have been spared. But still a counsel might, bona fide, think the expressions justifiable under the circumstances." (c) ¹

1134. *Defamatory statements by a party in open court conducting his own cause* are also privileged and protected, if they are relevant to the subject-matter of inquiry, or are spoken during the heat and excitement of a trial. "The

(a) Wood v. Gunstone, Styles, 462. (c) Hodgson v. Scarlett, 1 B. & Ald.
Mackay v. Ford, 29 Law J., Exch. 404. 241.
(b) Brook v. Montague, Cro. Jac. 90.

¹ Parker v. Mitchell, 31 Barb. (N. Y.) 469; Hoar v. Wood, 3 Met. (Mass.) 193; Tennings v. Paine, 4 Wis. 358.

party himself," observes HOLROYD, J., "from his comparative ignorance of what is and what is not relevant, may be indulged in a greater latitude, and not be restricted within the same limits as a counsel, whose superior knowledge should be sufficient to restrain him within due bounds." (d)¹

1135. *Privileged comments and charges by judges and magistrates in the exercise of the duties of their office.*—We have already seen that judges are not responsible for slanderous words spoken by them concerning private individuals, if the words are material and relevant to the cause or matter in issue before them. "Neither party, witness, counsel, jury, or judge, can be put to answer civilly or criminally for words spoken in office." (e) But no judge of an inferior court or magistrate has any immunity for slander; and if he goes out of his way to calumniate an individual by uttering charges wholly irrelevant to the matter in issue before him, and not warranted by the occasion, he will be answerable in damages if malice be clearly made out, and there is a want of reasonable and probable cause for the slanderous observations. But it is clearly within the sphere of the duty of magistrates to make such comments upon the conduct and demeanor of witnesses and parties coming before them, and upon the character of persons whose conduct is involved in the inquiry before them as the occasion seems to them to warrant, and they are entitled to express their opinions concerning them with the utmost freedom, however erroneous those opinions may be, (f) provided the proceedings before them are within their jurisdiction, and they have authority to inquire into and adjudicate upon them. An action, therefore, is not maintainable against a coroner for anything said by him whilst he is addressing a jury impanneled before him, however defamatory, false, or malicious in fact it may be. (g)

(d) *Hodgson v. Scarlett*, 1 B. & Ald. 244; Roll. Abr. 87, pl. 4. *Revis v. Smith*, 18 C. B. 126; 25 L. J., C. P. 195.

(e) *Reg. v. Skinner*, Lofft. 55.

(f) *Kendillon v. Maltby*, 2 M. &

Rob. 438. *Allardice v. Robertson*, 1 Dow., N. S. 514.

(g) *Thomas v. Chirton*, 31 Law J., Q. B. 139.

¹ *Hoar v. Wood*, 3 Met. (Mass.) 193; *Ring v. Wheeler*, 7 Cow. (N. Y.) 725; *Hastings v. Lusk*, 22 Wend. (N. Y.) 410; *Shelfer v. Gooding*, 2 Jones (N. C.) 175

1136. *Of the interpretation and application of the words used.*—"In former times," observes PRATT, C. J., "words were construed in mitiori sensu, to avoid vexatious actions, which were then very frequent; but distinguenda sunt tempora, and we ought to expound words according to their general signification to prevent scandals, which are at present too frequent." (*h*) "The rule," observes Lord ELLENBOROUGH, "which at one time prevailed, that words are to be understood in mitiori sensu, has been long ago superseded; and words are now construed by courts, as they always ought to have been, in the plain, popular sense in which the rest of the world naturally understand them." (*i*) The effect of the words used, and not the meaning of the party uttering them, is the test of their being actionable. "You must first ascertain the meaning of the words themselves, and then give them the effect any reasonable bystander would affix to them." (*k*)¹

1137. *Slander of title.*—If lands or chattels are about to be sold by auction, and a man declares in the auction-room, or elsewhere, that the vendor's title is defective, that the lands are mortgaged, or that the chattels are stolen property, and so deters people from buying, or causes the property to be sold for a less price than it would otherwise have realized, this is a slander upon the title of the owner, and gives the latter a claim for compensation in damages, unless the slanderer can prove the truth of his statement. (*l*) "An action for slander of title," observes TINDAL, C. J., "is not properly an action for words spoken, or for a libel written and published, but an action on the case for special damage, sustained by reason of the speaking or publication of the slander of the plaintiff's title. It is ranged under that division of actions in the Digests, and by other writers on the text law."

(*h*) Button v. Hayward, 8 Mod. 24.

442.

(*i*) Roberts v. Camden, 9 East, 96.
Woolnoth v. Meadows, 5 East, 468.

(*l*) Gutsale v. Mathers, 1 M. & W.
501. Wend v. Weild, *infra*.

(*k*) Hankinson v. Bilby, 16 M. & W.

¹ Dixon v. Stewart, 33 Iowa, 125; McKinley v. Rob, 20 Johns. (N. Y.) 351; Kennedy v. Gifford, 19 Wend. (N. Y.) 296; Galloway v. Courtney, 10 Rich. (S. C.) 414; Jarnigan v. Fleming, 43 Miss. 711; Dorland v. Patterson, 23 Wend. 424; Gidney v. Blake, 1 Johns. (N. Y.) 54; Maybe v. Fisk, 42 Barb. (N. Y.) 336.

The plaintiff, therefore, in order to sustain the action, must prove special damage, and there must be an express allegation on the face of the declaration of some particular damage resulting to the plaintiff from the slander. Where, therefore, a shareholder in a mining company complained of a paragraph in a newspaper, asserting that a bill had been filed in Chancery invalidating his title to his shares, whereby he was injured in his rights, and his shares was depreciated in the market, and he was prevented from selling them, it was held that this was not such an allegation of special damage as the law required in such actions; and that the necessity for an allegation of special damage does not in anywise depend upon the medium through which the slander is disseminated, that is, whether it be through words, or writing, or print. (*m*) "To support the action," observes PARKE, B., "it ought to be shown that the false statement was made *mala fide*, and that the special damage ensues therefrom. If some portions of the statement are *bona fide*, the injured party can not recover, unless he can distinctly trace the damage as resulting from that part which is *mala fide*." (*n*)¹

To enable a party, moreover, to maintain an action for slander of title, there must be malice, either express or implied, and the words spoken must go to defeat the plaintiff's title. If the words are spoken by a stranger, who has no right or business to interfere, the law presumes malice; and if he can not show the truth of his assertion, he is responsible in damages; but if he is himself interested in the matter, and announces the defect of title *bona fide*, either for the purpose of protecting his own interest or preventing the commission of a fraud, the legal presumption of malice is rebutted, (*o*) and the plaintiff must then show that there was no reasonable or probable ground for the statement. If the alleged slanderer of title is himself interested, or has fair and reasonable ground for believing himself to be interested, in the sale or disposi-

(*m*) *Malachy v. Soper*, Bing. N. C., 3 2423. *Smith v. Spooner*, 3 Taunt. 253. Scott, 737-739. See *Steward v. Young*, L. R., 5 C. P. 122.

(*n*) *Brook v. Rawl*, 4 Exch. 524.

(*o*) *Hargrave v. Le Breton*, 4 Burr.

¹ *Kendall v. Stone*, 5 N. Y. 14; *Paul v. Hulferty*, 62 Penn. St. 46; *Linden v. Graham*, 1 Duer (N. Y.), 670; *Like v. McKimstry*, 41 Barb. (N. Y.) 168; *Hill v. Ward*, 13 Ala. 3.

tion of the property, the title to which is alleged to be slandered, and has acted bona fide, though under the influence of prejudice or misconception, he is not responsible in damages unless it be shown that he must have known that there was not the slightest pretense for his interference. "The bona fides of the communication," observes Lord ELLENBOROUGH, "and not whether a man of rational understanding would have made it, is the question to be canvassed." (p)

In an action for slander the plaintiff's title to a patent, therefore, it is not sufficient to show that the defendant wrote to persons in negotiation with the plaintiff for the purchase of patented articles from him, stating that such articles were an infringement of a patent of his, the defendant's, and that he should claim royalties from them, if the defendant really had an existing patent for somewhat similar articles, and no evidence of mala fides is given. (q)

"Slander of title," observes MAULE, J., "ordinarily means a statement of something tending to cut down the extent of title, which is injurious only if it is false. It is essential to give a cause of action that the statement should be false, and therefore its falsehood is given in evidence under not guilty, since the new rules. It is essential also that it should be malicious; not, as Lord ELLENBOROUGH observes, malicious in the worst sense, but with intent to injure the plaintiff. If the statement be true, if there really be the infirmity of title that is suggested, no action will lie, however malicious the defendant's intention might be. The jury may infer malice from the absence of probable cause, but they are not bound to do so. The want of probable cause does not necessarily lead to an inference of malice, neither does the existence of probable cause afford any answer to the action." (r)

(p) *Pitt v. Donovan*, 1 M. & S. 648. 730.

(q) *Wren v. Weild*, L. R., 4 Q. B. (r) *Pater v. Baker*, 3 C. B. 868.

SECTION III.

OF ACTIONS FOR LIBEL AND SLANDER. (s)

1138. *Consolidation of actions for the same libel.*—Where seven different actions were brought against the same defendant, for seven different publications of the same libel to different persons, which might all have been comprised in one action, the court stayed the proceedings in all of them, except one, until that one had been tried. (t)

1139. *Parties to be made plaintiffs.*—The party to be made plaintiff in an action for libel or slander, is the person to whom the injury immediately accrues, and not the party indirectly or remotely affected by the libel. An action of slander does not lie by two jointly against a defendant, when the tort which one received by the words spoken was not the tort which the other received; but they ought to sever in their actions, as in the case of false imprisonment. (u) If, however, defamatory words be spoken of two partners in trade respecting them in their trade, they may maintain a joint action for the slander, averring special damage. (x) ¹

(s) See 30 & 31 Vict. c. 142, s. 10.

(t) Jones v. Pritchard, 6 D. & L. 530; 18 Law J., Q. B. 104.

(u) Dyer, 19a.; Burrough, J., Barrett

v. Collins, 10 Moore, 451.

(x) Le Fanu v. Malcolmson, 1 H. L. C. 637. Cook v. Batchellor, 3 B. & P.

150; *post*, ch. 21.

¹ Where a libel or slander applies to a class of persons, as such, the action must be in the name of all; White v. Delavan, 17 Wend. (N. Y.) 49; but the mere fact that several are affected thereby, does not warrant the bringing of a joint action; there must be such a joinder of interest that the libel or slander affects them jointly, otherwise the action must be in the name of each. Ryckman v. Delavan, 25 Wend. (N. Y.) 186; Smart v. Blanchard, 42 N. H. 137. Words spoken of a partnership as such, are only actionable in the name of all the members of the firm, but if the language affects any individual member specially, he may bring an action in his own name, and must, for the special individual damage; Fidler v. Delavan, 20 Wend. (N. Y.) 57; Tait v. Culbertson, 57 Barb. (N. Y.) 9; Taylor v. Church, 1 E. D. S. (N. Y.) 279; so where words relate to *both* husband and wife, the husband may sue alone, or they may join in the action for the injury to her; Ebersall v. Krug, 3 Binn. (Penn.) 555; Bush v. Sommer, 20 Penn. St. 159; and he should sue alone for the injury to him. Smith v. Hobson, Style, 112; Broom on Parties, 237; Townsend on Slander, 500.

¹ In *Gazynski and Wife v. Colburn*, 11 Cush. (Mass.) 10, METCALF, J., said, "It

1140. Parties to be made defendants.—Every publisher and disseminator of written slander is liable to an action for damages, as well as the original inventor, author, or utterer of the calumny. The person who repeats it may, as we have seen, give greater weight to the scandal, and may be actuated by greater malice than the original utterer, and he can not discharge himself from responsibility by giving up the name of the author or first utterer of the slander. The person slandered may, consequently, maintain an action for damages arising from the publication of written slander against the author and first publisher of the slander, as well as against any subsequent publisher or disseminator thereof, unless the publication can be justified or excused. (*y*) But in the case of verbal slander, where the action is maintainable only in respect of some special damage that has accrued from the utterance of the slander, the action must, as we have seen, be brought against the person whose wrongful act is the direct and immediate cause of the special damage. (*z*)¹

A corporation aggregate may be made answerable for a libel published by its directions, (*a*) although the body corporate had no ill-will to the plaintiff, and did not mean to injure him, for great injustice would be suffered by individuals if their remedy for wrongs authorized by corporations aggregate were to be confined to the agents employed by them. Therefore, where a railway company falsely published through their electric telegraph that a bank had stopped payment, it was held that the company was responsible in damages for the false and slanderous intelligence. (*b*)²

(*y*) *M'Pherson v. Daniels*, 10 B. & C. 273. *Tidman v. Ainslie*, 10 Exch. 63.

(*z*) *Ward v. Weeks*, *Parkins v. Scott*, *ante*.

(*a*) *Alexander v. North-East. Rail. Co.*, 34 Law J., Q. B. 152.

(*b*) *Whitfield v. South-East. Rail. Co.*, Ell. Bl. & Ell. 121; 27 Law J., Q. B. 229.

has always been held that when words are spoken of two or more persons, they can not join in the action for the words, *because the wrong done to the one is no wrong done to the other*. The case of husband and wife is no exception to this rule. The exceptions to it are the case of words spoken of partners *in the way of their trade and the case of slander of the title of joint owners of land*." *Dyer*, 19 *a*;³ *Burges v. Ashton*, Yelv. 128; *Sheppard's Actions on the Case for Slander*, 52; 1 *Walford on Parties*, 514; *Hart v. Crow*, 7 Blackf. (Ind.) 351.

¹ But in case of a libel, an action lies against two or more if the act be *joint* and done by all. *Harris v. Huntington*, 2 Tyler (Vt.) 147; *Thomas v. Ramsey*, 6 Johns. (N. Y.) 24.

² An action for a *libel* may be maintained either by or against a corporation, *bu*.

Where the slander is made by two persons in a joint publication, such as an affidavit sworn by both, they may both be made defendants in one and the same action, (c) but where slanderous words are spoken by two different persons, separate actions should be brought. (d) ¹

1141. *Declarations for libel and slander.*—In every declaration for libel or slander, either by publication in writing or by words, the writing or the very words themselves must be set out on the face of the declaration, in order that it may be shown to the court that the words are capable of receiving the innuendo or interpretation put upon them, and of producing the injury which is charged to have resulted from them; (e) and also that the defendant may know the certainty of the charge, and may be able to shape his defense either on the general issue or by plea of justification accordingly; and this defect is not cured by verdict. (f) “Whenever the charge,” observes HOLROYD, J., “arises out of the publication of a written instrument, the invariable rule is, that the instrument itself must be set out in the declaration, that the defendant may have an opportunity, if he pleases, of admitting all the facts charged, and of having the judgment of the court whether the facts stated amount to a cause of action; for it is clear, that when it can be shown distinctly what the instrument is upon which the whole charge depends, that instrument must be shown to the court, in order that they may form their judgment upon it. A defendant is not bound to put the question as a combined question of law and fact to the jury, but has a right to put it as a mere question of law to the court. The setting out only the substance and effect of the writing would not only deprive the defendant of that advantage, but also of his writ of error; and it would make the verdict of a jury binding in cases where it ought not to be so.” (g)

(c) Maitland v. Goldney, 2 East, 426.

(e) Gutsole v. Mathers, 1 M. & W.

(d) Chamberlain v. Goodwin, Cro. 503.

Jac. 647. Swithin v. Vincent, 2 Wils. 227.

(f) Cook v. Cox, 3 M. & S. 116.

(g) Wright v. Clements, 3 B. & Ald 509. Wood v. Brown, 6 Taunt. 169.

an action of *slander* can not be maintained against it. Trenton Ins. Co. v. Perrine, 23 N. J. 402; Aldridge v. Press Printing Co., 9 Minn. 133; Maynard v. Ins. Co., 34 Cal. 48; Phila. R. R. Co. v. Quigley, 21 How. (U. S.) 202.

¹ Harris v. Huntington, *ante*; Thomas v. Ramsey, *ante*.

In actions for slandering a man in his trade or profession, the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but ought also to show in what manner it was connected by the speaker with that profession. (h) ¹

1142. *Of the innuendo or defamatory sense attributed to the writing or words on the face of the declaration.*—By the Common Law Procedure, it is enacted, that in all actions for libel and slander, the plaintiff shall be at liberty to aver in his declaration that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration is sufficient. (i) The pleader, therefore, may put any construction he pleases upon the words, and it is for the jury to determine whether the construction is borne out by the evidence. (k)

(h) *Ayre v. Craven*, 2 Ad. & E. 7. 396.

James v. Brook, 9 Q. B. 13.

(i) See *Watkin v. Hall*, L. R., 3 Q. B. 346; 27 Law J., Q. B. 253.

¹ In all actions for slander, the words, the speaking of which is complained of, must be set out in the declaration, but it is sufficient if they are proved *substantially* as alleged. *Cheadle v. Bull*, 6 Ham. (Ohio) 67; *Bassett v. Spofford*, 11 N. H. 127; *Miller v. Miller*, 8 Johns. (N. Y.) 74; *Clark v. Munsell*, 6 Met. (Mass.) 373; *Pard v. Hartwell*, 17 Pick. (Mass.) 267; *Cooper v. Marlow*, 3 Mo. 188; *Allen v. Perkins*, 17 Id. 369; *Barr v. Gaines*, 3 Dana (Ky.) 258; *Treat v. Browning*, 4 Conn. 408; *Dexter v. Faber*, 12 Johns. (N. Y.) 239. And the words should be laid substantially as spoken; words spoken affirmatively should be so alleged. *Yeates v. Reed*, 4 Blackf. (Ind.) 463. All the words set forth need not be proved as laid, but they must be proved in substance; and enough must be shown to sustain a cause of action. *Nichols v. Hayes*, 13 Conn. 155; *Scott v. Renforth*, *Wright* (Ohio), 55; *Nesth v. Van Slyck*, 2 Hill (N. Y.), 382. Words in aggravation merely need not be alleged. *Stevens v. Handy*, *Wright* (Ohio), 121. It is essential that the words should be alleged to have been *spoken of* and concerning the plaintiff, and in the presence and hearing of some third person or persons; and it is not enough to say that the defendant *published of, &c.*, without adding "and spoke." *Watts v. Greenlee*, 2 Dev. (N. C.) 115. Words actionable *per se*, may be charged in the same count with those not actionable *per se*, in aggravation of damages. *Dwytt v. Tanner*, 20 Wend. (N. Y.) 190; *Klumph v. Dunn*, 66 Penn. St. 141; *Pennington v. Meeks*, 46 Mo. 217.

The forms of declaration in the schedule to the above Act merely set forth that "the defendant falsely and maliciously printed and published of the plaintiff, in a newspaper called, &c., the words following, that is to say, &c., meaning thereby," &c., and, in cases of verbal slander, "that the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say, he is a thief, whereby the plaintiff lost his situation as, &c., in the employ of," &c. Where the words, whether written or spoken, are susceptible of a harmless, but also of an injurious meaning, the injurious meaning must be set out as well as the words, and their true import and signification may be established by evidence of the surrounding circumstances. (l) When the words are libellous in themselves, no innuendo to explain their meaning is required. (m) If they are incapable of the interpretation put upon them, the declaration is bad, and the court will, if necessary, arrest the judgment. It is not necessary to allege formally that the defendant published the libel; it is sufficient if the circumstances set forth show that the libel was, in point of fact, published. (n)¹

(l) Griffiths v. Lewis, 8 Q. B. 851. endo which is incorrectly stated, is bad.
 Gallwey v. Marshall, 9 Exch. 294; 23 Watkin v. Hall, *supra*.
 Law J., Exch. 78. (n) Baldwin v. Elphinstone, 2 W. Bl.
 (m) Barrett v. Long, 3 H. L. C. 413; 1037.
 and, therefore, a plea answering an innu-

¹ The office of an innuendo is to set forth the sense in which the words were used, the full extent of the meaning intended by the use of the words spoken, and it is the duty of the court as a matter of law to determine whether the words used are susceptible of the meaning ascribed to them, and for the jury to find whether they were used in that sense. Blagg v. Sturt, 10 Ad. & El. (Q. B.) 899. And an innuendo is not necessary where the libel sufficiently appears without it. Id. Peterson v. Sentman, 37 Md. 140.

After verdict, if words which are not of themselves actionable, but may be shown to be so by innuendo, but are not stated with an innuendo, it will be presumed that the jury found that they were used, and understood in a slanderous sense, and the verdict will not for that cause be set aside. Hoare v. Silverlock, 12 Ad. & El. (Q. B.) 633. If an expression, originally allegorical, has passed into such common use that it ceases to be figurative, and has obtained a signification almost literal, we must understand it as used according to the sense which has become familiar, and in which it is generally understood. COLERIDGE, J., in Hoare v. Silverlock, *ante*. A verdict will not be disturbed when there is any ground upon which the construction placed upon the words used can be predicated. Opinion of EARLE, J., in same case. When words may or may not be used in a libellous sense, it is for the jury to find whether they were used in such a sense or not, and their finding will not be disturbed. Lord DENMAN in case, *ante*

1143. *Statement of special damage in actions for verbal slander.*—When the words themselves are not actionable without proof of special damage, the nature of the special

In an indictment or information for a libel, the words and the libel must be clearly and distinctly charged, and with legal certainty, that is, with certainty to a *common intent*. The charge must contain such a description of the offense that the defendant may fully understand what he is called upon to answer, and *whatever is necessary to constitute the offense, must be set out*. The libel must be clearly and distinctly alleged, and, if it is not expressed in words entirely unambiguous, so as of themselves to amount to a libel, they may be aided by proper innuendos, so that as applied, the libel is made clear and distinct. This is always necessary when the terms of the libel are general or ironical; or are spoken by way of allusion or reference, even though every person reading it might put the same construction upon it, *because it is by understanding something that is not expressed in direct words* that the libel is made applicable, and therefore something beyond the words themselves are essential to enable the jury to determine the fact, and the nature of the fact on which the whole charge depends, which they can not do unless by proper averments the whole matter is placed upon the records, and properly applied. Therefore it often becomes necessary to set forth *extrinsic* facts in *direct* and *specific* terms, so that the record may show *how* the words become libellous. This is always necessary when the libel does not in itself contain the crime, and in such cases it should be put upon the record by way of introduction if *new* matter, or by way of *innuendo* if it is merely by matter of explanation. In illustration of the rule and to show when extrinsic matter must be placed upon the record, either by direct averment, recitals or general inference, and aided by innuendos properly applied, we will take *Barham's Case* 4 Coke, 314. In that case Barham brought an action against *Nethersal* for slander, for speaking of him these words: "Mr. B— did burn my barn with his own hands, and none but he." At that time (1602) it was not a felony to burn a barn unless it was "parcel of a mansion house or full of corn." The plaintiff in his declaration set up the words with innuendo as follows: "Mr. B— (meaning the plaintiff) did burn my barn (meaning that the plaintiff, feloniously, did set fire to his, the defendant's, barn, then being full of corn), &c." The court held that the declaration was not aided by the innuendo, as the words must of themselves be sufficient to maintain the action, and that an innuendo can not be used to enlarge or extend their meaning, but only to apply the words. See also *Lovet v. Hawthorn*, Cro. Eliz. 834; *Crofts v. Boite*, 1 Saund. 243; *Rex v. Grepe*, 2 Salk. 513; *Peake v. Oldham*, 1 Camp. 276; *Rex v. Horne*, 2 Id. 684; *Hawkes v. Hawkey*, 8 East. 428. In this case it was attempted to extend the meaning of the words spoken, by the aid of the innuendo, without the averment of extrinsic facts. If the plaintiff had alleged that the defendant's barn at the time of the burning thereof was "full of corn," the declaration would have been sufficient, and the action maintainable, if the truth of the extrinsic matter, that the barn was full of corn, had been established. *DE GREY, J.*, *Rex v. Horne*, 2 Camp. 684. As to the office of an innuendo, see *Nichols v. Packard*, 16 Vt. 83; *McCuen v. Ludlum*, 2 Harr. (Del.) 12; *Weir v. Hess*, 6 Ala. 881; *Croswell v. Reed*, 25 Wend. (N. Y.) 621; *Watts v. Greenleaf*, 2 Dev. (N. C.) 215; *Harris v. Burley*, 8 N. H. 256; *Ryan v. Madden*, 12 Vt. 51; *Linville v. Earlywine*, 4 Blackf. (Ind.) 470; *Saunderson v. Hubbard*, 14 Vt. 462; *Wood v. Scott*, 13 Vt. 42; *Small v. Clewly*, 60 Me. 262; *Lundy v. Hart*, 46 Mo. 460.

damage must be particularized and set forth, in order that the defendant may be enabled to meet the charge. If by reason of the speaking of the words, the plaintiff has lost the society of friends and neighbors, and the substantial benefits arising from their hospitality, this temporal damage should be particularized, and the names of the neighbors and friends who have refused to receive the plaintiff into their houses, and entertain him at dinner, &c., should be specified. (*o*) Where a single woman brought an action against the defendant for saying she was with child, and had miscarried, in consequence of which she lost several suitors, it was held that she ought to have specified the names of these suitors, as they were necessarily within her knowledge. (*p*) And where a tradesman complained of a loss of custom as a consequence of the slander, and must have known who his customers were whom he had lost, he was required to state their names on the face of his declaration. (*q*) But if the declaration alleges the special damage with as much certainty as the subject-matter is capable of, it is now sufficient. Thus, where the declaration alleged that the plaintiff, before the speaking of the scandalous words by the defendant, was employed to preach to a dissenting congregation at a certain licensed chapel, and that he derived considerable profit from his good character and preaching, and that by reason of the scandal of the defendant the persons frequenting the chapel had refused to permit him to preach there, and had discontinued giving him the profits which they would otherwise have given him, it was held that it was not necessary to state the names of the persons who, in consequence of the slander, discontinued giving the plaintiff the emoluments, and that it was sufficient to show that, in consequence of the slander, he was removed from his office, and lost the emoluments of it. (*r*) And in an action for slander of the plaintiff in his business of an innkeeper or eating-house keeper, it was held to be sufficient to allege and prove as special damage a general loss of custom from the slander, without stating the names of the customers who ceased to frequent the establishment, as the customers of an inn are travelers and per-

(*o*) *Moore v. Meagher*, 1 Taunt. 39.(*p*) *Barnes v. Prudlin*, 1 Sid. 396.(*q*) *Fenn v. Dixe*, 1 Roll. Abr. 58.(*r*) *Huntley v. Herring*, 8 T. R. 133.

sons passing to and fro, and it might be impossible for the plaintiff to ascertain their names, or the reason why they ceased to frequent the house. (s) ¹

1144. *What may be given in evidence under the plea of not guilty.* It is competent to the defendant under the general issue to show that the words were not spoken maliciously, by proving that they were spoken on an occasion or under circumstances which the law, on grounds of public policy, allows; as in the course of a parliamentary or judicial proceeding, or in giving the character of a servant. (t) If a shareholder in a public company has published letters or writings imputing insolvency to the company, he may, under the plea of not guilty, show that he was actuated by a desire to protect the interests of the shareholders, and had reasonable ground for making the imputation. (u) The plea of not guilty puts in issue the tendency of the alleged libel, and also the lawfulness of the occasion upon which it was published. The fact, therefore, that a libellous publication was a privileged communication, or that it was a fair comment in a public journal on the acts of a public man, may be given in evidence under this plea, but the latter fact may be pleaded specially in addition to the plea of not guilty. It does not follow that a defense may not be given in evidence under "not guilty," because it might also form the subject of a special plea. (x) In an action for slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate as a denial of speaking the words, or speaking them maliciously, and in the defamatory sense imputed, and with

(s) *Evans v. Harries*, 1 H. & N. 251 : Exch. 201.
26 Law J., Exch. 31.

(t) *Littledale, J., M'Pherson v. Daniels*,
10 B. & C. 272.

(u) *Metrop. Saloon Omnibus Co. v.*
Hawkins, 4 H. & N. 151 ; 28 Law J.,

(x) *Lillie v. Price*, 5 Ad. & E. 645.
Hoare v. Silverlock, 9 C. B. 28. *Lucan*
(Earl of) *v. Smith*, 26 Law J., Exch. 94.
Lewis v. Levy, 27 L. J., Q. B. 287.

¹ Where words are actionable *per se*, or where the words relate to one in his trade or occupation, special damage need not be alleged, because damage is the necessary consequence of the words complained of. But in all cases where *special damage* is the gist of the action, the plaintiff must both allege and prove special damage and the allegation must be specific, and such as shows a legal damage. *Weir v. Allen*, 51 N. H. 177 ; *Bostwick v. Hawley*, Kirby (Conn.) 296 ; *Squier v. Gould*, 14 Wend. (N. Y.) 151 ; *Birch v. Benston*, 26 Miss. 155 ; *Barnes v. Trundy*, 31 Me. 321 ; *Shipman v. Burrows*, 1 Hall, (N. Y.) 399 ; *Maloney v. Daws*, 15 How Pr. 265 ; *Herrick v. Lapham*, 10 Johns, (N. Y.) 281.

reference to the plaintiff's office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff's holding the office or being of the profession or trade alleged. The innuendo or meaning, therefore, attributed to the words in the declaration is put in issue by the plea of not guilty. (*y*)

When the substance of the charge in the declaration is, that the defendant has inflicted injury upon the plaintiff by the speaking of disparaging words, not actionable in themselves, but forming a ground of action, by reason of special damage having arisen from the utterance of them, the plea of not guilty puts in issue all the facts creating the special damage; for without those facts, and without the special damage, there is no wrong of which the plaintiff has any reason to complain. (*z*) Where the words are actionable in themselves without special damage, a traverse of the allegation of the special damage is immaterial and unnecessary. In such a case, if the plaintiff proves his special damage, he will recover it; if he fails in proving it, he may still resort to and recover his general damages. A finding upon it, therefore, one way or the other, will have no effect as to the right to the verdict. (*a*) A plea to the damage only is bad, unless the damage is so essentially the cause of action that without it the action could not be maintained. (*b*)¹

(*y*) Reg. Gen. 16 Vict.; 1 Ell. & Bl. App. lxxxii. R. 16; 15 & 16 Vict. c. 76, s. 61.

(*z*) Wilby v. Elston, 8 C. B. 149. Norton v. Scholefield, 9 M. & W. 665.

(*a*) Smith v. Thomas, 2 Sc. 546; 2 B. N. C. 372. Wyatt v. Gore, Holt, N. P. C. 305 n.

(*b*) Robinson v. Marchant, 7 Q. B. 918.

¹ Under the general issue, the defendant can not give evidence of the *truth* of words, but he may give evidence in mitigation. Jarnigan v. Fleming, 43 Miss. 710; Mousler v. Harding, 33 Ind. 176; Adams v. Smith, 58 Ill. 417; Miles v. Harrington, 8 Kans. 425. And the truth of the words can not be given in evidence even in mitigation. Haskett v. Brown, 2 Heisk. (Tenn.) 264; Brickett v. Davies, 21 Pick. (Mass.) 404. But evidence of the general bad character of the plaintiff may be given even where the answer sets up the truth of the words. Young v. Bennett, 4 Scam. (Ill.) 43; Anthony v. Stevens, 1 Mo. 254; Eastland v. Cauldwell, 2 Bibb. (Penn.) 21; but not special acts; Sawyer v. Erbert, 2 N. & M. (S. C.) 511; Lamos v. Snell, 6 N. H. 413; Bowdish v. Peckham, 1 Chip. (Vt.) 145. And evidence tending to rebut the presumption of malice, is admissible under the general issue. Arrington v. Jones, 9 Port. (Ala.) 139. Or to show that the words were not used in a slanderous sense. Brite v. Gill, 2 Mon. (Ky.) 65; Sibley v. Marsh, 7 Pick. (Mass.) 38. Or if the plaintiff prove the speaking of words *not laid* in the declaration, the defendant

1145. *Plea that the libel was inserted without malice or gross negligence, and that an apology was published—Payment of money into court.*—By 6 & 7 Vict. c. 96, s. 2, it is enacted, that in any action for a libel contained in any public newspaper, or other periodical publication, it shall be competent to the defendant to plead that the libel was inserted without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, the defendant inserted in such newspaper, or other periodical publication, a full apology for the libel; or, if the newspaper or periodical publication is published at intervals exceeding a week, that he had offered to publish the apology in any newspaper or periodical publication, to be selected by the plaintiff; and that every defendant shall, upon filing such plea, be at liberty to pay into court a sum of money by way of amends for the injury sustained. (c) To entitle the defendant to the benefit of an apology under this statute, the apology should be printed in such a part of the paper, and in such a type, as will be likely to ensure its perusal by the persons who read the libel, or by all who read the paper. (d)

When a plea denying actual malice, and stating the publication of an apology is pleaded, the publication of previous libels on the plaintiff by the defendant, is admissible in evidence, to show that the defendant wrote the libel in question with actual malice. A long practice of libelling the plaintiff may show in the most satisfactory manner that the defendant was actuated by malice in the particular publication, and that it did not take place through careless-

(c) The special plea of apology and payment into court can not be pleaded along with not guilty to the same part of the declaration. *O'Brien v. Clement*, 15 M. & W. 435.

(d) *Lafone v. Smith*, 7 W. R. 13.

may, under the general issue, prove the truth of those words. *Burke v. Miller*, 6 Blackf. (Ind.) 165. Or that suspicions as to the guilt of the plaintiff, as to the matter charged, generally existed, or that the defendant heard the report from others, and only repeated what he had heard, may be shown in mitigation. *Leister v. Smith*, 2 Root (Conn.) 24; *Henson v. Veatch*, 1 Blackf. (Ind.) 369; *Calloway v. Middleton*, 2 A. K. Marsh. (Ky.) 372. And anything may be shown in mitigation under the general issue that does not amount to a justification. *Wilson v. Apple*, 3 Ham. (Ohio) 270; *Bechler v. Steever*, 2 Whart (Penn.) 313; *Regden v. Wolcott* 6 G. & J (Md.) 413.

ness or inadvertence; and the more the evidence approaches to the proof of a systematic practice, the more convincing it is. The circumstance that the other libels are more or less frequent, or more or less remote, from the time of the publication of the libel in question, merely affects the weights, not the admissibility, of the evidence. (*e*)

1146. *Pleas of justification.*—To enable the defendant to give the truth of the charge or imputation in evidence as a defense to the action, the defendant must plead a plea of justification, alleging that the plaintiff did the act imputed to him by the libel, and that the defendant therefore published or spoke the words of which the plaintiff complains. (*f*) Every plea of justification must meet and justify the charge or complaint set out on the face of the declaration. If it does not do this, reasonably and substantially, it is a nullity. (*g*) It must also, where the libel is in writing, justify everything contained in the libel which is injurious to the plaintiff. If it imputes to the latter that he has been guilty of some act that is discreditable to him as a gentleman, as well as of a criminal offense, the plea of justification must cover the whole charge. (*h*) But if the libel contains several charges, the defendant may justify some of them, and plead not guilty as to others. (*i*) A plea of justification imputing general misconduct to the plaintiff, and giving no specific instances of it, was formerly held bad on special demurrer. (*k*) A defendant, for example, was not at liberty to charge a plaintiff with swindling, without showing any special instances of it on the record, that the plaintiff might come prepared to meet them. (*l*)

The publication and dissemination of written or printed slander can not be justified, as we have seen, on the ground that the libellous matter was previously published by a third

(*e*) *Barrett v. Long*, 3 H. L. C. 414.

(*f*) *Smith v. Richardson*, Willes, 20.

(*g*) *Tighe v. Cooper*, 7 Ell. & Bl. 639; 26 Law J., Q. B. 215. *Wyatt v. Gore*, Holt, N. P. C. 308 n.

(*h*) *Helsham v. Blackwood*, 11 C. B. 128. *Mountney v. Watton*, 2 B. & Ad. 673. Where a defendant justifies words which amount to a charge of felony, and proves his justification, and obtains a verdict, it has been said that the plaintiff

may afterwards be put upon his trial for the felony by that verdict without the intervention of a grand jury. *Ld. Kenyon*, *Cook v. Fields*, 3 Esp. 134.

(*i*) *M'Gregor v. Gregory*, 11 M. & W 287.

(*k*) *Hickinbotham v. Leech*, 10 M. & W. 361. *O'Brien v. Clement*, 16 Id. 165.

(*l*) *Buller, J., J'Anson v. Stuart*, 1 T. R. 753; 2 *Smith's L. C.* 6th ed., 5

person, and that the defendant, at the time of his publication, disclosed the name of that person, and believed all the statements contained in the libel to be true. (*m*)¹

1147. *Evidence for the plaintiff (n)*—*Printed placards*—*Proof of publication*.—If a man writes a libel, and puts it into his desk, this is no publication of it; but if a libellous paper or placard has been notoriously circulated or posted up in places of public resort, proof of a paper in the defendant's handwriting, corresponding with the libellous placard, will be prima facie evidence against him of his being the author of the libel, and render it necessary for him to explain the matter. (*o*) A libellous paper in the handwriting of the defendant, found in the house of the editor of a newspaper, in which the libel complained of appeared, is admissible in evidence against the defendant, notwithstanding several parts of it have been erased and are omitted in the newspaper, provided the passages erased do not qualify the libel. (*p*) If the libel on which the action is founded contains any marked peculiarities in spelling, style, or composition, letters of the defendant concerning the plaintiff containing similar peculiarities are admissible in evidence, to show that the defendant was the writer of the libel. (*q*) The 2 & 3 Vict. c. 12, s. 2, which is re-enacted by the 32 & 33 Vict. c. 24, requires every person who prints any paper or book intended to be pub-

(*m*) *Tidman v. Ainslie*, 10 Exch. 63. *M'Pherson v. Daniels*, 10 B. & C. 273, overruling the 4th resolution in *Lord Northampton's case*, 12 Rep. 134.

(*n*) As to particulars, where the action is for stating that chattels sold by the plaintiff were infringements of the defendant's patent, see *Wren v. Weild*, L. R., 4 Q. B. 213. And see as to an injunction against a patentee from publishing statements of his intention to institute legal proceedings, in order to de-

ter persons from purchasing alleged infringements of his patent, if he has no *bona fide* intention to follow up his threats by taking such proceedings, *Rollins v. Hinks*, L. R., 13 Eq. Ca. 355.

(*o*) *Rex v. Beare*, 1 Ld. Raym. 417. *Lamb's case*, 9 Co. 59 b. *Rex v. Burdett*, 3 B. & Ald. 717; 4 B. & Ald. 95.

(*p*) *Tarpley v. Blabey*, 2 B. N. C. 437.

(*q*) *Brookes v. Titchborne*, 5 Exch. 929.

¹ The justification must be full and complete, and cover the entire charge embraced in the words spoken. There can be no half-way justification; unless it is full to a certain intent, it completely fails. *Stilwell v. Barter*, 19 Wend. (N. Y.) 488; *Andrews v. Van Deuser*, 11 Johns. (N. Y.) 38; *Self v. Gardner*, 15 Mo. 480; *Whittaker v. Carter*, 4 Ired. (N. C.) 461; *Talmage v. Baker*, 22 Wis. 624; *Ridley v. Perry*, 4 Shep. (Me.) 21; *Pallett v. Sargent*, 36 N. H. 496; *Holton v. Muzzey*, 30 Vt. 365; *Fidler v. Delevan*, 20 Wend. (N. Y.) 57; *Wachter v. Quenzer*, 29 N. Y. 547; *Lewis v. Black*, 27 Miss. 425; *Gregory v. Atkins*, 42 Vt. 237; *Fenn v. Rusal*, 4 N. Y. 165; *Skinner v. Grant*, 12 Vt. 466.

lished or dispersed, to print his name and place of abode or business upon the front of such paper, or upon the first and last leaves of every paper or book consisting of more than one leaf, on pain of forfeiting £5 for each copy so printed.

If in an action for slanderous words it be proved that some person took down the words, that will not prevent another witness from giving parol evidence of what the words were. (*r*) If a party takes a memorandum of particular facts and circumstances at the time they occur, and has not the paper with him, he may nevertheless give oral evidence of the facts independently of the writing; (*s*) but the non-production of the writing is of course matter for comment and observation.

Where a defendant, who had a copy of a libellous caricature in his house, showed it to another on being requested so to do, Lord ELLENBOROUGH ruled that this was not sufficient evidence of publication to support an action. (*t*)

Libellous matter contained in a private letter addressed to the plaintiff himself, and only delivered into his own hands, is not such a publication of a libel as will support an action. (*u*) But where it was proved that the defendant addressed a libellous letter to the plaintiff, knowing that the plaintiff's clerk, in the absence of the plaintiff, was in the habit of opening the plaintiff's letters, and the letter was, in point of fact, received and opened by the clerk before it reached the plaintiff's hands, Lord ELLENBOROUGH held that there was sufficient evidence for the jury to consider whether the defendant did not intend to put the clerk in possession of the letter, and that if he did, there would be a publication of its libellous contents. (*x*) The sending of a letter to a wife containing libellous charges against her husband, is a sufficient publication of the libel; for, to injure a man's character with his wife, or to assail his honor by communications made to her, is to do him a grievous wrong. (*y*)

(*r*) Sheridan's case, 31 How. St. Tr. 673. Peacock v. Reynal, 2 Brownl. 151.
 (*s*) Thistlewood's case, 33 *ibid.* 758. (*x*) Delacroix v. Thevenot, 2 Stark. 63.
 (*t*) Smith v. Wood, 3 Camp. 323. (*y*) Wenman v. Ash, 13 C. B. 842; 22 Law J., C P. 190.
 (*u*) Phillips v. Jansen, 1 Esp. 625.

If a letter is sent by post, it is *prima facie* evidence that the person to whom it was addressed received it in due course. (z)

Where the defendant's daughter had been employed by him to make out his bills and write letters for him on matters of business, and the daughter wrote and published a libel upon the plaintiff in her father's (the defendant's) name, it was held that this was not sufficient to fix him with the authorship of the libel; for the principal is only responsible for the acts of his agent within the limits of the authority delegated to the agent, and that it did not follow, from a daughter being employed to make out bills and write letters for her father for the purpose of conducting his business, that she was authorized by him to write a libel; and that there ought to be some evidence to show that the libel was written either by the command, or with the knowledge, of the defendant. (a) But if a man request another generally to write a libel, he is answerable for the libel written pursuant to his request, and must take his chance of what appears. He is responsible, though something may be added which he did not state. (b)

1148. *Publication in newspapers.*—Every sale of a newspaper to a person sent to purchase it, is a fresh publication, and, therefore, where an action was brought in respect of a libel in a newspaper, published seventeen years before the action, and the Statute of Limitations was pleaded, it was held that the plea was negatived by proof that a copy of the paper had been purchased from the defendant by the plaintiff's servant, sent to obtain it, within the six years. And where the proof of publication relied on was the sale of a copy of a newspaper to a messenger sent by the plaintiff to procure it, who, on receiving it, carried it to the plaintiff, it was held that this was a sufficient publication to sustain an action for damages; for a defendant who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to such stranger,

(z) *Warren v. Warren*, 1 Cr. M. & R. 350.

(a) *Harding v. Greening*, 1 Moore, 479.

(b) *Reg. v. Cooper*, 8 Q. B. 536.

though he may have been sent for the work by the plaintiff himself. (*c*)

If a man wraps up a newspaper, and sends it into another county by a boy, the man who sends the paper is the publisher of it, and not the boy, who is ignorant of the contents of the paper, and is an innocent agent in the transaction. (*d*)

1149. *Proprietorship of newspapers containing libels.*—The provisions of the 32 & 33 Vict. c. 24, as to the printing the name of the printer on every paper or book intended for publication, have been mentioned. That Act further re-enacts the 19th section of the 6 & 7 Will. 4, c. 76, (*e*) which provides, that if any person shall file a bill for the discovery of the name of any printer, publisher, or proprietor of a newspaper, in order more effectually to bring or carry on an action for libel, it shall not be lawful for the defendant to plead or demur to such bill; but the defendant shall be compelled to make the discovery required. It has accordingly been held that a bill against the publisher of a newspaper to discover the name of the proprietor, is not demurrable; (*f*) such discovery, however, is not to be made use of against the defendant in any other proceeding than that for which the discovery is made.

1150. *Proof of the utterance of the words charged in actions for verbal slander.*—The plaintiff need not prove all the words laid in the declaration, but he must prove so much of the very words alleged to have been spoken as is sufficient to sustain his cause of action; and it is not enough for him to prove equivalent words of slander; (*g*) but if the words proved in evidence convey substantially the same imputation, and the only difference is that the same thing is expressed in a different form of words, or is proved to have been done in a different way from that charged in the declaration, the variance may be amended at the trial. (*h*) If words alleged to have been spoken affirmatively were only

(*c*) *Brunswick (Duke of) v. Harmer*, 1 Q. B. 189.

(*d*) *Best, J., Rex v. Burdett*, 4 B. & Ald. 126. Proof of the delivery, by order of the defendant, of a copy of a newspaper to the officer at the Stamp Office, was held to be proof of publication in *Rex v. Amphlit*, 4 B. & C. 35.

(*e*) The 6 & 7 Will. 4, c. 76, is repealed by the 33 & 34 Vict. c. 99.

(*f*) *Dixon v. Enoch*, L. R., 13 Eq. Ca. 394. Whether it would lie against a mere stranger who happened to know the name of the proprietor *quære*, S. C.

(*g*) *Maitland v. Goldney*, 2 East, 437. *Orpwood v. Barks*, 4 Bing. 263.

(*h*) *Post*, ch. 21, s. 1. AMENDMENT.

put interrogatively, or if they convey quite a different imputation from that charged in the declaration, the defect can not be amended. (*i*)¹

1151. *Proof of the singing of libellous songs*.—Where a libellous song was sung in the streets from a printed paper, which had been destroyed, the singer of the song was allowed to prove that a paper produced was an exact copy of the song that was sung. (*k*) Where a number of placards are printed by order of the defendant, no one of the printed papers is an original more than the rest. When they are printed they all become originals, and the manuscript is discharged. (*l*)

1152. *Application of the libel to the plaintiff*.—If the libellous words point to no person in particular, it becomes a question of evidence whether they do or do not apply to the plaintiff. (*m*) If the name of the person libelled is left in blank, or is designated by asterisks, evidence may be given to show who was meant. "It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant." (*n*) Where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before a jury, and the jurors are to determine whether, when a class is referred to, the slander was pointed at the plaintiff. (*o*) Where, however, it appears, from the matter complained of, that there was not any intention of libelling any particular individual, but that the imputations intended to be conveyed were meant to be cast upon the public authorities, or some of several public functionaries, the plaintiff can not recover. (*p*)²

(*z*) Barnes v. Holloway, 8 T. R. 150.
Bell v. Byrne, 13 East, 563. Walters v.
Mace, 2 B. & Ald. 756. Cartwright v.
Wright, 5 B. & Ald. 616. Brooks v.
Bianchard, 1 Cr. & M. 791. See Sheridan's case, *ante*.

(*k*) Johnson v. Hudson, 7 Ad. & E.
233, n.

(*l*) Rex v. Watson, 2 Stark. 130.

(*m*) Merywether v. Turner, 19 Law J.,
C. P. 10.

(*n*) Bourke v. Warren, 2 C. & P. 310.

(*o*) Le Fanu v. Malcolmson, 1 H. L.
C. 637.

(*p*) Solomon v. Lawson, 8 Q. B. 823.

¹ See note 1, page , *ante*.

² Sumner v. Buel, 12 Johns. (N. Y.) 475; Harvey v. Coffin, 5 Blackf. (Ind.) 566;
Jackson v. Cady, 9 Cow. (N. Y.) 140; Miller v. Maxwell, 16 Wend. (N. Y.) 9;
Harper v. Dolph, 3 Ind. 225; Robinson v. Drummond, 24 Ala. 174; Ryckman v.
Delavan, 25 Wend. (N. Y.) 186; Chandler v. Halloway, 4 Port. (Ala.) 7.

1153. *Proof of the defamatory sense of the words used.*—

It must appear to the court, from the words set out in the declaration, that they are capable of conveying or bearing the defamatory meaning assigned to them; and if so, it is for the jury to determine whether, in point of fact, the construction put upon the words by the plaintiff is borne out by the evidence. (*q*) When the words are susceptible of a harmless meaning, it is for the plaintiff to show that they were used in a libellous and not in a harmless sense. If the plaintiff attributes to them a much wider and more extensive meaning than they fairly warrant, or the words do not fairly bear the meaning imputed to them, the defendant will be entitled to a verdict, (*r*) unless the words are manifestly libellous as they stand, and require no meaning to be assigned to them, in which case the meaning assigned to them by the plaintiff may be rejected as surplusage. (*s*) An insensible or repugnant meaning may be rejected as surplusage on demurrer, or on motion in arrest of judgment; but a plaintiff who has by his declaration assigned a particular meaning to equivocal words, which are not necessarily slanderous, and fails to establish that meaning by his evidence, can not reject the meaning he has himself adopted, and resort to another interpretation of the words. (*t*)¹

Where the words used have an equivocal meaning, but are well understood and known in a libellous sense, it is for a jury to say whether they were used in that sense or not. (*u*) "We ought to attribute," observes COLERIDGE, J., "to a jury an acquaintance with ordinary terms and allusions, whether historical, or figurative, or parabolical. If an expression, originally allegorical, has passed into such common use that

(*q*) *Solomon v. Lawson*, *ut sup.* *Hemmings v. Gasson*, *ante.* *Homer v. Taunton*, 5 H. & N. 663; 29 Law J., Exch. 318.

(*r*) *Broome v. Gosden*, 1 C. B. 732. *Williams v. Gardiner*, 1 M. & W. 249.

(*s*) *Harvey v. French*, 1 Cr. & M. 11.

Roberts v. Camden, 9 East, 92.

(*t*) *Williams v. Stott*, 1 Cr. & M. 689. *Smith v. Carey*, 3 Campb. 461. *Sellers v. Till*, 4 B. & C. 655.

(*u*) *Wakley v. Healey*, 7 C. B. 605. *Baboneau v. Farrell*, 15 C. B. 360. *Greville v. Chapman*, 5 Q. B. 745.

¹ *McKinley v. Rob*, 20 Johns. (N. Y.) 351; *Hawks v. Patton*, 18 Ga. 52; *Galloway v. Courtney*, 10 Rich. (S. C.) 414; *Jarnigan v. Fleming*, 43 Miss. 711; *Kennedy v. Gifford*, 13 Wend. (N. Y.) 296; *Com. v. Kneeland*, 20 Pick. (Mass.) 206; *Smith v. Gifford*, 33 Ala. 168; *Dorland v. Patterson*, 23 Wend. (N. Y.) 424; *Allensworth v. Coleman*, 5 Dana (Ky.) 315.

it ceases to be figurative, and has obtained a signification almost literal, we must understand it as it is used." The term "frozen snake," has an application very generally known, which is calculated to bring into contempt a person against whom it is directed. If, therefore, a publication imputes to a person that his friends, who have been assisting him, have realized in him the fable of the frozen snake, it is for a jury to say whether these words do not convey an imputation of ingratitude to friends and benefactors, and if they do, they are actionable. (x)

If the meaning is so obscure and doubtful as to render the document incomprehensible, it is not actionable, although the plaintiff's name may be mentioned therein in an impertinent manner, and the publication may have been evidently intended to vex and annoy him. (y)

In an action for words, some of which, if spoken and understood in their ordinary sense, would certainly be actionable, the jury may consider whether, taking the whole of the conversation together, the particular words are so qualified by the other parts of the conversation as to show that they were not intended to give the idea which their ordinary and primary meaning would give. (z) If the words themselves are not of a defamatory character, they are not actionable, although special damage may have resulted to the plaintiff from the utterance of them. There is no ground for presuming malice from the utterance of words innocent in themselves, and a jury can not infer it. Thus, where the plaintiff, a serving-maid and shopwoman, alleged in her declaration that the defendant maliciously spoke these words concerning her, "She (the plaintiff) secreted 1s. 6d. under the till, stating that these are not times to be robbed;" and that by reason of the speaking of these words by the defendant she had been refused a situation, it was held that, as the words did not of necessity import anything injurious to the plaintiff's character, they were not capable of sustaining an action, although they had been followed by special damage. "It is said," observes PATTESON, J., "that the words are actionable

(x) Hoare v. Silverlock, 12 Q. B. 624.
See Cox v. Lee, L. R. 4 Exch. 284; 38
Law J., Exch. 219

(y) Capel v. Jones, 4 C. B. 263.

(z) Shipley v. Todhunter, 7 C. & P.
680.

because a person, after hearing them, chose in his caprice to reject the plaintiff as a servant. But if the matter was not in its nature defamatory, the rejection of the plaintiff can not be considered the natural result of the speaking of the words wrongful, they must in their nature be defamatory." (a)

1154. *Admissibility of evidence of surrounding circumstances to explain and point the libel—Interpretation of the words used.*—The ordinary popular sense of the writing, language, or words alleged to be libellous or defamatory, is to be taken to be the meaning of the printer, publisher, or speaker of them; but a foundation may be laid for showing another and different meaning. Something may have previously passed which gives a peculiar character and meaning to some expression; and some word, which ordinarily, or popularly is used in one sense, may, from something that has gone before, have a meaning different from its usual one. When, therefore, it is wished to get rid of the ordinary meaning, the witness must be asked if there was anything to prevent those words from conveying the meaning they ordinarily would convey; and if evidence is given, and a foundation laid for it, then the further question may be put, "What did you understand by them?" (b) It must first be shown that the word is used in, and has acquired, a peculiar sense, and then a witness may be asked whether he understood it in that sense. The phrase "lame duck" would be actionable if applied to a person on the Stock Exchange, because there it has acquired a particular meaning, which could be shown. So of the word "black sheep," as applied to an attorney; or of the word "blackleg," if it can be shown that it had acquired a similar signification as applied to gamesters. (c)

The defendant has a right to have the whole of the publication read, in order that the meaning of particular passages may be illustrated and explained by the context of the whole writing; (d) and in an action for oral slander, he is entitled to have the whole conversation of which the slanderous words formed part, given in evidence, in order to explain the meaning of particular expressions, and to show

(a) Kelly v. Partington, 5 B. & Ad. 651.

(b) Daines v. Hartley, 3 Exch. 205.

(c) Watson, B., Barnett v. Allen, 3 H. & N. 381; 27 Law J., Exch. 415.

(d) Cooke v. Hughes, Ry. & M. 115.

that they did not convey the imputation sought to be fastened upon them.¹

1155. *Proof of subsequent libels to explain and point the libel charged in the declaration* may be given, but if the evidence is offered for the mere purpose of swelling the damages, it will be rejected. "The distinction," observes Lord ABINGER, "is, you may give evidence of subsequent words to explain the words in the declaration: but when there is nothing equivocal in the words charged, you can not give evidence of subsequent words of the same import, for which subsequent words another action may be brought and damages recovered; inasmuch as the record in this action would be no bar to a subsequent action for the same words, though the evidence now offered would tend to aggravate the damages in this." (e)

1156. *Proof of successive libels to show malice.*—As the spirit and intention of the person publishing a libel are fit to be considered by a jury in estimating the injury done to the plaintiff, evidence tending to prove it can not be excluded simply because it may disclose another and different cause of action; but whenever the evidence given does disclose another cause of action, the jury should be cautioned against giving any damages in respect of it. And if such evidence is offered merely for the purpose of obtaining damages for such subsequent injury, it will be properly rejected. (f) Defamatory statements, therefore, made by the defendant subsequently to the publication of the libel, are admissible in evidence merely to show malice; but if any considerable distance of time has elapsed between the publication of the libel and the speaking of the words, they ought to be received with very great caution, as they may refer to something that has taken place between the plaintiff and the defendant subsequently to the libel, and may not, therefore, amount to any proof of malice at the time of the publication of the libel. (g)

(e) *Pearce v. Ormsby*, 1 M. & Rob. 456. *kings*, 1 M. & G. 808. *Darby v. Guseley*, 1 H. & N. 13.

(f) *Pearson v. Le Maitre*, 5 M. & Gr. 720; 6 Sc. N. R. 607. *Barwell v. Ad-* (g) *Hemmings v. Gasson*, Ell. Bl. & Ell. 346; 27 Law J., Q. B. 252.

¹ *Com. v. Snelling*, 15 Pick. (Mass.) 321; *Fowle v. Robbins*, 12 Mass. 498; *Carter v. Andrews*, 16 Pick. (Mass.) 1; *Mix v. Woodward*, 12 Conn. 262; *Trafue v. Mays*, 3 Dana (Ky.) 138; *Phillips v. Barker*, 7 Wend. (N. Y.) 439; *Kennedy v. Gifford*, 19 Wend. (N. Y.) 296.

And when such statements are given in evidence, the defendant is entitled to get rid of the effect of them by proving the truth of the words. (*h*)¹

1157. Evidence of malice.—To sustain an action for libel or slander, the plaintiff must show that it was malicious; but every unauthorized publication of defamatory matter is, in point of law, to be considered as malicious, and it is a question of law whether the communication is authorized or not. If it be authorized, the legal presumption of malice arising from the unauthorized publication of defamatory matter fails, and the plaintiff, to sustain his action, must prove actual malice, or, as it is usually expressed, malice in fact. (*i*) Whenever one man is proved to have used words imputing the commission of felony, or of any other indictable offense to another, he will be taken to have used them maliciously, unless he gives some sufficient excuse for using them, as in giving the character of a servant, making a charge to a constable, &c. The defendant's conduct in putting a justification on the record which he does not attempt to prove, and will not abandon, may be taken into consideration by a jury, as proving malice and aggravating the injury, and every other part of the defendant's conduct down to the time of the trial may be considered by the jury; for acts, although subsequent, may indicate the existence of motives at a former time (*k*)²

1158. Proof of injury to the plaintiff.—If the tendency of the publication is injurious to the plaintiff, the law will presume that the defendant, by the act of publishing it, intended to produce the injury it was calculated to effect, and it is the duty of a judge, if he thinks the publication injurious to the plaintiff, to tell the jury it is a libel and actionable. (*l*) Every

(*h*) Warne v. Chadwell, 2 Stark. 457.

(*k*) Simpson v. Robinson, 12 Q. B.

(*i*) Cresswell, J., Coxhead v. Richards, 513.

2 C. B. 605.

(*l*) Haire v. Wilson, 9 B. & C. 645.

¹ Markham v. Russell, 12 Allen, (Mass.) 573; Cavanaugh v. Austen, 42 Vt. 579; Elliott v. Bayles, 31 Penn. St. 165; Deffries v. Davies, 7 C. & P. 112; Howard v. Sexton, 4 N. Y. 157; Stearns v. Cox, 17 Ohio, 590; Johnson v. Brown, 57 Barb. (N. Y.) 118; Lincoln v. Chrisman, 10 Leigh (Va.) 338; Inman v. Foster, 8 Wend. (N. Y.) 602; Randall v. Halsenbake, 3 Hill (S. C.) 175; Shrimper v. Hielman, 24 Iowa, 505; Miller v. Kerr, 2 McCord (S. C.) 285; Robbins v. Fletcher, 101 Mass. 115.

² See note 1, page , ante.

person who publishes in writing matter injurious to the character of another, is considered in point of law to have intended the consequences resulting from his act. (*m*)

1159. Evidence of special damage.—When proof of special damage is essential to the maintenance of the action, it must be proved as laid, and any substantial variance between the allegation and the proof will be ground of non-suit. It must appear also to be the natural and necessary result of the speaking or publishing of the words, or it will fail to sustain the action. Where the plaintiff alleged that he had engaged Madame Mara to sing at his oratorio, and that the defendant published a libel concerning her, in consequence of which she was prevented from singing, from an apprehension of being hissed, whereby the plaintiff lost the benefit of her services, it was held that the injury complained of was too remote, and not to be connected with the cause assigned for it; that if the libel was injurious to Madame Mara, she might have an action for it, but her refusing to perform might have proceeded from groundless apprehension or mere caprice, and not from the publication of the libel; and the plaintiff, therefore, was non-suited. (*n*) If there are two distinct causes of special damage, one proceeding from the act of the defendant, and another from the act of a third party, and the special damage may have resulted from either, it will fail to support an action. (*o*) If the declaration alleges as special damage, that several named persons had ceased to have dealings with the plaintiff in the way of his trade, the persons themselves must be called to prove the fact. (*p*)¹

1160. Proof of the trade, or profession, or official character of the plaintiff.—Where the libel imputes to the plaintiff misconduct in his practice of a physician or surgeon, or as an attorney, and does not call in question or deny his qualification to practice, it will not be necessary for him to do more than prove that he was acting in the particular professional

(*m*) Fisher v. Clement, 10 B. & C. 475.

(*n*) Ashley v. Harrison, 1 Esp. 48.

(*o*) Vicars v. Wilcocks, 8 East. 2.

(*p*) Tilk v. Parsons, 2 C. & P. 202.

Tunnicliffe v. Moss, 3 C. & K. 83.

¹ Maloney v. Dows, 15 How. Pr. (N. Y.) 265; Squier v. Gould, 14 Wend. (N. Y.) 159; Tobias v. Harland, 4 Wend. (N. Y.) 537; Halleck v. Miller, 2 Barb. (N. Y.) 30; Cook v. Cook, 100 Mass. 194.

capacity imputed to him at the time of the publication of the libel. (g) But when the libel or slander imputes to a medical or legal practitioner that he is not properly qualified, and the professional qualification is denied, the plaintiff must be prepared to prove it, by producing his diploma or certificate, (r) duly sealed or signed and stamped, where a stamp is requisite. (s) If the document is not admissible in evidence on its production under the Documentary Evidence Act, (t) the signatures must be proved in the ordinary way.

1161. *Proof that the words were spoken concerning a tradesman or professional man in the way of his trade or profession.*—In order to recover damages for slanderous words spoken of a tradesman or professional man in his trade or profession, it must be shown how the words were connected with his profession. To impute immorality to a clerk of a gas company, to say that he “consorts with whores,” is “a disgrace to the town,” and “unfit to hold his situation,” is not actionable, because they are not connected with his character and conduct as a clerk. He may be a very good clerk, well fitted for his duties, although he is scandalously immoral. (u)

1162. *Evidence on the part of the defendant—Traverse of material allegations.*—If the libel contains a charge upon a man in the way of his trade or business, the allegation concerning such trade or business must, if traversed, be strictly proved as it is set forth in the declaration, and the defendant is at liberty to bring evidence to disprove it, notwithstanding the disproving of the allegation does in effect prove the truth of the libel. If the plaintiff in his declaration alleges that he was, at the time of the publication of the libel, the manufacturer of a particular article, which he supplied to his customers in the way of his trade, and the defendant traverses the allegation, and the plaintiff establishes a prima facie case, the defendant is entitled to prove that the plaintiff did not manufacture the particular article he pretended to make, but a composition of a very different description, although the evidence amounts to proof of the truth of the charge imputed

(g) *Berryman v. Wise* 4 T. R. 366.

Smith v. Taylor, 1 B. & P. N. R. 204.

Rutherford v. Evans, 6 Bing. 451.

(r) As to apothecaries, see 14 & 15. 301.

ct. c. 99, s. 8.

(s) See 33 & 34 Vict. c. 97, ss. 16, 17.

(t) 8 & 9 Vict. c. 113. *Post*, ch. 21.

(u) *Lumby v. Allday* 1 Cr. & Jerv.

by the libel, and there is no plea of justification on the record. (x)

1163. *Proof of the truth of the charge or accusation.*—If the defendant can show that the defamatory charge or accusation made by him against the plaintiff is true in substance, he answers the claim for damages. (y) But to enable him to give the truth in evidence, in answer to the action, there must be a plea of justification on the record. (z) The truth is an answer to the action, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter, though true), but because it shows that the plaintiff is not entitled to recover damages for the law, will not permit a man to recover damages in respect of an injury to character which he either does not, or ought not to, possess. (a)

Where the defendant justifies words which impute a felony to the plaintiff, it is competent to him to go into proof of his justification, although the plaintiff has been tried and acquitted of the charge, the trial and acquittal being *res inter alios acta*. (b) If the plaintiff has been tried and convicted, the conviction may be given in evidence in support of the plea of justification. If a man be adjudged by the sessions to be the father of a bastard child, the adjudication is an answer to any complaint made by him against any one for saying or publishing that he has had a bastard. (c) When the plaintiff has not been actually convicted of the felony, he must be tried by the jury on the plea of justification, in the same way as if he was on his trial upon an indictment for the offense in a criminal court; so that, if there is a doubt of his guilt, the jury are bound to give him the benefit of the doubt. (d) ¹

(x) *Manning v. Clement*, 7 Bing 368.

(y) An inaccurate statement is not, therefore, necessarily libellous. See *Alexander v. North-East. Rail. Co.*, 34 Law J., Q. B. 152.

(z) *O'Brien v. Bryant*, 16 M. & W. 168. *Edsall v. Russell*, 5 Sc. N. R. 801. As to an order for particulars of the matters relied on to prove the truth of the plea, see *Jones v. Bewicke*, L. R., 5 C. P. 32.

(a) *Littledale, J.*, in *McPherson v. Daniels*, 10 B. & C. 272.

(b) *England v. Bourke*, 3 Esp. 80. *Cook v. Field*, Id. 134.

(c) *Thornton v. Pickering*, 1 Freem. 283. *Webb v. Cook*, Cro. Jac. 535. *Rex v. Rislip*, 1 Ld. Raym. 394. *Jervis, C.J.*, *Helsham v. Blackwood*, 11 C. B., 128.

(d) *Richards v. Turner*, Car. & M. 417.

¹ Upon the principle that the truth can hurt no man, the truth of the words charged is now admissible in defense of an action for slander, and if the defense is

If a person publishes a libel and then pleads a justification, the court will not assist him to obtain evidence in support of his plea. (*e*)

1164. *The damage recoverable in actions for defamation* will materially depend upon the nature and character of the libel, the extent of its circulation, the position in life of the parties, and the surrounding circumstances of the case. Where an action was brought for slanderous words, imputing subornation of perjury to the plaintiff, and the defendant suffered judgment by default, and on the execution of a writ of inquiry of damages the plaintiff gave no evidence of any actual damage, but his counsel addressed the jury, who assessed the damages at forty pounds, and the defendant then moved to set aside the inquisition on the ground that nominal damages only were recoverable in the absence of any proof of actual damage on the part of the plaintiff, it was held that the plaintiff was not bound to give any such evidence to support the inquisition. (*f*) If the defendant had any ground to urge in mitigation of damages, he should have proved it before the sheriff's jury.

The jury may give to the plaintiff damages for the publication of the libel and for the mental suffering arising from the apprehension of the consequences of the publication. (*g*) The damages are almost altogether in the discretion of the jury. (*h*) The court will not interfere with them unless they are shown to be manifestly outrageous and extravagant. (*i*)

1165. *Evidence in aggravation of damages* can not, as we have seen, be given, if it establishes another cause of action against the defendant; for if that were permitted, the jury would be giving damages for a second libel in an action for

(*e*) *Metrop. Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 151.

(*f*) *Tripp v. Thomas*, 3 B. & C. 427.

(*g*) *Goslin v. Corry*, 8 Sc. N. R. 25.

(*h*) *Kelly v. Sherlock, L. R.*, 1 Q. B. 686, where the jury gave a farthing, under the circumstances of the case, although

the libels were gross and offensive, and had been frequently repeated. *Forsdyke v. Stone*, L. R., 3 C. P. 607, *acc.*

(*i*) *Gilbert v. Burtenshaw*, Cowp, 230. *Highmore v. Earl of Harrington*, 3 C.B., N. S. 142. *Harrison v. Pearce*, 32 Law T. R. 298.

sustained, is a full and complete bar to the action. *Van Auken v. Westfall*, 14 Johns. (N. Y.) 233; *Perry v. Mann*, 1 R. I. 263; *Bisbey v. Shaw*, 12 N. Y. 67; *Dange v. Pierce*, 13 Ala. 127; *Wagner v. Holbrunner*, 7 Gill. (Md.) 296; *Sheahan v. Collins*, 20 Ill. 325; *Treat v. Browning*, 4 Conn. 406; *Smith v. Smith*, 8 Ired. (N. C.) 29; *Taylor v. Robinson*, 29 Me. 323; *Badwell v. Swan*, 3 Pick. (Mass.) 376.

the first. (*k*) Although a plea of justification, imputing felony to the plaintiff, is abandoned at the trial, and apologized for, still the putting of such a plea upon the record, and failing to prove it, is evidence of malice, and a great aggravation of the defendant's conduct, as showing an animus of persevering in the charge to the very last. The putting of such a plea upon the record, therefore, is a matter proper to be taken into account by the jury in estimating the amount of damages (*l*).¹

1166. *Mitigation of damages*.—A defendant is not now allowed to give evidence of the truth of the defamatory charge or statement in mitigation of damages, (*m*) but must, if he wishes to rely upon it in any way, put a plea of justification on the record. But where the plaintiff, by his declaration, alleges that before the publication of the libel he had always preserved a good character and position in society, from which he has been driven by the insinuations in the libel, and claims damages accordingly, evidence is admissible to show that, prior to the publication of the libel, the plaintiff's character was so bad, that he was universally avoided and shunned; (*n*) for whenever a person claims damages on the ground of disparagement to his character, it may be shown by evidence that his character was blemished prior to the utterance of the slander of which he complains. (*o*).²

Evidence of this sort must, however, be used with extreme caution, or it will tend to the aggravation, rather than the mitigation, of the damages. If the circumstances amount to a justification of the libel, they are not then receivable in

(*k*) *Finnerty v. Tipper*, 2 Campb. 74.

(*l*) *Warwick v. Foulkes*, 12 M. & W.

508,

(*m*) *Underwood v. Parks*, 2 Str. 1,200.

(*n*) *Leicester (Earl of, v. Walter*, 2

Campb, 251.

(*o*) *Lord Ellenborough, C. J., — v.*

Moor, 1 M. & S. 286.

¹ In *Williams v. Harrison*, 3 Mo. 411, it was held that the plaintiff might prove the repetition of the slanderous words after action brought, in aggravation. See also *Kean v. McLaughlin*, 2 S. & R. (Penn.) 469. In *Freeman v. Linsley*, 50 Ill. 497, it was held that where the defendant files a plea of justification, without an honest belief that it could be maintained, it should go in aggravation of damages, and to establish proof of malice; but if the plea is filed in good faith, and fails simply because the plaintiff overcomes the defendant's proof, it should not have that effect; *Wilson v. Nations*, 5 Yerg. (N. C.) 211; *Omsby v. Douglass*, 37 N. Y. 471. See note 1, p.

² See note, 1, p. *ante*.

mitigation of damages, as they should have been pleaded by way of justification if the defendant meant to rely upon them. (*p*) In some cases, general evidence of the plaintiff's bad character has been held to be inadmissible in mitigation of damages. (*q*) In other cases, the defendant has been allowed to prove, by cross-examination of the plaintiff's witnesses, that rumors and reports of the same tenor as the libel, were current prior to the publication of the libel, and were the common topics of conversation. (*r*) Rumors current after the utterance of slander, can not, of course, help the defense, as they are the natural result of the dissemination of the slander, and tend only to aggravate the damages. (*s*)

It is no ground of mitigation of damages that the defendant, at the time he uttered the slander, stated that he heard it from another person, naming such person. (*t*)

1167. *Proof of libels by the plaintiff on the defendant.*—"If a man is in the habit of libelling others, he complains," observes Sir JAMES MANSFIELD, "with a very bad grace, of being libelled himself; and if two men are concerned in publishing monstrous libels against each other every day, there can be no claim of damages on either side." (*u*) But the defendant can not give in evidence, in mitigation of damages, other libels published by the plaintiff concerning him, unless the defendant can show that the libels, proceeding from the plaintiff were connected with the libels proceeding from the defendant, for one libel can not be set off against another, unless it can be shown that they are connected together, and that the libel published by the plaintiff provoked the libel published by the defendant, and that the plaintiff is himself, to a certain extent, the cause of the injury for which he claims compensation in damages. (*x*) When the object is to show that the defendant was provoked, by libels published against him by the plaintiff, to retaliate by publishing the libel of which the plaintiff complains, it is essential to prove that the plaintiff's libels came to the defendant's knowledge

(*p*) *Watson v. Christie*, 2 B. & P. 224 ; *post*, ch. 22, s. 1.

(*q*) *Jones v. Stevens*, 11 Pr. 265.

(*r*) *Wyatt v. Gore*, Holt. N. P. C. 306.

Richards v. Richards, 2 M. & Rob. 557.

(*s*) *Thompson v. Nye*, 20 Law J., Q.

B. 85 ; 16 Q. B. 175.

(*t*) *Bennett v. Bennett*, 6 C. & P. 588

(*u*) *Finnerty v. Tipper*, 2 Campb. 72.

(*x*) *May v. Brown*, 3 B. & C. 126

Tarpley v. Blabey, 2 B. N. C. 441.

before he published his libel. (y) When the libel is published concerning persons not parties to the record, it can not be read in evidence in mitigation of damages. ¹

1168. *Evidence of offers of apology in mitigation of damages.*—By 6 & 7 Vict. c. 96, s. 1, it is enacted, that in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention, given to the plaintiff at the time of filing or delivering the plea in such action), to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity, in case the action was commenced before there was an opportunity of offering an apology.

1169. *Of the judge's direction to the jury.*—The 32 Geo. 3, c. 60, s. 1, enacts, that on trials for libel the jury may give a general verdict of guilty or not guilty, upon the whole matter put in issue, and shall not be required or directed by the court or judge to find the defendant guilty merely on the proof of the publication by the defendant of the paper charged to be a libel, and of the sense ascribed to the same. Also (s. 2) that the judge shall, according to his discretion, give his opinion and directions to the jury on the matter in issue, (z) who may (s. 3) find a special verdict. The usual course in cases of libel since the passing of this statute is, first to give a legal definition of the offense, and then to leave it to the jury to say whether the facts necessary to constitute that offense are proved to their satisfaction, and that, whether the libel is the subject of a criminal prosecution or a civil action. The judge, as a matter of advice to them in deciding the question, may give his own opinion as to the nature of the publication, but is not bound to do so as a matter of law. (a) "The cases," observes Lord DENMAN, "show that a judge must not leave the fact of the defendant's intention as a question for the jury, (b) except so far as the intention may be shown by the tendency of the publication itself. A man may willfully publish a mischievous libel without intending to injure the party, and may be responsible. He may, indeed,

(y) *Watts v. Fraser*, 7 Ad. & E. 232.

(z) *Baylis v. Lawrence*, 11 Ad. & E.

(a) *Parmiter v. Coupland*, 6 M. & W. 108. *Rex v. Watson*, 2 T. R. 206.

(b) *Haire v. Wilson*, 9 B. & C. 645.

¹ *Goodbread v. Leadbetter*, 1 Dev. & Bat. (N. C.) 12.

in effect, do him no harm by the publication; for it may be that blame from some quarters is more valuable than praise. Yet he must answer for such a publication." (c)

It is the duty of the judge to say whether a publication is capable of the meaning ascribed to it; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has that meaning or not. (d)

Where the defendant sets up as a defense that the communication was a privileged communication, but the judge holds that there are comments by the defendant in excess of the privilege, the judge is not thereby justified in telling the jury that the defendant, by exceeding his privilege, has been guilty of a libel, for whenever there is evidence of malice, either extrinsic or intrinsic, in answer to the immunity claimed by reason of the occasion, a question arises which the jury, and the jury alone, ought to determine. Whenever there are expressions in a publication which may reasonably be contended to prove malice, the plaintiff has a right to have the whole matter submitted to the jury, for them to say whether, in writing and publishing it, the defendant was acting bona fide or maliciously. (e) But if words used in a privileged communication are capable of two interpretations, one compatible with, the other incompatible with, the absence of malice, the former interpretation, it seems, should be allowed to prevail. (f)

1170. *Setting aside verdict—Arrest of judgment.*—If the publication is, on the face of it, libellous, and the jury, nevertheless, find their verdict for the defendant, the verdict may be set aside, and a new trial obtained. (g) If the judge and jury think the publication libellous, still if on the record it appears not to be so, judgment must be arrested. (h) If an action be brought for speaking slanderous words all at one time—that is, all in one count—and there is a verdict for the plaintiff, though some of the words will not maintain the action, yet if any of the words will, the damages may be given

(c) Baylis v. Lawrence, 11 Ad. & E. 924.

(d) Sturt v. Blagg, 10 Q. B. 908.

(e) Cooke v. Wildes, 5 Ell. & Bl. 342; 25 Law J., Q. B. 367. Stace v. Griffith, L. R., 2 P. C. Ca. 420.

(f) Spill v. Maule, 38 Law J., Exch 138.

(g) Parmiter v. Coupland, 6 M. & W. 105.

(h) Hearne v. Stowell, 12 Ad. & E. 731. Goldstein v. Foss, 6 B. & C. 159. Solomon v. Lawson, 8 Q. B. 837.

generally ; for it shall be intended that the damages were given for the words which are actionable, and that the others were inserted only for aggravation. But if the action be brought for several slanders spoken at several times, and the action will not lie for the words spoken at one time, but will lie for the words spoken at another, and a verdict be found for all the words, and entire damages given, the judgment will, it seems, be arrested. (*i*) If the words appear, upon the face of the declaration, to have been spoken at one time, the whole may be considered as one count, containing words actionable and not actionable, and the verdict will stand upon those which are actionable. (*k*)

1171. *Indictments for libel and slander.*—Malicious defamation, either in printing or writing, or by signs and pictures, and, in certain cases, by word of mouth, has always been considered an indictable offense at common law, (*l*) as tending to promote strife, and quarrels, and breaches of the peace, by inciting persons to revenge themselves for the affront, or for the preservation of their good name. A libel upon a magistrate or public officer in the execution of his public duty, has also always been considered a great public offense, as it tends to bring the administration of justice and the government itself into contempt.¹

Although the person libelled be dead at the time of the publication of the libel, yet it is punishable, if its tendency is to stir up others of the same family or society to break the peace in vindication of the memory of the deceased, or if it be a libel upon a magistrate or public officer. (*m*)

A person may be indicted and punished criminally, not only for the publication of scandalous writings, but also for singing libellous songs and poems directly tending to a breach of the peace, and for holding up persons to shame and ignominy by ridiculous and degrading pictures and prints, or by reproachful or ignominious signs, such as fixing up a gallows over a man's door. (*n*)

(*i*) Griffiths v. Lewis, 8 Q. B. 852.

(*k*) Alfred v. Farlow, Id. 863.

(*l*) Hawkins' Pleas of the Crown, ch. 73 ; 4 Inst. 174 ; Bract. lib. 3, c. 36.

(*m*) De Libellis Famosis, 5 Co. 254

Rex v. Topham, 4 T. R. 194.

(*n*) De Libellis Famosis, *ut sup.*

¹ State v. Burnham, 9 N. H. 34 ; Com. v. Guild, Thacher's Cr. Cas. (Mass.) 322 ; State v. Perrin, 3 Brev. (S. C.) 152 ; Townshend on Slander, 63.

A person may be convicted, also, of a misdemeanor for publishing a libel upon a class of persons, such as the clergy of a particular diocese, or the residents of a particular locality, if the direct tendency of the publication is to stir up riot and disorder, and incite to a breach of the peace. (*o*)

When a person, either by writing, or by publications in print, or by any other means, calumniates the proceedings of a court of justice, he renders himself liable to an indictment for a misdemeanor; (*p*) but the propriety of a verdict, or the correctness of the decisions of a judge, may be canvassed and controverted, provided it be done with fairness and candor, and temperate reasoning and argument, published with a view to elucidate the truth, and not to bring the administration of justice into hatred and contempt. (*q*)

The composing and writing of a libel, with a view to its publication, is in itself a misdemeanor, triable in the county where the libel was composed and published, though the publication afterwards takes place in a different county. If, therefore, a libel be written in one county and published in another, the libeller may be prosecuted in either county. (*r*)

Upon an indictment, as well as in an action, there is a great distinction between slander by word of mouth and slander in a published writing. As regards slanderous writings, it is said that wherever an action will lie for composing or publishing them, without alleging any special damage, an indictment may also be maintained; (*s*) but an indictment can not be supported for mere verbal slander, unless it is seditious or blasphemous, or directly tending to a breach of the peace, or is uttered respecting a magistrate in the execution of his office. (*t*) Thus, where it was said of an alderman, "When he puts on his gown, Satan enters into it," and of a mayor, "You are a forsworn mayor, and have broke your oath," also, "You, Mr. Mayor, are a rogue and a rascal," it was held

(*o*) *Rex v. Williams*, 5 B. & Ald. 595.
Rex v. Osborne, 2 Barnard, 138, 166.
Anor. 2 Swanst. 503, n.

(*p*) *Rex v. Watson*, 2 T. R. 199.

(*q*) *Rex v. White*, 1 Campb. 359.

(*r*) *Fox v. Burdett*, 4 B. & Ald. 95.

(*s*) Archb. Crim. Plead. 16th Ed. 899, 900.

(*t*) *Rex v. Weltye*, 2 Campb. 142. *R. v. Langley*, 2 Salk. 697. *R. v. Wrightson*, Id.

that these were but loose, unmannerly words, not punishable criminally by indictment. (u)

The 6 & 7 Vict. c. 96, ss. 4, 5, makes a distinction in respect of punishment between persons who maliciously publish defamatory libels, knowing them to be false, and those who publish them without having any knowledge one way or the other on the subject.

1172. *When the truth of the matter may be given in evidence.*—Formerly, in all cases of indictment or information for the public or criminal offense of libel, it was immaterial whether the libel was true or false, or whether the person libelled was of good or ill fame. (x) But now, by 6 & 7 Vict. c. 96, s. 6, it is enacted, that on the trial of any indictment or information for a defamatory libel, the defendant, having pleaded such plea as in the statute mentioned, may have the truth of the libel inquired into, but that the truth of it shall not amount to a defense, unless it was for the public benefit that the matters charged as libellous should be published.

In an information for a seditious libel, the production of the London Gazette, stating that certain addresses had been presented to the Crown, is sufficient evidence of the fact. (y)¹

1173. *Evidence for the defense.*—If, upon the trial of any indictment or information for libel, evidence is given establishing a presumptive case of publication against the defendant by the act of any other person by his authority, it is competent to the defendant to prove that the publication was made without the defendant's authority, consent, or knowledge, and that the publication did not arise from want of due care or caution on his part.

The public offense of libel against a private individual, being only a misdemeanor, does not in anywise suspend or interfere with the right of action for damages. (z)

It is not competent to a defendant charged with the pub-

(u) Reg. v. Langley, 6 Mod. 125. Rex 254.
 v. Pocock, 2 Str. 1158. (y) R. v. Holt, 5 T. R. 436.
 (x) See De Libellis Famosis, 5 Co. (z) See ante.

¹ The truth may be shown in defense to an indictment for a libel, as well as in an action for damages, but the justification must be as broad as the charge. State v. Burnham, 9 N. H. 34; Bartholemey v. People, 2 Hill, (N. Y.) 248; Com. v. Guild, Thacher's Cr. Cas. (Mass.) 329; Com. v. Bonner, 9 Met. (Mass.) 410.

lication of a seditious libel, to prove that similar libels had been previously published by other persons who had not been prosecuted for it. (a)

(a) *R. v. Holt, supra.*

CHAPTER XVIII.

OF FRAUDULENT MISREPRESENTATION AND DECEIT, FRAUDULENT CONCEALMENT, BREACH OF WARRANTY, AND FALSE PRETENSES.

SECTION I.—*Of fraudulent misrepresentation and deceit ; fraudulent concealment and breach of warranty.*

1174. Of willful deceit.

1175. Unintentional deception.

1176. False representations under pretense of a claim of right—False claim of lien.

1177.—Representations by a person of his knowledge of a particular fact, when he knows that he has no knowledge at all about it.

1178. Statements and representations which must be authenticated by a signed writing—False representations concerning the conduct, credit, ability, trade, or dealings of third persons.

1179. Representations concerning the character, credit, trade, or dealings of co-partnerships and joint-stock companies—Authentication thereof by a signed writing.

1180. Misrepresentation by directors and officers of public companies—Publication of deceitful prospectuses and reports.

1181. Fraudulent breach of warranty.

1182. Warranties made pending a negotiation for the sale of property.

1183. Private representations made prior to a sale by auction

forming no part of the public contract of sale.

1184. False representations amounting to a warranty by a person of his knowledge of a particular fact, where the means of knowledge lie peculiarly or exclusively within his reach.

1185. Representations concerning matters which are obvious to ordinary intelligence, and which lie as much within the knowledge of one party as the other.

1186. Representations amounting merely to expressions of opinion and belief.

1187. Statements in answer to inquiries—Information to sheriffs and public officers.

1188. Warranties by vendors on sales of real property.

1189. False representations of title by vendors of corporeal and incorporeal hereditaments—Representations not amounting to a warranty.

1190. Representation of title on sales of chattels amounting to a warranty.

1191. False representations by manufacturers of the character and quality of the articles they manufacture and sell.

1192. Representations by a vendor who is told that the purchaser wants the article he proposes

- to buy for a particular purpose.
93. False representations by vendors made to absent purchasers amounting to a warranty.
194. False representations by vendors where the purchaser has means of examination and judgment—Sale of goods by sample.
1195. False representations by railway companies amounting to a warranty.
1196. False representation of authority — Pretended agency — Deceit by agents.
1197. When a principal is responsible for the fraud of his agent.
1198. False assumption of authority, as between master and servant, employer and employed.
99. Counterfeiting trade-marks—Fraudulent use by one person of the trade-mark of another with intent to deceive.
00. Warranty of the genuineness of articles with trade-marks.
01. Warranty of description as to quantity or country.
32. Fraudulent assumption of the name of a bank.
1203. Deceit by provision-dealers in selling unwholesome food.
1204. False and fraudulent representations by married women and infants.
1205. Fraudulent concealment.
1206. Fraudulent concealment of the dangerous nature of articles delivered to a bailee to be warehoused or carried.
1207. Fraudulent sales with all faults.
- SECTION II.—*Of actions for fraud and deceit, and the remedy by injunction.*
1208. Actions for deceit—Parties to be made plaintiffs.
1209. Parties to be made defendants —Principal and agent.
1210. Joint-stock companies.
1211. Of declarations for deceit.
1212. Declarations for a breach of warranty on the sale of a horse.
1213. Declaration by an agent against a principal for a false representation.
1214. Declarations for fraudulently inducing an architect.
1215. Of the plea of not guilty.
1216. Proof of fraudulent misrepresentation and deceit.
1217. Proof of the representation having been made to the plaintiff.
1218. Proof that the plaintiff relied upon the representation, and not upon his own examination and judgment.
1219. Proof of warranties.
1220. Proof of the terms and conditions of warranty by proof of public notices stuck up in an auction-room or repository where the thing warranted was sold.
1221. Evidence of the breach of warranty of a horse—What constitutes unsoundness.
1222. Proof of manifest defects not covered by the warranty.
1223. Proof of vice
1224. Proof of the use of counterfeit trade-marks.
1225. Remedies in equity for a false representation.
1226. Of the damages recoverable in actions for fraudulent misrepresentation and deceit.
1227. Special damages—Breach of warranty.
1228. Special damages—False assumption of agency.
1229. Prevention of fraud by indictment.
1230. Indictments for obtaining, or endeavoring to obtain, money or goods by false pretenses
1231. Injunction to prevent fraud.
1232. Injunction to prevent the fraudulent use of trade-marks, names, &c.

SECTION I.

OF FRAUDULENT MISREPRESENTATION AND DECEIT; FRAUDULENT CONCEALMENT AND BREACH OF WARRANTY.

1174. *Of willful deceit.*—An action can not be supported for the telling a bare, naked lie, *i. e.*, saying a thing which is false, knowing or not knowing it to be so, and without any design to impose upon or cheat another, and without any intention that another should rely upon the false statement, and act upon it; (a) but if a falsehood be knowingly told, with an intention that another person should believe it to be true, and act upon it, and that person does act upon it, and thereby suffers damage, the party telling the falsehood is responsible in damages in an action for deceit, there being a conjunction of wrong and loss, entitling the injured person to compensation. (b) Where a gun had been delivered by the defendant to the plaintiff for the purpose of being used by him, with an accompanying representation that he might safely use it, and that representation was false to the defendant's knowledge, and the plaintiff, acting upon the faith of its being true, used the gun, and received damage thereby, it was held that he was entitled to recover compensation for the injury from the defendant. (c)¹

(a) Behn v. Kemble, 7 C. B., N. S. 260.

(b) Com. Dig. Action upon the case, DECEIPT, A, 9, A. 10. Parke, B., Watson v. Poulson, 15 Jur. 1112. "Dolus malus est omnis machinatio, calliditas, fallacia, ad circumveniens, fallendum, decipi-

endum aliquem adhibita."—Dig. lib. 4 tit. 3, lex. 1, s. 2.

(c) Langridge v. Levy, 2 M. & W. 530; 4 M. & W. 337. Farrant v. Barnes, 11 C. B., N. S. 553; 31 Law J., C. P. 139. Barry v. Croskey, 2 Johns. & H. 21.

¹ The author's statement of the principle involved in Langridge v. Levy does not cover the entire principle established in that case, and, as the doctrine is important, I will state it here. In that case the gun which produced the injury was not purchased by the plaintiff himself, but by his father, and the plaintiff was not present at the time of its purchase. But the plaintiff's father informed the defendant, at the time of the purchase, that he wanted the gun for the use of himself and his sons, and the defendant warranted the gun to have been made by one, Nock, a manufacturer of guns of excellent reputation, for King George the Fourth. Nock's guns were regarded as safe and reliable, and in that respect had an excellent reputation. The father of the plaintiff purchased the gun in June, 1833, upon these

If a defendant has made a false representation knowing it to be false, with intent to induce, and has thereby induced, the plaintiff to enter into a contract into which, but for that

representations, and he, as well as the plaintiff and other members of the family, used it occasionally until the following December, when the plaintiff, in firing the gun, loaded with an ordinary charge, was injured by its explosion. The question raised in the case was, whether the plaintiff, not having been an actual party to the purchase of the gun, had established such *privity* of interest as entitled him to maintain the action.

PARKE, B., in delivering the opinion of the court, said: "It is clear that this action can not be supported upon the warranty as a *contract*, for there is no *privity* in that respect between the plaintiff and defendant. The father was the contracting party with the defendant, and he alone can sue upon that contract for a breach of it. The question is whether there is enough stated upon the record to entitle the plaintiff to sue, though not on the contract, and we are of the opinion that there is."

We are not prepared to rest the case upon one of the grounds upon which the learned counsel sought to support his right of action, namely, that wherever a duty is imposed upon a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrongdoer. We think the action may be supported without laying down a principle which would lead to that indefinite extent of liability, . . . and we should pause before we made a precedent by our decision, which would be an authority against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of *any person whomsoever*, into whose hands they should pass, and who might happen to be injured thereby. . . . Our judgment proceeds upon another ground. If the instrument in question, which is not in itself dangerous, but which requires an act to be done, that is, to be loaded, in order to make it so, had been simply delivered by the defendant, without any contract or representation on his part, to the plaintiff, no action would have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it. But if it had been delivered to the plaintiff, *for the purpose of being so used by him*, with an accompanying representation that he might *safely so use it*, and that the representation had been false, to the defendant's knowledge, and the plaintiff had acted upon the faith of its being true, and had received damages thereby, *then* there is no question that an action would have lain, upon the principle of a numerous class of cases, of which *Parley v. Freeman*, 3 T. R. 51, is the leading one; which principle is, *that a mere naked falsehood is not enough to give a right of action, but that it must be a falsehood told with an intention that it should be acted on by the party injured, and that act must produce damage to him*. If, instead of being delivered to the plaintiff immediately, *the instrument had been placed in the hands of a third person, for the purpose of being delivered to, and then used by, the plaintiff, the like false representation being knowingly made to the third person, to be communicated to the plaintiff, and the plaintiff had acted upon it*, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the deceit. Nor could it make any difference that the third person *also* was intended by the defendant to be deceived; nor does there seem to be any substantial distinction if the instrument be delivered in order to be so used by the plaintiff, *thou*

misrepresentation, he would not have entered, and the plaintiff has been damaged by the falsehood, a case of fraud is made out, and an action for damages is maintainable. (d)'

(d) Canham v. Barry, 15 C. B. 620.

it does not appear that the defendant intended the false representation itself to be communicated to him.

There is a false representation made by the defendant, with a view that the plaintiff should use the instrument in a dangerous way, and unless the representation had been made, the dangerous act would never have been done. . . . The defendant has knowingly sold the gun to the father for the purpose of being used by the plaintiff, by loading and discharging it, and has knowingly made a false warranty that it might be safely done, in order to effect the sale, and the plaintiff, on the faith of that warranty, and believing it to be true, used the gun, and thereby sustained the damage which is the subject of this complaint. The warranty between these parties has not the effect of a contract. It is no more than a representation, but it is no less; the delivery of the gun to the father is not indeed averred, but it is stated that by the act of the defendant, the property was transferred to the father, in order that the son might use it, and we must intend that the plaintiff took the gun with the father's consent, either from his possession or the defendant's.

We, therefore, think that as there is fraud and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time, as one of its results, the party guilty of the fraud is responsible for the injury.

We do not decide whether this act would have been maintainable if the plaintiff had not known of and acted upon the false representation, nor whether the defendant would have been responsible to a person not within his contemplation at the time of

¹ Fenwick v. Grimes, 5 Cranch. (U. S.) 603; Suydam v. Watts, 4 McLean (U. S.), 162; Paddock v. Strobbridge, 29 Vt. 470; Credle v. Swindel, 63 N. C. 303; but no action can be maintained except for willful deceit, unless the vendor has sustained some actual damage or loss; Salem Rubber Co. v. Adams, 23 Pick. (Mass.) 256; Freeman v. McDaniel, 23 Ga. 354. Nor can an action for deceit in the sale of property be maintained unless the representations were untrue, and known by the person making them to be untrue; Stone v. Denny, 4 Met. (Mass.) 151; Campbell v. Hillman, 15 B. Mon. (Ky.) 515; Pettigrew v. Chellis, 41 N. H. 95; Holmes v. Clark, 10 Iowa, 423; Morton v. Scull, 23 Ark. 289; Walton v. Callaghan, 32 Ga. 382; Gatting v. Newell, 9 Ind. 572; except where the representations were the principal inducements to the purchase, and were made in reference to quality, quantity or value, and were asserted by the vendor as facts, when he did not know whether they were true or not, for in law, as well as in morals, an assertion of a matter as true, which the person does not know to or believe to be true, is as actionable as the assertion of that which is actually false, and, even though the person innocently misrepresented the matter, yet, if the party was thereby misled to his injury, an action lies therefor. But in such cases the representations must be such as to amount to a warranty. Sharp v. New York, 40 Barb. (N. Y.) 256.

SHAW, C. J., in Hazard v. Irwin, 18 Pick. (Mass.) 95, says: "To represent that he knows facts which he does not know, and which, in fact, he can not know cause they are not true, for the purpose of deception, is substantially false, and pro-

But if it be a contract made with the defendant, the plaintiff, on discovering the fraud, should at once repudiate the contract; for, where the plaintiff engaged to convey away cer-

sale, to whom the gun might have been sold or handed over. *We decide that he is responsible in this case for the consequences of his fraud whilst the instrument was in the possession of a person to whom his representation was, either directly or indirectly, communicated, and for whose use he knew it was purchased.*" The rule to be deduced from this case, then, is much broader than that stated by the author, and seems to be this: A person who, by false representations and fraud in the sale of an article to be used for a particular purpose, *knowing* that it is to be used by other persons than the plaintiff, and the persons are designated, so that the person making the representations can be said to have such use by such persons in contemplation, he is liable for any damage resulting to such persons from the use of such article *in its ordinary way, and for ordinary purposes*, if such article is not as represented by him, in consequence of which the injury resulted. The principle established in this case was carried somewhat further in an American case, *Thomas v. Winchester* (6 N. Y. 397), and we are not aware that the doctrine of this case has ever been controverted. In that case it was held that where a person negligently sells a *poisonous* drug, dangerous to life, for a *harmless* one, he is liable to *any* person who sustains injury therefrom, upon the ground, not that the injury vested in contemplation, but that it resulted from a violation of a duty to the public, which requires the exercise of the *highest* care on the part of persons vending articles that, in their ordinary use, endanger human life. In that case the doctrine was broadly asserted that a dealer in drugs, who carelessly labels a deadly poison as being a harmless drug of a different kind and name from that which in fact is, is liable to all who, without fault on their own part, are injured by using it, in consequence of the false label. In

duces all the ill effects of falsehood." See also *Harding v. Randall*, 15 Me. 332; *Craig v. Ward*, 36 Barb. (N. Y.) 377; *Hubbard v. Briggs*, 31 N. Y. 518; *Foster v. Kennedy*, 38 Ala. 359; *Smith v. Richards*, 13 Pet. (U. S.) 26; *Terhune v. Dener*, 36 Ga. 648; but see *Marshall v. Gray*, 39 How. Pr. (N. Y.) 172; *Wheeler v. Randall*, 48 Ill. 182. But no action lies when the vendee *knows* the representations are false. In such a case he can not be said to rely upon them, or to have been defrauded or injured thereby. *Ely v. Stewart*, 2 Md. 408; *Anderson v. Burnett*, 6 Miss. 165; *Clopton v. Clozart*, 21 Miss. 363.

False representations in reference to minor matters that do not operate as an inducement to the purchase or the making of the contract—mere puffing, or expressions of an opinion rather than of a substantial fact in reference to a material matter, are not actionable. In order to form the basis of an action, they must amount to a statement of facts rather than opinion, in reference to *material matters*, and must be such as the party not only did, but had a right to rely on, and they must have been made in reference to matters not equally open to the observation of both parties, and of which the party complaining could, by reasonable prudence, have attained correct knowledge. A person can not rely upon the statements of others too implicitly. He must, when he reasonably can, exercise reasonable diligence himself; and if he blindly trusts another, or closes his eyes when he should see, he can not predicate an action for the damage. Thus, for a man to rely upon a representation that a horse is *not blind*, when both eyes are out, or that it is sound and all right, when it has but three legs, would hardly be actionable even under an ex-

tain rubbish for a certain price under a false representation by the defendant as to the amount of rubbish to be moved, it was held that having knowledge of the fraud before the work

such a case the liability does not rest upon any contract or direct privity between the vendor and the person using the drug, but *out of a public duty, which imposes upon every person to avoid acts in their nature dangerous.*

The distinction between the doctrine of this case and that of *Langridge v. Levy* is quite marked. In the latter, the article itself, and by itself, was not dangerous. It was only its use in connection with other agencies, as gunpowder, &c., that made it so, and the sale of it was not unlawful; therefore, however much fraud was practised by the seller, he could not be made liable for injuries resulting from it, except such as were fairly within his contemplation at the time of sale, and to such persons as he had noticed would use the article. Thus, if A sells B a horse, and falsely warrants it to be kind and steady, to be used in a livery, to let for hire, when in fact, it is a vicious and unmanageable animal, he would be liable to B for all damage sustained by him from injuries resulting from the viciousness of the horse, *but he would not be liable to a person who hired the horse of B* for injuries resulting to him from its viciousness, *although he knew and was informed that it was to be let for hire.* So, if a blacksmith shoes a horse defectively, in consequence of which he falls and injures a person who is riding it, having procured it from the owner for that purpose, the blacksmith can not be held chargeable in damages for the injury, *for there is no privity between him and the person injured, and he owed him no duty in respect to the shoeing of the horse, public or private.* But in all cases *where the act itself is unlawful*, the defendant is liable to *any person* sustaining injury therefrom, as a natural and necessary result of the act. *No privity is necessary in such a case except such as grows out of the unlawful act.* *Myers v. Malcolm*, 6 Hill (N. Y.), 272; *Vanderburgh v. Truax*, 4 Den. (N. Y.) 464; *Underwood v. Stuyvesant*, 19 Johns. (N. Y.) 181. But in order to predicate liability, the injury must grow out of the ordinary use of the article, in the ordinary way, and for ordinary purposes, or a use of which the vendor had notice, so that the injury can be said to be *the natural or necessary consequence of the wrong.* If the article itself is not dangerous, and only becomes so by a particular use to which it is not ordinarily devoted, or in the case of a drug or chemical, by being mixed with other substances with which it is not ordinarily used, and of which use the vendor has no notice, no liability can arise against the vendor for any fraud practised by him or for any negligence by which he delivers a different article from that intended, *except to the purchaser himself.* The rule is that, for an injury resulting from a breach of con-

press warranty, unless the horse was purchased without being seen by the purchaser. Thus, as to all defects or faults apparent upon inspection, without the exercise of any particular skill, if the purchaser has the opportunity for examination, he must see for himself, and *has no right to be deceived.* *Frenzel v. Miller*, *ante*; *Hager v. Grassman*, 31 Ind. 223; *Smith v. Webb*, 64 N. C. 541. In *Beebe v. Keep*, 28 Mich. 53, the court say: "In order to maintain an action for deceit in making false representations, it is not necessary to show that the party making them *knew* them to be false. *If a party recklessly makes a false representation, of the truth or falsehood of which he knows nothing*, for the fraudulent purpose of inducing another, in reliance upon it, to make a contract or do an act to his prejudice, and the other party does rely on it, he is liable for the fraud as much as if he had known it to be false."

was finished, he was not at liberty to finish the work and then sue for more than the stipulated price. He ought to have repudiated the contract at once. (e)¹ It is not necessary in all cases to show that the defendant knew the representation to be untrue; for if he made the statement for a fraudulent purpose, and without believing it to be true, and with the intention of inducing the plaintiff to do an act, and the plaintiff does the act to his own prejudice, an action for damages is maintainable. (f)²

1175. *Unintentional deception*.—But a person who has reason to believe, and actually believes, a particular fact to be true, and accordingly represents what he believes, is not liable to an action merely because it turns out that he was mistaken, and that his representation was unintentionally false; (g) for, if every untrue statement which produces damage to another would found an action at law, a man might sue his neighbor for any mode of communicating erroneous information, such (for example) as having a conspicuous clock too slow, whereby the plaintiff was induced to neglect some important duty; but if it be shown that the defendant was under any legal obligation to state the truth correctly to the plaintiff, there would be a legal grievance in misleading him, for which an action would lie; still more so, if he made the false representation with a view to some unfair advantage to himself. (h)³

(e) Selway v. Fogg, 5 M. & W. 86.

Orinrod v. Huth, 14 M. & W. 664. Childers v. Wooler, 29 Law J., Q. B., 129.

415.

(f) Taylor v. Ashton, 11 M. & W.

(h) Barley v. Walford, 9 Q. B. 208.

(g) Collins v. Evans, 5 Q. B. 826.

tract merely, no action, whether *ex contractu* or *ex delicto*, can be maintained, *except by those who are privy thereto*. But when the injury results from the breach of public duty, any person injured may maintain an action therefor Davidson v. Nichols, *et al.*, 11 Allen (Mass.) 517; Longmird v. Halliday, 6 Exch. 761; Thomas v. Winchester, 6 N. Y. 397; Lasser v. Clute, 53 N. Y. 169; Loop v. Litchfield, 42 N. Y. 351.

¹ Carroll v. Rice, Walk. (Mich.) 373.

² Foster v. Kennedy, 38 Ala. 359; Hubbard v. Briggs, 31 N. Y. 578; Hazard v. Irwin, 13 Pick. (Mass.) 95; Grove v. Hodges, 55 Penn. St. 504; Frenzel v. Miller, 37 Ind. 1; Elder v. Allison, 45 Ga. 13; Craig v. Ward, 1 Abb. (N. Y. App.) 454.

³ Wheeler v. Randall, 48 Ill. 182; Marshall v. Gray, 39 How. Pr. (N. Y.) 172; Weed v. Case, 55 Barb. (N. Y.) 534; Taylor v. Seaville, 54 Barb. (N. Y.) 54; Bunkhead v. Alloway, 6 Cold. (Tenn.) 56; unless he states a matter to be true when he does not know whether it is true or false, or when the representation is as to a material

In order to maintain an action for deceit, or for a false and fraudulent representation, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff; it is enough if a representation is made which the person making it knows to be untrue, and which is intended or calculated to induce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred. A willful falsehood of such a nature is, in the legal sense of the word, a fraud. (*i*)¹ Whether the defendant has any interest in the assertion he makes, or in the matter respecting which it is made, is perfectly immaterial. (*k*)² And whether the representation be made to the plaintiff, or a third party, is immaterial, if it is false to the knowledge of the defendant, and has been made for the purpose of being communicated to the plaintiff, in order that he might act upon it, and the plaintiff has acted upon it, and has sustained damage from the deceit. (*l*)³ The general rule appears to be, that if any man makes a fraudulent representation for another to act upon, either directly or indirectly,

(*i*) Ld. Tenterden, C. J., *Polhill v. Walter*, 3 B. & Ad. 123. (*k*) *Pasley v. Freeman*, 3 T. R. 60, 62.
 Milne v. Marwood, 15 C. B., 778; 24 Law J., C. P. (*l*) *Langridge v. Levy*, *ante*.

matter, and amounts to a false warranty. *Terhune v. Dener*, 36 Ga. 648; or there are facts or circumstances that should put him on his guard as to the truth of the statement; *Craig v. Wood*, 36 Barb. (N. Y.) 377.

¹ *Foster v. Kennedy*, 38 Ala. 389; *Bennett v. Judson*, 21 N. Y. 238; *Wakeman v. Dailey*, 51 N. Y. 27; *Hubbell v. Meigs*, 50 Id. 480; *Reid v. Flippen*, 47 Ga. 373

² If A, with a fraudulent purpose, to enable B to defraud C in the sale of property, falsely represents that the property is different from what it is, or is of greater value than is asked for it, or, as in the case of a horse, is sound when in fact it is not sound, and he *knows* it, thus inducing or encouraging C to buy it, he is answerable for the fraud as much as though he sold the property himself as his own. *Bean v. Herrick*, 12 Me. 226; *Carpenter v. Lee*, 5 Yerg. (Tenn.) 265; *Irwin v. Sherrell*, 7 Tayl. (N. C.) 1. So, where, by false representations as to pecuniary standing, he induces credit to be given to one who is, in fact, insolvent; *Newsom v. Jackson*, 26 Ga. 241; *Stiles v. White*, 11 Met. (Mass.) 356; *Medbury v. Watson*, 6 Met. (Mass.) 246; and in all cases where one, either by words or actions, by false representations with intent to deceive another, and by which he is *in fact* deceived and damaged, an action lies, even though the person guilty thereof *had no interest in making them, and was not to be personally benefited thereby*; *Nowlan v. Cain*, 3 Allen (Mass.), 361; *Hubbard v. Briggs*, 31 N. Y. 518; *Ives v. Carteor*, 24 Conn. 532; *Eames v. Morgan*, 37 Ill. 360; *McAleeer v. Murray*, 58 Penn. St. 126; *Weed v. Case*, 55 Barb. (N. Y.) 534.

and such representation is calculated to induce that other person to act on it, and he does act on it, the person who makes the representation is responsible in damages. Thus, where a director of a company puts forth transferable shares into the market, and publishes and circulates false statements and representations for the purpose of selling the shares, the false representation is deemed in law to be made to all persons who read the public announcements, and become purchasers of shares on the faith of the statements contained in them. (m)¹ But it must be shown that the damage of which the plaintiff complains was brought about by the wrongful act of the defendant. (n)²

(m) Scott v. Dixon, 29 Law J., Exch. 623. Barry v. Crosky, *ante*.
62, n. Bedford v. Bagshaw, Id. 65. Ld. (n) Collins v. Cave, 4 H. & N 234 ;
Campbell, Wilde v. Gibson, 1 H. L. C. 28 Law J., Exch. 204.

¹ In Nelson v. Taylor, 46 How. Pr. (N. Y.) 355, the plaintiff sued the defendants as directors of "The New York and Bremen Steamship Co.," for fraudulently combining to organize said company, for the purpose of deceiving such of the public as might be induced to become stockholders therein, and with inducing the plaintiff, by false and fraudulent representations, to purchase a number of shares therein. It was held that; in order to entitle the plaintiff to recover, he must show that the representations claimed to be fraudulent, *were not only false in fact*, but that *they were made with a fraudulent intent to deceive*. And that, while fraud would not be presumed, yet it would be inferred from evidence of their falsity, and the fact that the defendants *knew* them to be false, or that they professed knowledge of their truth, when in fact they were conscious that they had none, but that in either case a *fraudulent intent* is essential.

² There can be no actionable fraud unless attended with actual damage. Both *fraud and damage* must concur. Upton v. Vail, 6 Johns. (N. Y.) 181 ; Bennett v. Terrill, 20 Ga. 83 ; Zabriskie v. Smith, 13 N. Y. 322 ; Nye v. Merriam, 36 Vt. 438 ; Hanson v. Edgerley, 29 N. H. 343 ; Nowlan v. Cain, 3 Allen (Mass.), 261. The rule is, that to entitle a party to maintain an action for fraud by false representations, there must be proof, not only that the assertions *were* false, but that they related to a material matter, and were made with an *intent* to defraud, and have been productive of actual damage. Taylor v. Saville, 54 Barb. (N. Y.) 34 ; Taylor v. Guest, 58 N. Y. 262.

In Marsh v. Falker, 40 N. Y. 562, the rule as to the necessity of proving a fraudulent *intent* in an action for deceit, arising from false representations, was thus stated : "An *intent* to deceive is essential to sustain an action for false representations ; and the rule, that one who makes representations which are untrue, upon a subject as to which he has no knowledge, may be held liable for deceit, should be limited to cases where the circumstances indicate that *he intended the injured party to suppose that he spoke from actual knowledge*."

In determining whether the representations are mere expressions of an opinion or statements of *facts* as such, reference must always be had to the subject-matter to which they relate, the circumstances under which they were made, and the difference

1176. False representations under pretense of a claim of right.—*False claim of lien.*—An action is maintainable for a false and malicious representation, though made under the pretense of a claim of right, if it was made without reasonable and probable cause, and must have been known to be false, by the person making it, and special damage has resulted to the plaintiff from the wrongful act. Thus, where a defendant, knowing that there had been no agreement between him and the plaintiff for a lien on the plaintiff's goods, falsely pretended that he was entitled to a lien on them, and made the representation without any reasonable foundation for it, and from improper and malicious motives, and damages resulted therefrom to the plaintiff, it was held that the defendant was bound to make compensation to the plaintiff for the wrong done to him. (o)¹

1177. Representations by a person of his knowledge of a particular fact, when he knows that he has no knowledge at all about it.—If a man undertakes positively to assert that to be true which he does not know to be true, and which he has no grounds for believing to be true, in order to induce another to act upon the faith of the representation, and the representation is acted upon and turns out to be false, and the person who has acted upon it has been deceived and damnified, he is entitled to maintain an action for compensation. Whoever

(o) *Green v. Button*, 2 C. M. & R. 716.

in the means of knowledge in reference to the matter between the plaintiff and defendant. If the plaintiff *ought*, by reasonable diligence, to have known the truth or falsity of the statements, or had equal facilities for knowing as the defendant, he can not by blindly believing where he ought not to have believed, or trusting where he ought not to have trusted, or shutting his eyes where he ought to have kept them open, charge the defendant with the consequences of his folly. Every man is bound to exercise his judgment when he can do so, but when the *means* of forming a correct conclusion are peculiarly possessed by one, then, if that person misrepresents and deceives another to his damage, he is liable, otherwise not. *Marsh v. Falker*, *ante*; *Frenzel v. Miller*, 37 Ind. 1; *Ellis v. Andrews*, 56 N. Y. 83.

¹ *Paull v. Halferty*, 63 Penn. St. 46; *Kendall v. Stone*, 5 N. Y. 14; *Stark v. Chetwood*, 5 Kan. 141; *McDaniel v. Baca*, 2 Cal. 326; *Hill v. Ward*, 13 Ala. 310; *Swan v. Tappan*, 5 Cush. (Mass.) 104. See upon this subject a very full and satisfactory note to the case of *Malachy v. Soper*, in Bigelow's *Leading Cases on The Law of Torts*, where the editor has brought together the cases, English and American, bearing upon the question, and eliminated the doctrines in a very able and satisfactory manner.

pretends to positive knowledge of the existence of a particular fact, when in truth he knows nothing at all about it, does in reality make a willful representation, which he knows to be false, and if the representation is made in order that another may rely and act upon it, and it is acted upon, and damage flows from the false representation, the person making it is in principle guilty of willful deception and fraud. (*p*) Lord MANSFIELD lays it down generally that, in a representation made to induce a person to enter into a contract, it is equally actionable for a man to undertake to assert that of which he knows nothing, as to affirm that to be true which he knows to be false. (*q*) And, says Lord KENYON, "If a man affirms that to be true within his own knowledge which he does not know to be true, this falls within the notion of legal fraud. The fraud consists in asserting positively his knowledge of that which he did not know." (*r*) So, according to MAULE, J., "If a man, having no knowledge whatever upon the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud; for he takes upon himself to warrant his own belief of the truth of that which he asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may, nevertheless, have been fraudulently made." (*s*)¹

(*p*) *Smout v. Ilbery*, 10 M. & W. 10.
Cresswell, J., and Wilde, C. J., Jarrett v. Kennedy, 6 C. B. 322. *Erle, J., Jenkins v. Hutchinson*, 13 Q. B. 748.
Randell v. Trimen, 18 C. B. 786.

(*q*) *Pawson v. Watson*, Cowp. 788.
Pulsford v. Richards, 17 Beav. 94.
(*r*) *Haycraft v. Creasy*, 2 East. 103.
(*s*) *Evans v. Edmond's*, 13 C. B. 786.
Milne v. Marwood, 24 Law J., C. P. 37.

¹ Where a person makes a statement honestly believing it to be true, he will not, generally, be held liable for fraud, even though the statement subsequently proves to be untrue. *Weed v. Case*, 55 Barb. (N. Y.) 534. But where he asserts that to be true of the truth or falsity of which he has no knowledge, with a view of inducing another to rely and act upon it, he is treated as warranting the truth of the statement, and if another has acted upon it to his damage he is held chargeable for all the consequences. The fraud consists in asserting that as a fact, in reference to a material matter, when he knew that he had no knowledge as to its truth or falsity, and when he could not have had because the *fact* did not exist. The assertion, however, must have been made with a *fraudulent intent*. *Marsh v. Falker*, 40 N. Y. 562. The rule in reference to such matters was well stated in *Cabot v. Christie*, 42 Vt. 121, substantially thus: A person may render himself liable to an action of damages for deceit, by stating his *mere belief as knowledge*. Thus, if the vendor of

1178. Statements and representations which must be authenticated by a signed writing.—False representations concerning the conduct, credit, ability, trade, or dealings of third persons.—By 9 Geo. 4, c. 14, s. 6, it is enacted, that no action shall be brought to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods, unless such representation or assurance be made in writing, signed by the party to be charged therewith. A representation to be within the Act, must be of the third person's trustworthiness, as evidenced by his character, conduct, ability, credit, trade, or dealings, with intent that he may obtain personal credit on the faith of such representation. (*r*) Any representation that a person may be trusted, constitutes a representation as to his credit and ability. (*u*) If the representation is in writing, and signed by the defendant pursuant to the statute, and the defendant at the time he makes the representation knows that it is untrue, he will be responsible in damages in an action for deceit, if the plaintiff has been induced to give credit on the faith of it, (*x*) although he has not relied altogether on the writing, but has trusted partly to the writing and partly to subsequent oral representations. (*y*)

(*t*) As to representations of the ability of parties, see *Lyde v. Barnard*, 1 M. & W. 101, and *Harmar v. Alexander*, 2 B. & P. N. R. 241, decided before the passing of the statute.

(*u*) *Swann v. Phillips*, 8 Ad. & E.

461.

(*x*) *Pasley v. Freeman*, 3 T. R. 51. *Foster v. Charles*, 6 Bing. 400; 7 Bing 107.

(*y*) *Tatton v. Wade*, 18 C. B. 371. *Wade v. Tatton*, 25 Law J., C. P. 242.

land has only an opinion or belief as to the quantity contained in the tract he offers to sell, to *pass off such belief as knowledge* is an imposition, and is actionable if the quantity is overstated. And this is so if he makes an absolute statement which is understood and intended as a statement upon knowledge, *although, in terms, he does not profess to have knowledge*. Generally, a declaration is not deemed fraudulent *if the declarant believes it to be true*. But a person who is aware that he has only an opinion, *who represents that opinion as knowledge, can not believe that representation as true, for he knows that his representation, when stated as positive knowledge, although it rests in opinion merely, is false and fraudulent*. See also *Sharp v. New York*, 40 Barb. (N. Y.) 56; *Smith v. Babcock*, 2 W. & M. (U. S.) 246; *Hazard v. Irwin*, 18 Pick. (Mass.) 95; *Bennett v. Judson*, 21 N. Y. 238; *Harding v. Randall*, 15 Me. 332; *Craig v. Ward*, 36 Barb. (N. Y.) 377; *Foster v. Kennedy*, 3 Ala. 359; *Terhune v. Dener*, 36 Ga. 648.

Where the defendant's son, being about to open a shop, applied to the plaintiffs for a supply of goods upon credit, stating that he had a capital of £300 to begin with, and referred them to his father, the defendant, for a corroboration of his statement, and the plaintiffs wrote to the father inquiring whether the son had, as he asserted, £300 capital, his own property, and the defendant wrote in reply that he had, whereas the defendant knew that his son had nothing but borrowed capital, it was held that this was a fraudulent misrepresentation, for which the defendant was liable in damages to the plaintiffs in an action for deceit. (z) But if the person makes the representation in good faith, honestly believing it to be true, and has reasonable ground for his belief, he is not then responsible if he is altogether mistaken, and formed a wrong judgment in the matter, whatever damage may have resulted to the plaintiff therefrom. (a)

1179. *Representations concerning the character, credit, trade, or dealings of co-partnerships and joint-stock companies—Authentication thereof by a signed writing.*—A representation by one of several partners as to the trustworthiness of the firm, is a representation as to the credit of another person within the statute. It is not the less a representation of the solvency of the other partners that it includes himself. (b)¹ The word "person" is of extensive signification, and is applicable to a corporation sole or aggregate, as well as to a private individual; (c) so that representations by one member of a company as to the circumstances, credit, and condition of the company, in order to induce another to lend his money, or subscribe, or take shares in the undertaking, must be authenticated by a signed writing, in order to be made the foundation of an action for deceit. (d)

1180. *Misrepresentation by directors and officers of public companies—Publication of deceitful prospectuses and reports.*—

(z) Corbett v. Brown, 8 Bing. 33.

(a) Haycraft v. Creasy, 2 East, 105.

(b) Devaux v. Steinkeller, 6 B. N. C.

89.

(c) Boyd v. Croydon Rail. Co., 4 B. N. C. 669.

(d) As to the recovery of money paid on the strength of fraudulent representations of the condition of trading companies, see Wontner v. Shairp, 4 C. B. 439. Watson v. Earl Charlemont, 12 Q. B. 856.

¹ Roberts v. Adams, 8 Port. (Ala.) 297; Chester v. Dickerson, 52 Barb. (N. Y.) 349; Bullard v. Lockwood, 1 Dal. (N. Y. C. P.), 158.

Where a defendant, knowing that a joint-stock company, of which he was a promoter and director, was a bubble company, and that no bona fide dividend could be paid upon the shares, fraudulently pretended by a signed writing to guarantee the bearer of shares a minimum annual dividend of 33 per cent., to induce persons to purchase shares, and the plaintiff, by reason of this representation, purchased shares and lost his money, it was held that the defendant was responsible in damages to the plaintiff in an action for deceit. (e)¹ And where the defendant, a director of a joint-stock

(e) Gerhard v. Bates, 2 Ell & Bl. 490.

¹ After the formation of a corporation, so that it has a legal existence as such, it is liable for fraud or deceit in the conduct of its business by its directors or agents authorized by it; but, for frauds practiced in securing shares of the company, to be subscribed for, *before* the company has been organized, so as to have an individual or legal existence *as a corporation*, the individuals practicing the fraud would alone be liable, and it is doubtful whether the corporation, *after* its organization—the fraud being complete before—could be held chargeable therewith, even by a ratification of the acts of such persons, such persons can not be said to have acted as the *agents* of the corporation, *for at that time no such corporation existed*, and a person can not act as the agent of a person or corporation that does not exist. Upon the question of the liability of corporations for frauds practiced by its directors or agents, see Vance v. Erie R. R. Co., 3 Vr. (N. J.) 334.

In Fogg v. Griffin, 2 Allen (Mass.), 1, the action was brought by an assignee of an insurance company, against a policy holder, upon notes given for premiums upon policies of insurance issued by it to the defendant. The defendant admitted the making of the notes, but set up fraud in defense, which fraud consisted in representations as to the pecuniary ability of the company, by its agents, through whom the insurance was effected. The court held that the company was liable for frauds practiced by its agents within the scope of his duties, and that his representation, as to the pecuniary ability of the company being false, was a defense to the action. BIGELOW, C. J., said: "A corporation can act only through its agents. If they, while exercising the authority conferred on them, are guilty of falsehood and fraud, their principal is liable for the consequences which may flow therefrom. The true list of the liability of the principal in such cases, is whether, in committing a fraud, the agent was acting in the business of his principal. *If he was engaged in the course of his employment*, then, parties injured by his misconduct or fraud can resort for redress to the persons who clothed him with the power to act in their behalf, and who have received the benefits resulting from his agency." Foster v. Essex Bk., 17 Mass. 479; Fuller v. Wilson, 3 Ad. & Ell. (U. S.) 58.

In N. Y. & N. H. R. R. Co. v. Schuyler, 17 N. Y. 592, it was held that, where an officer of a corporation was vested with power or authority to issue stock of the company, issued *spurious* certificates of stock, which, on their face, purported to be genuine, and which were undistinguishable from the genuine, the company was liable to the holders of such stock for all the damages they had sustained from its purchase. See, also, N. Y. & N. H. R. R. Co. v. Schuyler, 38 Barb. (N. Y.) 534.

bank, sanctioned the publication of a report, with his signature attached thereto, professing to set forth the state and condition of the bank, and representing that a particular dividend had been fairly earned, and was properly payable out of profits, and the report was publicly sold, and the plaintiff purchased a copy of it, and read it, and bought shares in the bank, relying on its correctness, and the bank was proved to be insolvent to the knowledge of the defendant, at the time he sanctioned the publication of the report, and the plaintiff lost his money, and incurred serious liabilities, it was held that he was entitled to maintain an action against the defendant for damages. (*f*)

If, therefore, directors of public companies authorize the publication and circulation of prospectuses and advertisements concerning the transactions and monetary affairs of the company, containing statements, with their signatures annexed thereto, which are false, to the knowledge of the directors, or which the directors, from their position and means of knowledge, may fairly be taken to warrant as true, (*g*) or if, on the formation of the company, they conceal a material fact, they will be personally responsible, both at law and in equity, to parties who have taken shares, and invested money in the company, on the faith of those prospectuses,

(*f*) *Scott v. Dixon*, 29 Law J., Q. B. 62, n. *Bedford v. Bagshaw*, 4 H. & N. 548; 29 Law J., Exch. 59. *Barry v. Croskey*, *ante*; *Stainbach v. Fernley*, 9 Sim. 566.

(*g*) *Ante*. *Taylor v. Asheton*, 11 M.

& W. 415. *New Brunswick, &c., Rail. Co. v. Conybeare*, 31 Law J., Ch. 297. *The Same v. Muggeridge*, 30 Ib. 242; 1 Dr. & Sm. 363. *Smith's Case*, L. R., 2 Ch. App. 604.

As to instances in which corporations have been held liable for the fraud and misconduct of its officers, see *Barksdale v. Finney*, 14 Gratt. (Va.) 338, where it was held that, where the president of a mining company, who was also trustee under a marriage settlement, in violation of his trust, sold all the trust property at auction, and purchased a part of it as *manager of the company*, the corporation was liable as participants in the breach of trust.

Corporations are held liable for a libel perpetrated by its agents under its authority; *Phila. &c. R. R. Co. v. Quigley*, 21 How. (U. S.) 202; *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48; so for assault and battery committed by its agents in the scope of their employment; *Moore v. Fitchburgh R. R. Co.*, 5 Gray (Mass.) 465; *Brokur v. R. R. Co.*, 32 N. Y. 328; so for malicious prosecution; *Vance v. Erie R. R. Co.*, 32 Id. 334; and generally, corporations are liable for torts commanded or authorized by them, of all descriptions; *Beach v. Fulton Bank*, 7 Cow. (N. Y.) 485; *Lyman v. White Riv. Br. Co.*, 2 Aik. (Vt.) 255; *McCready v. Guardward*, 9 S. & R. (Penn.) 94.

and have sustained damage in consequence thereof. (*h*) But the person defrauded would not, it seems, in such a case, be entitled to sue the company for the deceit. (*i*) So, if the officers of the company knowingly and fraudulently aid in the concoction of false and deceitful reports, to induce persons to invest in the company, and investments are made and losses sustained by persons who have acted on the faith of such reports, the officers so acting will be responsible to the parties they have defrauded. (*k*)

Directors and officers so acting may also be punished for a misdemeanor, or fined, &c. (*l*) These statutes, however, do not in anywise interfere with the civil remedy by way of action against any such director, manager, or officer, for damages for fraud and deceit; the rule requiring parties to proceed for the criminal offense before they pursue their civil remedy applying only, as we have seen, to *felonies*.

To support the action, the plaintiff must prove that he acted on the faith of the representation, and sustained actual pecuniary damage in consequence thereof, (*n*) and that the statements were false, not highly colored merely. (*o*) But it is no answer that the plaintiff might have ascertained the truth by proper inquiry, (*p*) or that the statements were in a sense literally true, if calculated and intended to mislead, *e.g.*, that so many shares had been already subscribed for, when in fact all that had been obtained was a contract to place so many, (*q*) or that all that is stated is true, if material facts have been omitted. (*r*) The plaintiff is, however, it seems, bound

(*h*) *Clarke v. Dixon*, 28 Law J., C. P. 225; 6 C. B., N. S. 453. *Hill v. Lane*, L. R. 11 Eq. Ca. 215. *Peek v. Gurney*, L. R. 13 Eq. Ca. 79. Or the shareholders may plead fraud in an action for calls. *Bwlch-y-plwm Mining Co. v. Baynes*, L. R., 2 Exch. 324.

(*i*) *Weston Bank of Scotland v. Addie*, L. R., 1 Sc. & Div. App. 158, 166, 167. See *Henderson v. Lacon*, L. R., 5 Eq. Ca. 249.

(*k*) *Cullen v. Thompson*, 6 Law T. R., N. S. 870.

(*l*) 24 & 25 Vict. c. 96, s. 84; 31 & 2 Vict. c. 119, s. 5; 33 & 34 Vict. c. 61, s. 19; 34 & 35 Vict. c. 78, s. 10.

(*n*) *Eastwood v. Bain*, 28 Law J., Exch. 74.

(*o*) See *Denton v. Macneil*, L. R. 2 Eq. Ca. 352.

(*p*) *Venezuela Rail. Co. v. Kisch*, L. R., 2 H. of L. Ca. 99, in which case it was held that the statement of the capital of the company as £500,000, omitting the fact that £50,000 would have to be paid for the concession, was fraudulent; and that the terms "available capital of the company" meant capital, exclusive of any borrowing powers. See, also, *Ross v. Estates Investment Co.*, L. R., 3 Eq. Ca. 122.

(*q*) *Ross v. Estates Investment Co.*, *supra*.

(*r*) *Heyman v. European Central Rail Co.*, L. R., 7 Eq. Ca. 154.

¹ *Nelson v. Taylor*, 46 How. Pr. (N. Y.) 355.

to make himself acquainted with the provisions of the articles of association, (*s*) if they are in existence at the time of the contract, (*t*) or within a reasonable time, *i.e.*, semble the earliest practicable time, after they are in existence. (*u*) Although, however, he may thus sue the directors for fraudulent misrepresentation, or plead fraud to an action for calls brought by the company, or within a reasonable time (*x*) rescind and be relieved from the contract on the ground of fraud, (*y*) he will still be liable as a contributory, in case the company winds up, (*z*) so far as his original contract extends, (*a*) unless it was annulled on the ground of misrepresentation or otherwise before the commencement of the winding up. (*b*)

It is no answer by the directors to an injunction to restrain an action for calls, that they believed the statements, and were themselves deceived; (*c*) and it is sufficient to show that there was a fraudulent misrepresentation as to any part of the consideration that induced the defendant to enter into the contract. But a mere innocent misrepresentation, bona fide made, and on reasonable and probable ground, is not sufficient, unless it goes to the root of the matter, and makes the shares he has got something totally different from what he contracted to get. (*d*) And a misrepresentation of law, *e.g.*, that a company is legally competent to issue certain securities, made to an intending lender, but which turns out to be incorrect, will not entitle the lender to relief on the ground of misrepresentation. (*e*)

The representations of a director or manager, or a clerk, are not the representations of the company, unless

(*s*) *Oakes v. Turquand*, L. R., 2 H. of L. Ca. 326. *Ex parte Briggs*, L. R. 1 Eq. Ca. 483. *Re Madrid Bank*, 2 *Ibid.*, 218.

(*t*) *Webster's Case*, L. R., 2 Eq. Ca. 741. *Stewart's Case*, L. R., 1 Ch. App. 574. *Hallows v. Fernie*, L. R., 3 Eq. Ca. 520; 3 Ch. App. 467.

(*u*) *Re Cachar Company*, L. R., 2 Ch. App. 412. *Re Madrid Bank*, *Ib.* 536. *Peel's Case*, *Ib.* 674.

(*x*) See *Whitehouse and Tait's Cases*, L. R., 3 Eq. Ca. 790, 795. *Downes v. Price*, L. R., 3 Engl. and Ir. App. 343; *Ashley's Case*, L. R. 9 Eq. Ca. 263. *M'Neil's Case*, 10 *Ibid.* 503.

(*y*) *Kent v. Freehold Land Co.*, L. R.,

4 Eq. Ca. 588.

(*z*) *Oakes v. Turquand*, *ut sup.* *Kent v. Freehold Land Co.*, L. R., 3 Ch. App. 493.

(*a*) *Waterhouse v. Jamieson*, L. R., 2 Scotch App. 29.

(*b*) *Wright's Case*, L. R. 7 Ch. App. 55.

(*c*) *Smith v. Reese River Mining Co.*, L. R., 2 Eq. Ca. 264; 2 Ch. App. 604; 4 Eng. and Ir. App. 65.

(*d*) *Kennedy v. Panama Steam Co.*, L. R., 2 Q. B. 580.

(*e*) *Rashdall v. Ford*, L. R., 2 Eq. Ca. 750. See *Hallows v. Fernie*, *supra*. When time is a bar; *Smallcombe's Case*, L. R., 3 Eq. Ca. 769.

they are adopted and ratified by the shareholders at a general meeting of the company. (*f*) But the representations of the promoter may be, in certain cases. (*g*)

By the 30 & 31 Vict. c. 131, s. 38, it is enacted, that every prospectus of a company, and every notice inviting persons to subscribe for shares, shall specify the dates and names of any contract entered into by the company, or by the promoters, directors, or trustees thereof, before the issue of the prospectus, whether subject to adoption by the directors or not, and that every prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, or officers knowingly issuing the same as regards any person taking shares in the company on the faith of the prospectus, unless he has had notice of the contract.

1181. *Fraudulent breach of warranty.*—Whenever the representation or statement amounts to a warranty of the fact stated, and is untrue, it is fraudulent, in contemplation of law, whether there was knowledge or want of knowledge of the untruth on the part of the person making it. “If one man,” observes Lord ELLENBOROUGH, “lull another into security as to the goodness of a commodity he offers for sale, by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale: the warranty is the thing which deceives the buyer who relies on it, and is thereby put off his guard, and it is sufficient to prove the warranty broken to establish the deceit. (*h*) If, therefore, a watchmaker warrants a watch to go well, or a horse-dealer warrants his horse to be sound, or quiet and free from vice, or a wine-merchant warrants his claret to be in a fit and proper state for exportation, or a copper manufacturer warrants his copper to be fit for sheathing vessels, and a purchaser buys upon the faith of the warranty, and then finds that the watch will not go, or that the horse is unsound or vicious, or that the claret is sour, or that the copper is unfit for sheathing, this is a fraud, though neither the watchmaker, the horse-dealer, nor the copper manufacturer was aware of

(*f*) Royal Brit. Bank, *In re*, 3 Law T. R., N. S. 843; 9 W. R. 328. See Ferguson v. Wilson, L. R. 2 Ch. App. 77.

(*g*) Ross v. Estates Investment Co., L. R., 3 Eq. Ca. 122. S. C., 3 Ch. App. 682.

(*h*) Williamson v. Allison, 2 East, 450.

the fact at the time he gave the warranty. (i) A warranty will not bind a man in a thing that is apparent; as to warrant that a horse has both his eyes, when he is manifestly blind of one of them, or that a house is in perfect repair, when it has neither roof nor windows. (k) To warrant a thing that may be perceived at sight is not good. (l)¹ If, therefore, at the

(i) Wallace v. Jarman, 2 Stark. 162. 173.

Anon., Lofft, 146. Gresham v. Postan, 2 C. & P. 540. Williamson v. Alison, 2 East, 446. Jones v. Bright, 3 M. & P.

(k) Ekins v. Tresham, 1 Lev. 102. Dyer v. Hargrave, 10 Ves. 507.

(l) Baily v. Merrell, 3 Bulstr. 95.

¹ Warranties on the sale of property are either express or implied. An express warranty is a positive and unequivocal affirmation by a vendor of goods or chattels as to the state or quality of the thing sold, *on the faith of which* the purchase is made, and the consideration paid, or agreed to be paid. An implied warranty is a warranty inferred from the language or conduct of the vendor at the time of sale, or both, or from the character of the article sold, and knowledge of the purpose for which it is purchased, and to which it is to be devoted. Thus, where the manufacturer of an article sells it for a particular purpose, knowing the purpose to which it is to be devoted by the purchaser, the law *implies* a warranty on the part of the vendor that the article is fit for that purpose. Lespard v. Van Kirk, 27 Wis. 152; Boothby v. Scales, 27 Id. 636; Pacific, &c., Works v. Newhall 34 Conn. 67; Miller v. Gaither, 3 Bush. (Ky.) 152; Field v. Kinnear, 4 Kan. 476. So, where goods are sold by sample, there is an implied warranty that the goods shall correspond with the sample; Whittaker v. Hurske, 29 Tex. 355; unless the buyers have an opportunity to inspect the goods themselves; Leonard v. Fowler, 44 N. Y. 289; Barnard v. Kellogg, 10 Wall. (U. S.) 383; so when a person sells a negotiable security as a note, bond, or coupon, in the absence of statements to the contrary, there is an implied warranty that it is genuine, and that the amount purporting to be due thereon is actually due; McCay v. Barber, 37 Ga. 423; Flynn v. Allen, 57 Penn. St. 482; so where pork or other articles of meat are sold to be used as food, there is an implied warranty that it is sound and fit for the purposes of food; Hoover v. Peters, 18 Mich. 51; so where a person sells property which at *the time of sale* is in his possession, the law implies a warranty of title; Chancellor v. Wiggins, 4 B. Mon. (Ky.) 201; Ricks v. Dillahunt, 8 Port. (Ala.) 133; but there is no such implied warranty when he is *not* in possession; Scranton v. Clark, 39 N. Y. 220; so, that merchandise sold without being seen by the buyer, is of a merchantable quality. Howard v. Hoey, 23 Wend. (N. Y.) 350.

In order to constitute a warranty no particular form of words are necessary. It is not essential that the vendor should use the word *warrant*; it is enough if he makes positive representations in reference to the quality, quantity, or character of the article sold, as *facts* rather than opinion, upon which the vendor has a *right to* and *does* rely in the purchase of the article, and which is a part of the inducement to the purchase. Thus, where A, on the sale of a horse to B, said, "he is fourteen years old," it was held to amount to a warranty that the horse was no older; McGregor v. Penn, 9 Yerg. (Tenn.) 74; Merrill v. Wallace, 9 N. H. 111; Burge v. Stroberg, 42 Ga. 89, so, where on the sale of cows, the vendor said, "they are all coming in good season in the spring," it was held that this amounted to a warranty that they

time of the sale of a horse the animal is warranted sound, that is understood to mean, saving those manifest and visible defects which are obvious to all mankind, and known to the purchaser at the time he bought the animal. (*m*) If, however, the manifest defect is not necessarily of a permanent nature; if a horse has a cough and running at the nose, and the vendor says that it is merely a cold, and that the horse will be sound and well in a given time, and the purchaser buys in reliance upon the truth of the representation, the vendor, as we have seen, will be responsible in damages if the horse continues unsound and permanently diseased. (*n*) And a purchaser who relies upon a warranty is not bound to make any particular examination of a horse before he buys, to ascertain whether a defect exists. If, relying upon the warranty, he neglects to make any particular examination of the animal,

(*m*) *Margetson v. Wright*, 5 M. & P. 606; 7 Bing. 603. (*n*) *Liddard v. Kain*, 9 Moore, 356.

were all with calf; *Richardson v. Mason*, 53 Barb. (N. Y.) 601; but mere commendation of property, or an expression of a mere opinion, and not amounting to the positive assertion of a material fact, as, where in answer to the purchaser's inquiry as to diseased sheep, the vendor says, "they appear to be healthy, and are doing well," it was held that this could not be construed as more than a mere expression of an opinion, and did not amount to a warranty; *Tewksbury v. Bennett*, 31 Iowa, 83. See also, *McGrew v. Forsythe*, 31 Id. 179; *Horton v. Green*, 66 N. C. 596; *Vandewalker v. Osmer*, 65 Barb. (N. Y.) 556; *Hawkins v. Pemberton*, 51 N. Y. 198; *Kinley v. Fitzpatrick*, 59; *McGregor v. Penn*, 9 Yerg. (Tenn.) 74; *Morrill v. Wallace*, 9 N. H. 111; *Ricks v. Dillahunty*, 8 Port. (Ala.) 303; *Bunn v. Stevens*, 2 Ired. (N. C.) 411; but, in determining whether or not these representations amount to a warranty, the situation of the property, and the circumstances under which they are made, are to be taken into account. Thus, where a purchaser of trees was present at their packing, it was held that the assurance of the vendor of the trees that they were all right, and were not injured, did not amount to a warranty; that it was a mere expression of an opinion, and not of a substantive fact peculiarly within his knowledge. *Baker v. Henderson*, 24 Wis. 509; *Ricks v. Dillahunty*, 8 Port. (Ala.) 133. Whether or not a statement is a warranty or a mere statement of opinion, is for the jury in view of all the facts; *Morrill v. Wallace*, 9 N. H. 111; *Kinley v. Fitzpatrick*, 5 Miss. 59; *Hause v. Fort*, 4 Blackf. (Ind.) 293; but in *all* cases a warranty, in order to be available, must be made *before* the sale; if made *after*, it is not good unless predicated upon a *new* consideration; *Lowell v. Gatewood*, 2 Scam. (Ill.) 22. So a warranty against obvious, visible defects, not requiring the exercise of any special knowledge or skill to detect, is not operative; *Lang v. Hicks*, 2 Humph. (Tenn.) 305; but although obvious, if any special knowledge or skill is necessary to detect the defects, the warranty is good; *Thompson v. Batts*, 8 Miss. 710; *Pinney v. Andrus*, 41 Vt. 631.

and fails consequently to discover a defect, which might have been ascertained by examination, he is, nevertheless, entitled to maintain an action for deceit. (o)

The purchaser of a warranted but worthless article is entitled to maintain an action for deceit, although he has stipulated that if he dislikes the article it shall be exchanged for another of the same value. (p)

1182. *Warranties made pending a negotiation for the sale of property.*—"As to selling with a warranty," observes HOLT, C. J., "that will be so, though the warranty be before the sale; as if, upon a treaty about the buying of certain goods, the buyer should ask the seller if he would warrant them to be of such a value, and to be his own goods, and the seller should warrant them, and then the buyer should demand, and the seller set the price, and then the buyer should take time to consider for two or three days, and then should come and give the seller his price; though the warranty here was before the sale, yet this will be well, because the warranty is the ground of the treaty, and this is selling with a warranty. But it is otherwise if the warranty be after the sale; as if a man sells goods and afterwards warrants them, such warranty is not good. But in the other case the warranty is part of the contract. (q)

1183. *Private representations made prior to a sale by auction forming no part of the public contract of sale.*—If what passes between a vendor and purchaser forms no part of the negotiation ending in the purchase, it can not be treated as a warranty. Thus in the case of a sale by auction, you can not "tack on a previous private communication to what is said by the auctioneer at the time of the actual public sale, in order to constitute a warranty. To permit such a practice," observes MAULE, J., "would be to encourage a fraud upon all others attending the sale." If, therefore, a horse is advertised to be sold by auction without a warranty, and the owner privately represents the horse to be sound and free from vice, to a person who attends the sale, and bids for and

(o) *Holyday v. Morgan*, 1 Ell. & Ell. 1; 28 Law J., Q. B. 9. See *Aberaman Iron Works v. Wickens*, L. R., 4 Ch. App. 101.

(p) *Wallace v. Jarman*, 2 Stark. 162.

(q) *Lysney v. Selby*, 2 Ld. Raym. 1120; 1 Salk. 211. *Canham v. Barry*, 15 C. B. 597; 24 Law J., C. P. 100. *Roscorla v. Thomas*, 2 Q. B. 236.

purchases the horse in reliance on the representation, the representation can not be treated as a warranty. Those who bid at a public auction, bid against each other on the supposition that they all stand upon an equal footing; and if the sale is announced and conducted as a sale without a warranty, and the biddings are made upon that understanding, any secret underhand bargain for a warranty would be a fraud. (r)

1184. *False representations amounting to a warranty by a person of his knowledge of a particular fact, where the means of knowledge lie peculiarly or exclusively within his reach.*—If the means of information lie peculiarly or exclusively within reach of the person making the representation, and he pretends to know the truth of the matter, he must be taken to warrant his knowledge of the fact, and his want of knowledge constitutes a fraud. (s) Thus, a jeweller, or a diamond merchant, who deals in diamonds and precious stones, has better means of knowing the nature and quality of the stones he sells than an unskilled stranger who comes to his shop to buy them. If, therefore, he represents a glittering stone to be a diamond, he impliedly warrants his knowledge of the truth of his representation. His statement amounts to a warranty of the fact to a purchaser, and the jeweller is responsible if the stone turns out to be only a piece of crystal, whether he knew the representation to be true or false. (t)¹ Where the vendor of a ship published a written description of the vessel, without knowing whether the description was true or false, and the vessel was afloat and the hull covered with water, so that the purchaser had no means of examining the hull himself, it was held that the vendor must be considered to have warranted the fact to be as he asserted, and that his want of knowledge constituted a

(r) *Hopkins v. Tanqueray*, 15 C. B. 130; 23 Law J., C. P. 162.

(s) *Cave v. Coleman*, 3 M. & Ry. 4

Salmon v. Ward, 2 C. & P. 211. *Liddard v. Kain*, 9 Moore, 356.

(t) *Chandelor v. Lopus*, 1 Smith's Lead. Cas., 6th ed.

¹ *Donelson v. Young*, Meigs (Tenn.) 155; *Chester v. Dickenson*, 52 Barb. (N. Y.) 349; *Peter v. Wright*, 6 Ind. 183; *Smith v. Richards*, 13 Peters, (U S.) 26; *Hubbard v. Briggs*, 31 N. Y. 518.

fraud. "If he made the representation," observes Lord MANSFIELD, "not knowing at the time whether it was true or false, it is a fraud, if in point of fact, it turns out to be false. It is equally false and fraudulent for a man to affirm his knowledge of that of which he knows nothing, as to aver that to be true which he knows is not true." (u)

1185. *Representations concerning matters which are obvious to ordinary intelligence, and which lie as much within the knowledge of one party as the other.*—Where the real quality of the thing is an object of sense obvious to ordinary intelligence, and the parties making and receiving the representation have equal knowledge or means of acquiring information, and the correctness or incorrectness of the representation may be ascertained by the party interested in knowing the truth, by the exercise of ordinary inquiry and diligence, and the representation is not made for the purpose of throwing the latter off his guard, and preventing him from making those inquiries and examinations which every prudent person ought to make, there is no warranty of the person's knowledge of the truth of his representation, or of the fact being as it is stated to be. (x)¹ In an action for deceit, it appeared that the defendant having a load of wood to be carried came to the plaintiff, who was a carrier, and bargained with him for the carriage of it at 2s. a hundredweight, representing that there were eight hundredweight; whereupon the plaintiff, relying upon the representation, caused the wood to be put into his cart and carried, but finding that he had got an overpowering load, and having killed two of his horses in dragging it along, he caused the wood to be weighed, when he found the weight to be twenty hundredweight; and there-

(u) *Schneider v. Heath*, 3 Campb. 508. (x) *Clapham v. Shillito*, 7 Beav. 150.
Pawson v. Watson, Cowp. 788. *Adamson v. Jarvis*, 4 Bing. 73. *Scott v. Hanson*, 1 Sim. 14.

¹ As to defects patent to any ordinary observation, a warranty does not extend, but where any special knowledge, experience, or skill is necessary to determine whether it is *in fact* a defect, however obvious the defect may be, it is covered by warranty. *Long v. Hicks*, 2 Humph. (Tenn.) 305. Thus in the case of the sale of a slave afflicted with the scrofula, which to a skilled person could be readily detected, and which was clearly visible, it was held that, as the *character* of the defect required the exercise of skill to detect it, it was covered by a warranty of soundness. *Thompson v. Batts*, 8 Miss. 710; *Pinney v. Andrews*, 41 Vt. 631.

upon he brought an action to recover compensation for the damage he had sustained by reason of the deceit; but it was held that the action was not maintainable, as it was his own fault not to have weighed the wood before he put it into his cart. "There is a difference," observes DODDERIDGE, J., "where the carrier is absent and where he is present; for where the carrier is there present, it is very easy for him to see the difference between 800 and 2000 weight." (y)

§1186. *Representations amounting merely to expressions of opinion and belief.*—When the representation is made concerning something which is mere matter of opinion, which every man can exercise his own judgment upon and inquire about, it is the plaintiff's own fault if he suffers himself to be deceived. If the person giving his opinion, or expressing his belief, does not possess any exclusive means of knowledge, and merely says that which he thinks to be true, there is no fraud, however erroneous may be the statement he has made. If, therefore, a defendant having reason to believe, and actually believing, a particular fact to be true, has represented it as such to the plaintiff, he is not, as we have seen, liable to an action merely because it turns out that he was mistaken, and that his representation was false. (z)¹ The credit to which

(y) *Baily v. Merrell*, 3 Bulstr. 95. See *Selway v. Fogg*, *ante*.

(z) *Collins v. Evans* 5 Q. B. 826.

Childers v. Wooler, 29 Law J., Q. B. 136, *Rashdall v. Ford*, *ante*.

¹ An action lies against a person who falsely represents the credit and pecuniary ability of another, whereby the person to whom such representations are made, gives credit to such person and suffers damage, but in order to make such representation actionable, they must have been made with a *fraudulent intent*, although if false in fact, and *known* to be so by the person making them, a fraudulent intent will be inferred. *Foster v. Swasey*, 2 W. & M. (U. S.) 217; *Upton v. Vail*, 6 Johns. (N. Y.) 181; *Lang v. Lee*, 3 Rand. (Va.) 410; *Boyd v. Browne*, 6 Penn. St. 310; *Bigelow's Leading Cases on Law of Torts*, 39; *Lord v. Colby*, 6 N. H. 99; *Whiting v. Otis*, 1 Bas. (N. Y.) 320; *Bean v. Wills*, 28 Barb. (N. Y.) 466; and the fact that the representation is made as the *belief* of the party does not change the liability, if he did not in fact entertain such belief, or he possessed such knowledge of the person's affairs as to render such belief impossible; *Foster v. Sweasy*, *ante*; but such a representation, if made under an *honest belief* of its truth, is not actionable, although false, nor if made under an honest mistake with no fraudulent intent; *Lord v. Goddard*, 13 How. (U. S.) 198; *Conrad v. Nicoll*, 4 Pet. (U. S.) 29; *Russell v. Clark*, 7 Cr. (U. S.) 69; *Chester v. Comstock*, 40 N. Y. 575; *Stewart v. Potter*, 37 How. (N. Y.) 68. The very *gist* of an action for deceit is the *fraudulent intent* with which the representation is made, and the mere fact that it is false does not establish

a man is entitled in the commercial world, is a matter which does not lie exclusively within the knowledge of any one person. It is to a great extent matter of judgment and opinion, on which different men will form different opinions, and if a man in answer to inquiries respecting the solvency or credit of a particular individual, or of a partnership, or joint-stock company, does no more than state his own honest

the *fraudulent intent*, it must be shown that the party *knew* that it was false; *Rheem v. Naugalkin Wheel Co.*, 33 Penn. St. 356; *Robinson v. Flint*, 58 Barb. (N. Y.) 100; *Weed v. Case*, 55 Id. 534; *Stafford v. Newsom*, 9 Ired. (N. C.) 507; *Bond v. Clark*, 35 Vt. 577; *Gibbs v. Odell*, 2 Cold. (Tenn.) 132; *Munroe v. Gardner*, 3 Brev. (S. C.) 31; but it is not necessary that the person should have had any interest to make such representations; *Weed v. Case*, *ante*; *White v. Merritt*, 7 N. Y. 352. And this is the case where a person makes the representation as a matter of *positive knowledge* on his part. In order, even in such a case, to render him liable, it must be shown that he *knew* that the statement was false. *Chester v. Comstock*, *ante*; *Marsh v. Falker*, 40 N. Y. 562; or that he had knowledge of such facts as should have put him on inquiry as to their truth; *Craig v. Ward*, 3 Keyes, (N. Y.) 385; or that he had *no* knowledge to justify such a representation; *Myer v. Arindon*, 45 N. Y. 169; *Oberlander v. Spiers*, 45 Id. 175.

Generally, it may be said that in order to uphold an action for fraud in misrepresenting the pecuniary condition of another, an *intent to deceive* must be established, and this intent must be established by other evidence than the mere falsity of the statement. Thus, it must be shown that the circumstances of the party were such, or that his relations with the party making the representations were such, that knowledge of his insolvency on the part of the person making the representation can fairly be inferred, or that the circumstances indicate that he intended the party to believe that he spoke from *actual knowledge, when in fact he had none*. So, too, it is important to ascertain whether the representation was a mere expression of an opinion, and whether that opinion was honestly entertained, for, if it was made in *good faith*, however erroneous, or however much damage ensues therefrom, no liability attaches therefor. In order to show the honesty of his representations, it is always competent to show that other persons acquainted with the person in reference to whose solvency, the representations were made, entertained a similar opinion. *Marsh v. Falker*, *ante*; *Haycraft v. Creasy*, 2 East, 92; *Matrurin v. Harding*, 28 N. H. 128; *Case v. Boughton*, 11 Wend. (N. Y.) 106.

Where a person misrepresents his own pecuniary condition, and thereby obtains credit, he is guilty of a fraud, and no title passes to the goods purchased on the faith of such representations; and if they are still in his possession they may be retaken by the vendor, or trover may be brought therefor, and the debt becomes due *instantly*, even though a definite time of credit was agreed upon. *Jude v. Woodburn*, 27 Vt. 415; *Dyer v. Tilton*, 23 Vt. 313; *French v. White*, 5 Duer (N. Y.), 254; *Robinson v. Dauchy*, 3 Barb. (N. Y.) 20; *Stewart v. Levy*, 36 Cal. 159; *Hawkins v. Appleby*, 2 Sandf. (N. Y.) 421; *Smith v. Frank*, 2 Robt. (N. Y.) 526; *Cugin v. Tarr*, 32 Me. 55; *Cummings v. Cummings*, 5 W. & S. (Penn.) 553; *Simmons v. Fay*, 1 E. D. S. (N. Y.) 107; *Munfrey v. Brau*, 23 Barb. (N. Y.) 361. So, where land is fraudulently obtained no title passes. *Gilbert v. Hoffman*, 2 Watts (Penn.), 66; *Small v. Jones*, 1 E. D. S. 128.

opinion, believing what he says to be true, he is not responsible for the correctness of the opinion, and does not warrant the fact to be as represented by him. (a)¹

(a) Haycraft v. Creasy, 2 East, 105.

¹ A mere expression of an honest opinion can not be made the ground of an action. There can be no fraud without a fraudulent intent, and a *knowledge* that the words used are not true; Stone v. Denny, 4 Met. (Mass.) 151; Campbell v. Hillman, 15 B. Mon. (Ky.) 508; McDonald v. Trofton, 15 Me. 225; Hallam v. Todhunter, 24 Iowa, 166; Morton v. Scull, 23 Ark. 289; Pettigrew v. Chillis, 41 N. H. 95; in order to make out fraud in the sale of property, or in any transaction, it is not always essential that any representation should be made. Thus an artful and purposed *concealment* of material facts peculiarly within the vendor's knowledge, and *known by him* to be material, is an actionable fraud. But in order to amount to fraud, the facts concealed must be such as the party is *under some legal or moral obligation* to communicate to the other, and *which the other party has a right to know*. Thus, where a person having no funds in bank, draws a check payable instantly, this is a fraud; True v. Thomas, 16 Me. 36. Upon the general question, see Peter v. Wright, 6 Ind. 183; Smith v. Click, 4 Humph. (Tenn.) 186; Keller v. Equitable Fire Ins. Co., 28 Ind. 170; Turner v. Johnson, 2 Cr. (U. S.) 287; Jenkins v. Simpson, 14 Me. 364; McAdams v. Oates, 24 Mo. 223; Durrell v. Haly, 1 Paige (N. Y.), 492; Story v. Norwich, &c., R. R. Co., 24 Conn. 94.

The test by which to determine whether or not a representation is a mere expression of an opinion or a substantive fact, is this: If the representation is as to a matter not equally open to both parties, it may be said to be a statement of a fact as such, but if it is as to a matter that rests merely in the judgment of the person making it, and the means of deriving information upon which a fair judgment can be predicated, are equally open to both parties, and there is no artifice or fraud used to prevent the person to be affected thereby from making an examination and forming a judgment in reference to the matter for himself, the representation is a mere expression of an opinion, and, however incorrect, does not support an action for fraud. Generally, a statement as to the *value* of property, real or personal, which the purchaser has an opportunity to inspect for himself, and in reference to which, upon reasonable inquiry, he could ascertain facts upon which to predicate a fair judgment, are mere expressions of opinion, and, however erroneous or false even, are not actionable. In reference to all such matters where the opportunities for information are equally within the reach of both, the doctrine of *caveat emptor* (let the purchaser take care of himself) applies; Harvey v. Young, 21 Yel. 21; Ekins v. Tresham, 1 Lev. 102; Davis v. Meeker, 5 Johns. (N. Y.) 354; Baly v. Merrill, Cro. Jac. 386; Fenton v. Brown, 14 Ves. 145; Bowring v. Stevens, 2 C. & P. 337; Ellis v. Andrews, 56 N. Y. 83.

In Ellis v. Andrews, 56 N. Y. 83, the plaintiff brought an action against the defendant for fraud, in the sale of \$27,000 of the stock of The Congress and Empire Springs Co., at Saratoga. The complaint averred that the defendant, fraudulently representing to her that the stock of said company was worth *at least* eighty per cent. of its par value, induced her to buy of him \$27,000 of said stock, for which she paid \$20,000, and that the defendant at the time of such representations knew that said stock was not worth forty per cent. of its par value. The complaint, however, did not disclose that the defendant stood in any confidential relation to the company, or that the defendant enjoyed any better means for forming an opinion **as**

1187. Statements in answer to inquiries—Information to sheriffs and public officers.—If a sheriff, about to seize the goods or the person of a debtor under a writ of execution, makes

to the value of said stock than the plaintiff did, and upon motion the complaint was dismissed upon the grounds that it did not set forth a good cause of action against the defendant, but it seems to me that GROVER, J., in delivering the opinion of the court, made some statements that can not be maintained either upon principle or authority consistently with the judgment in the case, and which are clearly in conflict with the doctrine of *Simar v. Cannady*, 53 N. Y. 298. Indeed, it seems that the reporter himself deemed it necessary to make an apology for the court, for he takes occasion to charge the reporter of the case of *Simar v. Cannady* with not having fairly eliminated the doctrine of that case, and proceeds to state the doctrine to conform more nearly to the doctrine of *Ellis v. Andrews*. GROVER, J., says, "The assertion by the defendant that the stock was worth eighty per cent, of its value *can not*, as I think, *be regarded as the expression of an opinion as to its value*, for the reason that it is averred that it was fraudulently made and that the defendant *knew* that it was not worth more than forty per cent. *I think it must be regarded as a false statement of the value, for the purpose of obtaining a higher price for the stock than they knew it was worth.*"

If what the learned judge says is true, as a fact in the case, then the judgment is clearly wrong, for the only ground upon which the defendants could hope to escape liability was that their statements were mere matters of opinion, and not of *a substantive material fact*. The rule is that, in all such cases, the question shall be left to the jury, to find whether the representation was intended as *mere matter of opinion, or of a fact*, and if of a fact, liability attaches. The learned judge, in effect, says, that the court regard the statement as *a statement of a fact made with a fraudulent intent and false in fact*. That being the case, the court can find no authority, ancient or modern, to support its doctrine. The doctrine is predicated upon the case of *Harvey v. Young*, Yelv. 21, but that case is in no sense an authority for such a singular and extraordinary statement.

The doctrine of that case amounts to no more nor less than that the mere statement of an *opinion*, although erroneous, is not actionable as a fraud. Indeed, in *Pasley v. Freeman*, 3 T. R. 57, BULLER, J., in commenting upon the doctrine advanced in *Harvey v. Young*, said: "If the court went on a distinction between the words warranty and affirmation, *the case is not law*; for it was rightly held by HOLT, C. J., in the subsequent cases, and has been uniformly adopted ever since, *that an affirmation at the time of a sale, is a warranty, provided it appears on evidence to have been so intended*. But," he adds, "*the true ground of that determination was that the assertion was a mere matter of judgment and opinion, of a matter of which the defendant had no particular knowledge, but of which many men will be of many minds, and which is often governed by whim and caprice.*"

"*Judgment or opinion*," adds the learned judge, "*in such cases implies no knowledge*. And here this case differs materially from that in *Yelverton*; for it is stated in this record that the defendant *knew that the fact was false*." Thus it will be seen that the very foundation upon which GROVER, J., founded his judgment, falls to pieces and leaves the doctrine announced by him in direct antagonism with the doctrine of the case cited to support it, and, I believe I may safely say, in direct conflict with all well considered cases involving similar questions. According to the statement and finding of the court, the statement of *Andrews* was not *intended by*

inquiry of another as to whether certain goods do or do not belong to the debtor, or as to the identity of the person of the debtor, and the person applied to for information does

him as a matter of opinion, but was the affirmation of a falsehood *materially affecting the value of the property, and made with intent to deceive plaintiff and induce a purchase of the stock at a price double its value.* If, under such circumstances, an action could not be maintained, it is difficult to conceive how one ever could be for fraud arising from false representation as to value. Yet in *Simar v. Cannady*, *ante*, the court held that a fraudulent representation as to the value of property—in that case a mortgage—made with *an intent to mislead a purchaser and which he relies on to his injury*, is actionable, if he does not have equal means of knowledge with the vendor, or if the vendor induces him to forbear making inquiries as to value of the property.

Now, the complaint in that case was substantially the same as that in *Ellis v. Andrews*, and how could the court say, without proof of the fact, that the vendor of a mortgage had any better means of knowing its value than the vendee? In fact, it would seem that the vendee of a mortgage had much more favorable facilities for ascertaining its value than the vendee of a stock of a corporation has for ascertaining the actual value of the stock. In the case of the mortgage, the land is in existence, and can be seen, and its value ascertained upon inquiry, or estimated by the party himself, and incumbrances upon it can be discovered upon inquiry and examination at the proper office for the recording of conveyances; while the *actual value of stock* is dependent upon a multitude of conditions, as the value of the property of the corporation, the extent of its business, the amount of its profits, the extent of its indebtedness, and the character of its officers, matters not easily ascertained, and correct information as to which can seldom be obtained except by those who are in the confidence of the officers and managers of the company. The learned judge in *Ellis v. Andrews* applied the rule applicable to real estate and ordinary property, in regard to affirmations in reference to the value of which the maxim *caveat emptor* applies. But I have always supposed that where the property was of such a character that an approximately accurate opinion as to its *real* value could not be formed by the ordinary modes of determining the value of property, as in the case of stock of an incorporated company, an entirely different rule would apply, and that when a person states its value to be a certain sum, not as a matter of opinion, but *as a fact*, that the purchaser could treat that as a warranty as to value, and sue for damages if it turned out that the statement was fraudulently made, the vendor *knowing* that it had no such value as he represented. It seems to me that when a person makes such an affirmation which is the inducement to a purchase, within the principle of *all* the cases, it *is* a warranty as to value. The rule may fairly be stated thus. In all cases where the value of property in reference to which affirmations as to value are made, can be ascertained by ordinary inspection, the maxim *caveat emptor* applies; but when its value can only be ascertained by inquiry from others, or when any particular experience or skill is requisite to ascertain the value, the maxim does *not* apply, and affirmations as to value may be relied on.

In England, from a very early period, a distinction has been taken between an affirmation as to the value of land and the value of *rents*. This distinction is noted in *Risney v. Selby*, Salk. 211, and it was held, that where a vendor of a house makes a false affirmation as to the rent received for a house, to a person to whom he sells it—as in this case, that it rented for £30, when, in fact, it rented for but £20—he is liable for the damage, sustained, for, say the court: “The value of the rent is matter that *in lies* the private knowledge of the landlord and tenant, and if they affirm the rent to be

no more than represent what he believes to be true, he is not responsible in an action for deceit, if the information he gives turns out to be false, and the sheriff who has acted upon it, more than it is, the purchaser is cheated, and ought to have a remedy for it." And the same doctrine is advanced in *Leakins v. Clissel*, 2 L. Ray, 1118, and I am not aware that it has ever been denied. Here the distinction is broadly marked between an affirmation as to the value of property of which a person can form a reasonable judgment from an inspection of it, and that class of property whose value, like that of stock in incorporated companies, which is not sold at the stock boards, so as to have a market value, and rests so largely upon a variety of contingencies that no reasonable opinion as to its real value could be formed. The theory upon which these cases proceed is, that, where the value can only be ascertained upon inquiry from others, the means of information are not equal, and the maxim *caveat emptor* does not apply.

In *Medbury v. Watson*, 6 Met. (Mass.) 259, which was an action against a third person for false affirmations in reference to the value of a tannery, which, by reason of such false affirmations, plaintiffs were induced to purchase, a verdict for the plaintiffs was sustained, upon the ground that, the buildings being covered with snow, plaintiffs did not have an opportunity to form a fair and reasonable judgment in reference to their condition and value; and this doctrine seems to conform fully to the principles controlling all such actions. *If the property*, in reference to which the affirmations are made, is, at the time, in such a condition or situation that the purchaser can not fairly judge for himself as to its value, he has a right to rely upon the affirmations of the vendor, and the maxim *caveat emptor* does not apply. Thus, necessarily, the question whether such affirmations are of matters of opinion, or of facts amounting to a warranty, must depend upon the nature, condition, and situation of the property, and the relations of the parties thereto, and is a question of fact for the jury. Therefore it would seem that, when a person fraudulently asserts that the value of property is a certain sum, which he knows to be false, which assertion he makes as of a fact, with an intent to induce a purchase of stock from him at much more than its value, that at least as much consideration should be shown him as is shown to one who has been similarly cheated in the purchase of a mortgage of land, the value of which could be easily ascertained. At least it would seem to be right to give the vendee of such stock an opportunity to show whether the vendor and himself stood upon an equal footing as to means of information, and that the burden of proving this equality as to means of information, is upon the defendant. See *Cronk v. Cole*, 10 Ind. 485.

In all cases where statements of value are attended with statements as to the elements that go to make up the value, which are false, such statements are not treated as statements of an opinion, but of facts, which, if false, render the person making them liable for all damages resulting to the vendee from a purchase upon the faith of them. 5 Hill (N. Y.) 70; 50 N. Y. 480; 1 Starkie, 75.

As to fraud on the part of a vendor of property, in reference to extrinsic facts which may affect the value of the property being negotiated for, it is held that, where the means of information are equally accessible to both parties, the vendor, although at the time in the exclusive possession of a knowledge of such defects, is not bound to disclose them, but he must be careful not to say or do anything to impose upon the vendee. In *Laidlaw v. Organ*, 2 Wheat. (U. S.) 195, MARSHALL, Ch. J., thus announced the rule: "The question in this case is, whether the intelligence of extrinsic circumstances which might influence the price of the commodity, and which was exclusively within the knowledge of the vendor, ought to have been disclosed by him to the vendee. The court is of the opinion that he was

believing it to be true, has been damnified; but if a person officiously interferes and gives directions to the sheriff, he may make himself responsible for trespasses committed by the sheriff whilst acting in obedience to those directions, and may become liable to make good any damages which the sheriff himself has been obliged to pay in consequence of his having obeyed such directions; (b) but it has been held that a mere indication of the defendant's place of residence, endorsed on the back of a writ of *fi. fa.* by the attorney of the plaintiff, for the purpose of affording the sheriff information, is not a direction to execute a writ against the person pointed out, so as to render the attorney responsible if the endorsement should turn out to be incorrect, and to relieve the sheriff from the responsibility of making inquiry, and acting in the matter upon his own responsibility. (c)

1188. *Warranties by vendors on sales of real property.*—If, pending a negotiation for the sale of real property, the vendor affirms the rents to be more than they really are, and the person to whom the affirmation is made relies upon it and purchases the property, the vendor is liable to an action for

(b) Collins v. Evans, 5 Q. B. 830.

B. 129; diss. Wightman, J., Cronshaw v.

(c) Childers v. Wooler, 29 Law J., Q.

Chapman, *ante*.

not bound to disclose it. It would be difficult to circumscribe the contrary doctrine within the proper limits,—where the means of intelligence are equally accessible to both parties; but at the same time, each party must take care not to say anything tending to impose upon the other." Butler's Appeal, 26 Penn. St. 63; Kintzing v. Elrath, 5 Barr. (Penn.). In Bench v. Sheldon, 14 Barb. N. Y.) 66, the plaintiff lost a flock of sheep, and having made diligent search for them without finding them, the defendant meeting him—and knowing where the sheep were—asked the plaintiff if he had found them, and being answered in the negative, said, "*I suppose you never will find them*," and offered him \$10 for the sheep, which the plaintiff accepted. The court held that this was a fraud, and that the defendant was liable for the value of the sheep.

The purchase of land when the vendee knows that there is a mine on it, and the vendor is ignorant of the fact, is not fraudulent if the vendee does not say or do anything to throw the vendor off his guard. Harris v. Tysor, 24 Penn. St. 349. So, where a statement as to the value of property is fraudulently made with an intent to defraud another, and the facilities for obtaining information in reference to the value are not equal, or the vendor induces the vendee to forbear making inquiries, or by any fraudulent practice induces him to rely on his statement, an action will lie for the damage resulting to the vendee therefrom; Simar v. Cannady 53 N. Y. 298; McClellan v. Scott, 24 Wis. 81; Medbury v. Watson, 6 Met. (Mass.) 255; 1 Rolle's Abr. 91, pl. 8; also 101, pl. 16; Risney v. Selby, Salk. 211; Leakins v. Clissel, 2 Ld. Rayd. 1118.

deceit whether he knew or did not know of the falseness of the affirmation at the time it was made, and although a conveyance is subsequently executed which contains no notice of any such affirmation. A representation of this sort has been held to amount to a warranty of the fact, on the ground that the vendor had better means of knowledge than the purchaser, who relied upon the truth of the statement and was deceived by it; "for" says GOULD, J., "the value of the rents was a thing hard to be known, and secret, known to none but the landlord and his tenants, and they might be in confederacy together." "If," observes HOLT, C. J., "the vendor gives in a particular of the rents, and the vendee says he will trust him and inquire no further, but rely upon his particular, there, if the particular be false, an action will lie; but if the vendee will go and inquire further what the rents are, there it seems unreasonable he should have an action, though the particular be false, because he did not rely upon the particular." (d)¹ And even if the rent stated is literally true, but the fact is that the property had been only let for one year at the rent stated, which was far above its value, so that the statement is calculated to mislead, the vendee is entitled to be relieved in equity from his purchase. (e) On the other hand, a statement which is not literally true, but which does not substantially mislead, is not ground for annulling a contract; as where a vendor of a leasehold house stated himself as a lessee for twenty-four years, whereas he was an under-lessee for that period, less three days. (f)

Where the vendor of a public-house, made, pending the treaty for the sale of the house, sundry false representations to the plaintiff concerning the amount of business done in the house, and the rent received for part of the premises, whereby the plaintiff was induced to give a larger sum than he would otherwise have given for the property, it was held that the

(d) *Lysney v. Selby*, 2 Ld. Raym. App. 21.

1120. *Ekins v. Tresham*, 1 Lev. 102. See

Bos v. Helsham, L. R., 2 Exch. 72.

(e) *Dimmock v. Hallett*, L. R., 2 Ch.

(f) *Duddell v. Simpson*, L. R., 2 Ch.

App. 102. See *Aberaman Iron Works*

v. Wickens, L. R., 4 Ch. App. 101.

¹ As to title; *Hays v. Bonner*, 14 Tex. 663; as to improvements; *Miller v. Howell*, 2 Ill. 499; as to quantity; *Howell v. Chilton*, 2 W. Va. 410; *Harlow v. Green*, 34 Vt. 379; as to price paid for it by vendor; *Hemmer v. Cooper*, 8 Allen (Mass.), 334; as to quality and description; *Sikes v. Baer*, 8 Iowa. 368. See note 1, page , *ante*.

plaintiff was entitled to maintain an action against the defendant for the deceit. (*g*)¹

1189. *False representations of title by vendors of corporeal and incorporeal hereditaments.*—Representations not amounting to a warranty.—Representations and assertions of title by a vendor of real property, where the title-deeds are submitted to the inspection of the purchaser, who exercises his own or such other judgment as he confides in on the goodness of the title, amount only to expressions of opinion and belief, and can not be treated as a warranty. (*h*) Every prudent purchaser of real property looks into the title of the vendor before he accepts a conveyance and pays the purchase-money, and he has a right to have a covenant for title on the part of the vendor inserted in the deed of conveyance; and if he waives his right of examination and approval of the title, and does not think fit to require any covenant for title on the part of the vendor, he must be presumed to have been content to take whatever estate or interest in the land the vendor might chance to possess, and when the vendor's title, such as it is, is actually conveyed to him, the rule of caveat emptor applies. (*i*) But if a representation as to title was false, to the knowledge of the person making it, and was made for the purpose of preventing inquiry and covering a fraud, then it may be made the foundation of an action for deceit, although the party receiving and acting upon the representation had accepted a conveyance, without requiring any covenant for title. (*k*)²

(*g*) *Dobell v. Stevens*, 3 B. & C. 623.
Canham v. Barry, 15 C. B. 597.

(*h*) *Roswell v. Vaughan*, Cro. Jac. 196.
See *Hume v. Pocock*, L. R., 1 Ch. App. 379.

(*i*) *Bree v. Holbech*, 2 Doug. 655 ;

Ld. Alvanley, C. J., in *Johnson v. Johnson*, 3 B. & P. 170. *Duke v. Barnett*, 2 Coll. Ch. C. 337. *Maynard v. Moseley*, 3 Swanst. 655.

(*k*) See per Turner, L. J., in *Hume v. Pocock*, L. R. 1 Ch. App. 385.

¹ The rule is that if the owner of a lease fraudulently greatly exaggerates its value, and thereby induces another to purchase it at a price largely in excess of its value, his statements can not be regarded as *mere puffing*, but is a statement of a substantive fact, which renders him liable for damages to the purchaser. *Adams v. Soule*, 33 Vt. 538.

² *McCreery v. Pursley*, 1 A. K. Mar. (Ky.) 114 ; *Aldrich v. Warren*, 16 Me. 465. As to the effect of stifling inquiry, see *Medbury v. Watson*, 6 Mass. 298 ; *Hubbard v. Meigs*, 50 N. Y. 480 ; *Dawes v. King*, 1 Starkie, 75 ; *Van Epps v. Harrison*, 5 Hill (N. Y.) 70 ; *Simar v. Carmady*, 53 N. Y. 298.

1190. *Representation of title on sales of chattels amounting to a warranty.*—"Where one having the possession of any personal chattel, sells it, the bare affirming it to be his," observes HOLT, C. J., "amounts to a warranty, and an action lies on the affirmation; for his having possession is a color of title, and perhaps no other title could be made; aliter where the seller is out of possession, for there may be room to question the seller's title, and caveat emptor in such a case to have either an express warranty or a good title." (l) Mr. Justice BULLER, however, has disclaimed any distinction between the vendor's being in or out of possession, treating the affirmation as equivalent to a warranty in both cases, (m) the true principle being, "that he who affirms either what he does not know to be true, or knows to be false, to another's prejudice and his own gain, is both in morality and law guilty of falsehood, and must answer in damages." (n) In the ordinary case of a sale of goods in a shop, the seller does in effect warrant that the goods are his own, and is liable if they are not. (o) However, if a man does not sell as owner, but in some special character or capacity, such as sheriff or pawnbroker, and does not make any representation as to title, he is presumed to sell only such a title as he actually possesses. (p) 'Where the defendant sold a boiler (affixed to a house, but removable piecemeal without injury), which had been distrained for a poor-rate, and which he had bought at the auction, to the plaintiff, explaining to him at the same time the

(l) *Medina v. Stoughton*, 1 Salk. 210.
Crosse v. Gardner, Carth. 90.

(m) *Pasley v. Freeman*, 3 T. R. 58.

(n) Per Best, C. J., *Adamson v. Jarvis*, 4 Bing 73. *Furnis v. Leicester*,

Cro. Jac. 474; 1 Roll. Abr. 90, pl. 6.

(o) *Eicholz v. Bannister*, 34 Law J., C. P. 105.

(p) *Chapman v. Speller*, 14 Q. B. 624.
Morley v. Attenborough, 3 Exch. 500.

¹ In reference to the title of personal property, the rule is that where the chattel at the time of sale is in the possession of the vendor he is treated as warranting his title thereto; *Grap v. Kierski*, 41 Cal. 111; *Storm v. Smith*, 43 Miss. 497; *Bardwell v. Colie*, 1 Lans. (N. Y.) 141; but where the chattel is in the possession of third persons a warranty is not implied; *Storm v. Smith*, 43 Miss. 497; *Scranton v. Clark*, 39 N. Y. 220; nor when a written bill of sale embracing the contract is given; *Sparks v. Mesick*, 65 N. C. 440. In reference to affirmations as to the title of chattels, the maxim *caveat emptor* does not apply. Common prudence does not require that the purchaser should investigate the title, and he has a right to rely on the assertions of the vendor as to his title. *Crosse v. Gardner*, 1 Salk. 210; *Medina v. Stoughton*, 1 Ld. Rayd. 593; *Defreeze v. Trumper*, 1 Johns. (N. Y.) 274.

circumstances, it was held that the plaintiff (who had been prevented by the mortgagees of the house from removing it) could not sue the defendant on a warranty of title, or upon an implied undertaking that he should be permitted to remove it. (g)

1191. *False representations by manufacturers of the character and quality of the articles they manufacture and sell.*—The manufacturer of an article has superior means of information as to the nature and quality of the article he makes than a stranger not engaged in the manufacture. If, therefore, he represents the article he makes to be of some superior or peculiar quality, or to be fit for some particular purpose, in order to recommend it to a purchaser, his representation amounts to a warranty of the fact. "It is not necessary," observes BEST, C. J., "that the seller should say, 'I warrant;' it is sufficient if he says that the article he sells is of a particular quality, or fit for a particular specified purpose." Where, therefore, the plaintiff, a shipowner, on being introduced to the defendant, a copper manufacturer, stated that he wanted some copper for sheathing a vessel, and the defendant said, "We will supply you well," whereupon the plaintiff gave an order for some copper, it was held that this amounted to a warranty on the part of the copper manufacturer that the copper he supplied to the plaintiff in execution of the order should be fit for sheathing vessels, and that he was responsible in an action for deceit for furnishing defective copper unfit for that purpose. This tends to protect the purchaser, who is necessarily ignorant of the nature of the article sold, from imposition, whilst the person who manufactures it must, or ought to, know its particular virtues and qualities. (r) But when the purchase is of a well-known ascertained article, and the manufacturer represents that it is fit for the purpose for which it is made, and for which it is generally used, there is no warranty on the part of the vendor that it is fit for any peculiar or special purpose for which the purchaser requires it. (s) ¹

(g) *Bagueley v. Hawley*, L. R., 2 C. Bing. 533.
P. 625.

(s) *Chanter v. Hopkins*, 4 M. & W. 399.

(r) *Jones v. Bright*, 3 M. & P. 174; 5 *Camac v. Warriner*, 1 C. B. 367.

¹ Where a machinist sold a machine which was wholly worthless, representing

A person who receives the order and gets the article made is as much the manufacturer of it as the person who actually makes it. (t)

1192. *Representations by a vendor who is told that the purchaser wants the article he proposes to buy for a particular purpose.*—If a stranger goes to a shop and tells the shopkeeper that he wants an article fit for a particular specified purpose, and it is the clear understanding of the parties that the purchaser relies upon the skill and judgment of the shopkeeper for the supply of an article fit for the purpose specified, there is an implied warranty on the part of the shopkeeper that the article he furnishes is reasonably fit for that purpose. "It appears to me," observes TINDAL, C. J., "to be a distinction well founded, both on reason and on authority, that if a party purchases an article upon his own judgment, he can not afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed." (u)¹

1193. *False representations by vendors made to absent purchasers amounting to a warranty.*—Wherever the purchaser has no opportunity of inspecting the commodity he buys, the rule of caveat emptor does not apply. Every representation, therefore, made by a vendor to an absent purchaser, as to the quality or fineness of the article he offers for sale, amounts to a warranty of the fact to such absent purchaser, who has

(t) *Brown v. Edgington*, 2 M. & Gr. 279. Addison on Contracts, 6th ed., p. 213.

(u) *Tindal, C. J.*, in *Brown v. Edgington*, 2 M. & Gr. 289. See *Walker v. Milner*, 4 F. & F. 745.

it to be a good one, it was held to be a fraud although the vendor was, through want of skill in his business, ignorant that the machine was not a good one; *Donel-son v. Young, Meigs* (Tenn.) 155. See *Holden v. Clancy*, 58 Barb. (N. Y.) 590; *Post Carbon Iron Co. v. Graves*, 68 Penn. St. 149; and generally, when a manufacturer sells a manufactured article, knowing the purpose for which it is to be used, there is an implied warranty on his part that it is fit for that use; *Lespard v. Vankirk*, 27 Wis. 152; *Boothby v. Scales*, 27 Id. 626; *Field v. Kinnear*, 4 Kan. 476.

¹ *Lespard v. Van Kirk*, 27 Wis. 152; *Boothby v. Scales*, 27 Id. 626; *Field Kinnear*, 4 Kan. 162.

no means of judging for himself, but relies exclusively on the judgment and good faith of the vendor. (*x*) If a purchaser orders a particular article to be forwarded to his agent abroad for a foreign market, and the vendor executes the order, and pretends or represents that he has sold the particular article required, and the purchaser has had no opportunity of inspection or examination, the representation of the vendor amounts to a warranty of the fact. (*y*) If an article, represented to be of a particular or peculiar quality, turns out to be of a substantially different or inferior quality, it does not accord with the representation, and damages are therefore recoverable. (*z*) "A seller," observes Lord ELLENBOROUGH, "is unquestionably liable to an action for deceit if he fraudulently misrepresent the quality of the thing sold to be other than it is in some particulars which the buyer has not equal means with himself of knowing, or if he do so, in such a manner as to induce the buyer to forbear from making the inquiries, which, for his own security and advantage, he would otherwise have made." (*a*)

1194. *False representations by vendors where the purchaser has means of examination and judgment—Sale of goods by sample.*—Whenever the vendor is not himself the manufacturer of the goods he sells, and the purchaser is afforded the means of inspection and examination, and of forming his own judgment of their quality, the representations made by the vendor of the quality of the goods amount merely to assertions of his own opinion and belief, and not to a warranty. If, therefore, the representation is honestly made, and is believed at the time to be true by the person making it, it does not constitute a fraud in law, though it was not true in point of fact. The rule of *caveat emptor* applies, and the representation does not furnish a ground of action. (*b*)

(*x*) *Ld. Ellenborough, C. J., in Gardiner v. Gray, 4 Campb. 145.*

(*y*) *Bridge v. Wain, 1 Stark. 504.*

(*z*) *Wieler v. Schilizzi, 25 Law J., C. P. 90.*

(*a*) *Vernon v. Keys, 12 East, 637.*

(*b*) *Ormrod v. Huth, 14 M. & W. 664.*

¹ Thus, where a person makes false statements in reference to lands situated in a distant county, it is immaterial that the other party has correct sources of information. He may rely on the vendor's statement *Spaulding v. Hedges, 2 Penn. 3t. 240.*

Every person who exhibits a sample of goods for sale, impliedly represents or warrants that the sample has been fairly taken from the bulk of the commodity, and he does no more than this. The purchaser takes the risk of all latent defects and infirmities inherent in the article, and unknown to the seller, whether they arise from natural causes, or fraudulent dealings with the goods by persons through whose hands they have passed. Thus, where the plaintiff bought hops (c) of the defendant, whom he knew not to be the grower, by samples taken from the pockets in which the commodity was closely packed, and at the time of the sale the samples answered fairly to the commodity in bulk, and no defect was perceptible at the time to the buyer, but, owing to the grower of the hops having fraudulently watered them after they were dried, to increase their weight, they gradually deteriorated in quality, and became utterly unsaleable shortly afterwards, it was held that the defendant, who had fairly drawn and exhibited the samples, and was wholly ignorant of the fraud at the time of the sale, was not responsible for the latent defect afterwards discovered in the hops, although it rendered them unmerchantable, and of no value in the hands of the buyer. Here the vendor and purchaser had both equal means of knowledge. Both examined the sample, and neither of them discovered, or had the least idea of, the defect which was afterwards disclosed by the gradual process of heating. The maxim of *caveat emptor*, therefore, applied. (d)

So, where cotton had been fraudulently packed in America, the interior of the bales being filled with bad, unmerchantable cotton, and the outer part of the bales, from whence the samples would be taken, with cotton of superior quality, and the cotton so falsely packed was consigned to a Liverpool merchant, who drew samples in the ordinary way, and exhibited them to the plaintiff, who purchased and received forty-five of the bales, and then brought his action against the defendant for the deceit, it was held that the action was not maintainable, unless the jury could see grounds for inferring that the defendants or their brokers were acquainted

(c) See 29 & 30 Vict. c. 37.
II.—28

(d) *Parkinson v. Lee*, 2 East, 320.

with the fraud that had been practiced in the packing of the bales, or had themselves acted in the matter against good faith, or with some fraudulent purpose. (*e*) And, generally, if it be understood that there is to be a purchase of the article shown by sample, and the sample is fairly taken from the bulk, there is no misrepresentation or deceit, although the vendor may have given an incorrect description of the age or quality of the article, provided the description was honestly given in full belief of its truth. (*f*) A sale, however, by sample of goods to order includes a warranty of merchantable quality as to all matters that can not be judged of by the sample. (*g*)¹

1195. *False representations by railway companies amounting to a warranty.*—It has been held that railway companies must be taken to warrant the truth of the representations made by them in their published time-tables, as to the time of the starting of their trains, so that if the representation is untrue, it is what the law calls a fraudulent representation, and may be made the foundation of an action of deceit by any person who has relied upon the representation, and has sustained damage in consequence thereof. (*h*)²

(*e*) Ormrod v. Huth, 14 M. & W. 663.

49; 38 Law J., Exch. 12.

(*f*) Carter v. Crick, 4 H. & N. 412;
28 Law J., Exch. 238.

(*h*) Denton v. Great Northern Rail.
Co., 5 Ell. & Bl. 867; 25 Law J., Q. B.

(*g*) Mody v. Gregson, L. R., 4 Exch.

129.

¹ To constitute a sale by sample, the contract must have been made solely with reference to the sample exhibited, and this must have been understood by both parties. Day v. Raguet, 14 Minn. 273; Kellogg v. Barnard, 6 Blatch. (U. S.) 279; Hubbard v. George, 49 Ill. 275; Whittaker v. Hueske, 29 Tex. 355; Conrad v. Dater, 2 Biss. (U. S.) 342; Barnard v. Kellogg, 10 Wall. (U. S.) 383; but, if the party has an opportunity to examine the goods themselves, and does do so, it is not a sale by sample; Barnard v. Kellogg, *ante*; Hubbard v. George, *ante*; and where there is a sale by sample, if there is a substantial compliance therewith, an action will not lie even though the goods are not precisely like the sample in all respects. Leonard v. Fowler, 44 N. Y. 280.

² It can not be claimed that the publication of a time-table by a railroad company amounts to an absolute warranty that its trains shall arrive and depart at its different stations at the times named therein, but it does impose upon such companies the duty of exercising due care and skill to have the cars arrive and depart at the precise time designated therein, and when *through negligence or want of care* on its part, its trains are delayed, whereby a person seeking conveyance over the road by such train is delayed and sustains damage, he may maintain an action therefor. But in all cases when the train is delayed or fails to stop at a station, the company may show that the delay or neglect arose from matters which it could

1196. *False representations of authority—(i)—Pretended agency—Deceit by agents.*—If the vendor of goods affirm that the goods he sells are the goods of a stranger, his friend, and that he had authority from him to sell them, and upon that B buys them, when, in truth, they are the goods of another, yet if he sells them falsely and fraudulently on this pretense of authority, though he do not warrant them, and though it be not averred that he sold them, knowing them to be the goods of the stranger, yet B shall have an action for this deceit. (k) If an agent, who has no authority to make a contract in the name of his principal, and knows it, nevertheless makes the contract as having such authority, he is responsible in an action for deceit, for he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge; and it is but just that he who does so should be considered as holding himself out as one having competent authority to contract, and as guaranteeing the consequences arising from any want of such authority. Where, also, a party making a contract, as agent, bona fide believes that he has authority, but has, in fact, no authority, he is still personally liable. It is a wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct; and if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded

(k) Mere excess of authority does not constitute equitable fraud. *Stewart v. Austin*, L. R., 3 Eq. Ca. 299. *Ship v. Crosskill*, L. R., 10 Eq. Ca. 82. (k) 1 Roll. Abr. 91, pl. 7.

not prevent by proper care or reasonable diligence. *Gordon v. Manchester R. R. Co.*, 52 N. H. 596; *Weed v. Panama R. R. Co.*, 17 N. Y. 362; *Sears v. Eastern R. R. Co.*, 14 Allen (Mass.) 433; *Boston & Maine R. R. Co. v. Bartlett*, 5 Cush. (Mass.) 227; *Brown v. Eastern Railroad*, 11 Id. 101; *Malone v. Boston & Worcester R. R. Co.*, 12 Gray (Mass.) 388; *Lafayette R. R. Co. v. Simms*, 27 Ind. 59; *Dunlop v. Edinburgh & Glasgow R. R. Co.*, 16 Jurist, 407; *Denton v. Gt. Northern R. R. Co.*, El. & Bl. 860; *N. O. & c., R. R. Co. v. Hartz*, 36 Miss. 360; *Heirn v. McCaughan*, 2 Miss. 17; *Strohn v. Detroit, &c., R. R. Co.*, 23 Wis. 126; *Hawcroft v. Gt. Northern R. R. Co.*, 8 Eng. Law & Eq. 362.

and who has relied on the correctness of the assertion, it is equally just that he who makes the assertion should be personally liable for its consequences. (1) "One person may," observes ERLE, J., "assert he has authority to make a contract on behalf of another, and bona fide believe it, and yet it may be deceit if he makes the positive assertion without disclosing the grounds on which he erroneously, as it turns out, believes it." (m)

Where, therefore, the defendant represented himself to be the agent of one Gardner, and as such authorized to let an estate to the plaintiff, and the defendant had no authority to let the property, although he believed that he had, and in consequence of that mistake the plaintiff was induced to lay out money upon the estate, relying on the representation, it was held that the defendant was liable for all the expenses incurred by the plaintiff on the strength of the representation. (n) "I am of opinion," observes WILLES, J., "that a person who induces others to contract with him as the agent of a third party, by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages he sustains by reason of the assertion of the authority being untrue. This is not the case of a bare mis-statement to a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act, but his moral innocence, in so far as the person he has induced to contract is concerned, in no way aids him, or alleviates the inconvenience and damage which he sustains. If one of the two in such cases is to suffer, it ought not to be the person who has been guilty of no error, but he who, by an untrue assertion, believed and acted upon, as he intended it should be, and touching a subject within his peculiar knowledge, and as to which he gave the other party no opportunity of judging for himself, has brought about the damage. The obligation arising in such a case is well expressed by saying that the person professing to contract as agent for

(1) Alderson, B., *Smout v. Ilbery*, 10 M. & W. 9; *Polhill v. Walter*, 3 B. & Ad. 114.

(m) *Jenkins v. Hutchinson*, 13 Q. B. 748; *Randell v. Trimen*, 18 C. B. 786;

25 Law J., C. P. 307. *Richardson v. Dunn*, 8 C. B., N. S. 655; 30 Law J., C. P. 44.

(n) *Collen v. Wright*, 8 Ell. & Bl. 647; 26 Law J., Q. B. 147; 27 Id. 215.

another impliedly undertakes with the person who enters into such a contract upon the faith of his being duly authorized, that the authority he professes to have does in point of fact exist." (o) Thus where a person lent money to a building society, and received a receipt signed by two directors, but the society had no power to borrow money, it was held that, by signing the receipt, the directors in effect represented that they had authority to make a valid contract of loan on behalf of the society, and that they were therefore personally liable to repay the money. (p)

If the authority is of a public nature, or the grounds of it are known to the other contracting party, and the agent does no more than express his own opinion and belief as to the nature and extent of the authority vested in him, and manifests an intention merely to bind the principal if he has powers so to do, and guards himself against any positive representation of authority, he will not then be responsible if it should turn out that he had not the power he was supposed to possess. (q)

A mistake made by an agent in describing the quantity of goods he has bought for his principal, or the time of their delivery, or the price to be paid for them, may render such agent liable to his principal for negligence or for a breach of duty, (r) but does not render him liable to an action for deceit; (s) it is otherwise, however, if he knowingly makes a false representation with intent to deceive his employer. (t)

1197. *When a principal is responsible for the fraud of his agent.*—Deceits and frauds practised by agents do not fall upon the principal unless the principal adopts and takes the benefit of the fraudulent act with knowledge of the fraud, (u) or unless the fraud was committed by the agent in the transaction of the ordinary business of the principal. The gen-

(o) *Collen v. Wright*, *supra*. *Pow v. Davis*, 1 B. & S. 220; 30 Law J., Q. B. 257.

(p) *Richardson v. Williamson*, L. R., 6 Q. B. 276. See *Cherry v. Colonial Bank of Australasia*, L. R., 3 P. C. Ca. 24. *Leather v. Simpson*, L. R., 11 Eq. Ca. 398.

(q) *Macgregor v. Deal and Dover Rail. Co.*, 22 Law J., Q. B. 69.

(r) See, per Blackburn, J., *Ireland v.*

Livingston, L. R., 5 Eng. and Ir. App. 395.

(s) *Thorn v. Bigland*, 8 Exch. 729.

(t) *Pewtriss v. Austen*, 6 Taunt. 522.

(u) *Addison on Contracts*, 5th edit. 617-621. *Udell v. Atherton*, 7 H. & N. 181; 30 Law J., Exch. 337. *Barry v. Croskey*, 2 Johns. & Hem. 1. *New Bruns. and Can. Rail. Co. v. Conybeare*, *ante*. See *Wilson v. Rankin*, L. R., 1 Q. B. 162.

eral rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's or principal's benefit, though no express command or privity by the master or principal be proved. (v)¹ Thus, a trustee who employs a solicitor to invest the money of the cestui que trust, is responsible if the solicitor fraudulently fabricates a surrender of copyholds by which the cestui que trust incurs loss. (x) An exception to this rule occurs in the case of misrepresentation by directors of public companies, which do not render the company responsible in an action of deceit as for statements made by their authorized agents. (y) "Where fraud has been committed, and a third person is concerned who was ignorant of the fraud, such third person is innocent of the fraud only so long as he does not insist upon deriving any benefit from it, but when once he takes the benefit he becomes a party to the fraud." (z)

1198. False assumption of authority, as between master and servant, employer and employed.—Every man who employs another to do an act which the employer assumes to have, and appears to have, a right to authorize him to do, impliedly warrants that he has the authority he pretends to have, as the means of knowledge are peculiarly within his power; and if he has no such authority he is guilty of deceit, and must indemnify his servants or agents for all such wrongful acts as have been done by them in obedience to his commands, and which would have been lawful if the employer had the authority he pretended to have. (a) If a landlord employs a bailiff, and represents that he has a right to distrain on a tenant for rent, and signs a distress-warrant, and delivers it to the bailiff to be executed, and it turns out that the landlord had no right to distrain, and the bailiff has to pay

(v.) *Barwick v. English Joint Stock Bk.*, L. R., 2 Exch. 259.

(x) *Bostock v. Floyer*, L. R., 1 Eq. Ca. 26. *Sutton v. Wilders*, L. R., 12 Eq. Ca. acc.

(y) *Western Bank of Scotland v. Adie*, ante.

(z) *Wood, V. C.*, *Scholefield v. Temple*, 1 Johns. 163.

(a) *Best, C. J.*, *Adamson v. Jarvis*, 4 Bing. 72.

¹ *Bennett v. Judson*, 21 N. Y. 138; *Locke v. Stearns*, 1 Met. (Mass.) 540; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518; *Durst v. Burton*, 47 N. Y. 167; *Allerton v. Allerton*, 50 Id. 670; *Cook v. Cartner*, 9 Cush. (Mass.) 266; *Sandford v. Hurdy*, 23 Wend. (N. Y.) 266; *Chester v. Dickenson*, 52 Barb. (N. Y.) 349.

damages for the unlawful distress, he may maintain an action against the landlord for deceit, although the landlord made the representation believing it to be correct, and without any intention to deceive. (*b*)

1199. *Counterfeiting trade-marks—Fraudulent use by one person of the trade-mark of another with intent to deceive.*—If a manufacturer has adopted a particular mark to denote that the goods so marked were made by him, and the mark has become known and understood in the trade, he who uses the mark for the purpose of deceiving purchasers and making them believe the goods to be the goods of the manufacturer who has introduced the mark, is guilty of a false and fraudulent representation, and if this produces damages to another, the person injured is entitled to an action for the deceit. (*c*) Where “a clothier in Gloucestershire sold very good cloth, so that in London if they saw any cloth of his mark they would buy it without searching thereof; and another, who made ill cloth, put the Gloucestershire mark upon it, and an action was brought by him who bought the cloth for this deceit, it was adjudged maintainable.” (*d*) The manufacturer, also, who is damnified in having goods fraudulently palmed upon the world as goods made by him when in truth they are not so, is also entitled to an action for the deceit. (*e*) He does not, in an action of this sort, claim any abstract right to the exclusive use of the mark in question. He merely says that, having adopted a particular mark to denote that the goods so marked were made by him, and the mark having become known and understood in the trade, the public were led to believe that goods so marked were of his manufacture, and that the defendant marked his goods with a mark resembling the plaintiff’s mark with a view to deceive the public to purchase the same as and for the plaintiff’s goods, and by reason thereof the plaintiff sustained damage. (*f*)¹

1200. *Warranty of the genuineness of articles with trade-*

(*b*) Rawlings v. Bell, 1 C. B. 959.

(*c*) Crawshay v. Thompson, 4 M. & Gr. 386 n.

(*d*) 33 Eliz. cited by Dodderidge. J.

Cro. Jac. 471.

(*e*) Dodderidge, J., Poph. 142, 144.

(*f*) Rogers v. Nowill, 5 C. B. 127.

¹ Marsh v. Billings, 7 Cush. (Mass.) 322; Newman v. Alvord, 51 (N. Y.) 187; Partridge v. Menck, 2 Sandf. Ch. (N. Y.) 622.

marks.—By 25 & 26 Vict. c. 88, s. 19, it is enacted, that where any person shall sell, or contract to sell, to any other person, any chattel or article with any trade-mark thereon, or upon anything together with which such chattel or article shall be sold, or contracted to be sold, the sale or contract to sell shall be deemed to have been made with a warranty by the vendor to the vendee, that every trade-mark upon such chattel or article, or upon any such thing sold therewith as aforesaid, was genuine and true, and not forged or counterfeit, and not wrongfully used, unless the contrary shall be expressed in some writing signed by, or on behalf of, the vendor, and delivered to and accepted by the vendee.

1201. *Warranty of description as to quantity or country.*—By s. 20, it is further enacted, that in every case in which any person shall sell, or contract to sell, to any other person, any chattel or article upon which, or upon anything together with which, such chattel or article shall be sold, or contracted to be sold, any description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article, or the place or country in which such chattel or article shall have been made, manufactured, or produced, the sale, or contract to sell, shall in every such case be deemed to have been made with a warranty by the vendor, to or with the vendee, that no such description, statement, or other indication was in any material respect false or untrue, unless the contrary shall be expressed in some writing signed by, or on behalf of, the vendor, and delivered to and accepted by the vendee.

By the 29 & 30 Vict. c. 37, s. 18, every person, who shall sell any hops in a bag or pocket, having marked thereon any name, description, date, trade-mark, or symbol, intended to indicate the name of the grower, the place of growth, or the year when the hops were grown, shall be deemed to contract that the said description, &c., is genuine and true, and in accordance with the provisions of the Act. And by s. 19, that in case of any person acting contrary to the provisions of the Act, the person aggrieved by the wrongful act shall be entitled to maintain an action for damages against the person doing or causing the doing of the wrongful act.

1202. *Fraudulent assumption of the name of a bank.*—Where

the declaration in an action against a banking corporation stated that the plaintiff had established in the city of London a bank called the Bank of London, and had caused that name to be affixed on the offices of the bank, and had made the bank well known as the only Bank of London, and that the defendant, after the plaintiff's bank had been so established, and whilst it was the only bank styled the Bank of London, wrongfully established another bank in the city of London under the name of the Bank of London, and as representing the plaintiff's bank, and under the pretense that the bank so established was the plaintiff's bank, whereby the plaintiff was injured in his business, &c., it was held that the declaration disclosed no cause of action; but it seems to have been thought that, if it had been averred and shown that the plaintiff carried on the business of a banker under the name and style of the Bank of London, and that while he was so carrying on business the defendant came and established another bank of the same name, and carried on business under that name, for the purpose of making the public believe that the plaintiff's business was carried on at the defendant's bank, and so drew away customers from the plaintiff's bank, there would have been a good cause of action. (*g*)

1203. *Deceit by provision-dealers in selling unwholesome food.*—Every dealer in provisions offered for sale as food for man, who knowingly sells corrupt and unwholesome food, whereby the plaintiff is injured, is liable to an action for deceit; but he can not be made responsible in damages, unless it is shown that he sold it as sound and good meat, knowing it at the time to be unsound and unfit for food. (*h*)¹

1204. *False and fraudulent representations by married women and infants.*—Neither a married woman nor her husband can be sued for a false and fraudulent representation by such married woman that she was a feme sole, whereby she induced the plaintiff to make a contract with her, which he could not

(*g*) *Lawson v. Bank of London*, 18 C. B. 84; 25 Law J., C. P. 188. *Emmerton v. Matthews*, 7 H. & N. 586; 31 Law J., Exch. 139.

(*h*) *Burnby v. Bollet*, 16 M. & W. 644;

¹ Where pork is sold to be used as food, there is an implied warranty that it is sound and fit for that purpose. *Hoover v. Peters*, 18 Mich. 51; *Divine v. McCormick*, 50 Barb. (N. Y.) 116.

enforce by reason of her being married. (*i*) Nor can an infant be sued for a false and fraudulent representation that he was of full age, whereby the plaintiff was induced to contract with him. (*k*) Nor for falsely affirming goods to be his own goods, and that he had a right to sell them, and thereby inducing the plaintiff to purchase them. (*l*)

1205. *Fraudulent concealment*—*A suppressio veri*, or concealment of the truth, will alone, in certain cases, and under certain circumstances, amount to a fraud, and give rise to an action for deceit. Where on the sale of a house the seller, being conscious of a defect in a main wall, plastered it up and papered it over, it was held, that as the vendor had expressly concealed the defect, the purchaser might recover damages in an action for deceit. (*m*) And where on a sale of goods the vendor knew that he had no title to the goods he sold, and failed to disclose the fact to the purchaser, it was held that the latter was entitled to maintain an action for damages "on the ground that he had been deceived, and was the worse for the deceit, and that he was entitled to recover to the extent to which he had been damnified by the deception." (*n*) So, where an auctioneer sold a lease which he knew to have been forfeited in consequence of a breach of covenant by the lessee, and failed to disclose the forfeiture and the plaintiff bought the lease in ignorance of the breach of covenant and forfeiture, it was held that the auctioneer had been guilty of a deceit, and was responsible in damages to the plaintiff. (*o*)

If it is a custom of trade for a vendor of merchandise to disclose particular defects at the time of the sale, if he is cognizant of their existence, the vendor will be responsible in damages for a fraudulent concealment, if, knowing of the particular defect, he fails to make the customary disclosure. (*p*)¹ And if the vendor is cognizant of any serious

(*i*) Liverpool Adelphi Loan Assoc. v. Fairhurst. Wright v. Leonard. *ante*.

(*k*) Johnson v. Pye, 1 Sid. 258. Bartlett v. Wells, 1 B. & S. 836; 31 Law J., Q. B. 57. Price v. Hewett, 8 Exch. 146.

(*l*) Grove v. Nevill, 1 Keb. 778.

(*m*) Anon., cited by Gibbs, J., Pickering v. Dowson, 4 Taunt. 785.

(*n*) Gibbs, C. J., Peto v. Blades, 5 Taunt. 659.

(*o*) Stevens v. Adamson, 2 Stark. 422.

(*p*) Jones v. Bowden, 4 Taunt. 846.

¹ Griggs v. Woodruff, 14 Ark. 9; Torrey v. Buck, 2 N. J. 366; State v. Halloway, 8 Blackf. (Ind.) 45; Cape v. Arherney, 2 J. J. Mar. (Ky.) 296; Linker v. Smith,

secret defect materially deteriorating the value of the goods in the market, and nevertheless offers them for sale at the ordinary market price, and knows that the purchaser is deceived by the appearance of the goods at the time of the sale, and is laboring under a gross delusion respecting them, and the vendor takes no trouble to rectify the mistake and disclose the real facts to the purchaser, he is responsible in damages for willful deceit. (q)¹ But if the defect is patent, and

(q) Hill v. Gray, 1 Stark. 434.

4 Wash. (U. S.) 224. Whenever an article has a latent defect known to the seller and not known to the buyer, or when animals are afflicted with a contagious disease, to the knowledge of the seller and not known by the buyer, and generally in all instances where there is a legal or moral obligation upon the vendor to communicate to the vendee certain facts relative to the chattels, known to the vendor and not to the vendee, the suppression of such facts is a fraud. Dickinson v. Davis, 2 Leigh (Va.) 401; Van Arsdale v. Howard, 5 Ala. 596; Jenkins v. Simpson, 14 Me. 364; Wortsen v. Richardson, 18 Ill. 23; Dupre v. Uzee, 6 La. An. 280; Durrell v. Haley, 1 Paige (N. Y.) 492; Prentiss v. Rup, 16 Me. 30; Stuart v. Luddington, 1 Rand. (Va.) 403. The obligation must be *jure et de jure*, and not merely *in foro conscientiae*. Harris v. Tyson, 24 Penn. St. 347; Matthews v. Bliss, 22 Pick. (Mass.) 48.

¹ The doctrine of implied warranty upon the sale of property for a special purpose is extended to cover the sale of articles for the consumption of man or beast for the purposes of food. This doctrine is well illustrated in the case of French v. Vining, 102 Mass. 132. In that case the defendant sold to the plaintiff a quantity of hay to be fed to her cow, upon which the defendant *knew* that a quantity of white lead had been spilled. He had attempted to remove all the hay affected by it, and supposed he had, but knowing that the plaintiff wanted the hay to feed to her cow, he did not disclose the fact to her that paint had been spilled on it, and as a result she fed the hay to her cow and it sickened and died. The court held that the defendant was liable. AMES, J., in delivering the opinion of the court, said: "It may, perhaps, be more accurate to say, that independently of any express or formal stipulation, the relation of the buyer to the seller may be of such a character as to impose a duty upon the seller differing very little from a warranty. The circumstances attending the sale may be equivalent to a distinct affirmation on his part as to the quality of the thing sold. A *grocer*, for instance, who sells at retail, may be presumed to have some general notion of the uses which his customers will make of the articles they buy of him. If they purchase *flour, or sugar, or other articles of daily domestic use* for their families, or *grain or meal* for their cattle, the act of selling to them under the circumstances is equivalent to an affirmation that the things sold are at least *wholesome and reasonably fit for use*, and proof that he *knew* at the time of the sale that they were not wholesome and reasonably fit for use, would be enough to sustain an action against him for deceit, *if he had not disclosed the true state of facts*. The buyer has a right to suppose that the thing which he buys, *under such circumstances, is what it appears to be*, and such purchases are usually made *with a reliance upon the supposed skill or actual knowledge of the vendor*." So in reference to articles sold for domestic use generally, there is an im-

can readily be discovered by proper examination, and the purchaser has the means of examination at hand, there is no fraudulent concealment, and the maxim of *caveat emptor* will

plied warranty that they are fit for such use; *Winsor v. Lombard*, 18 Pick. (Mass.) 57; *Emerson v. Brigham*, 10 Mass. 197; *Van Bracklin v. Fondou*, 12 Johns. (N. Y.) 468; but this is restricted to cases where the seller is presumed to *know* the quality of the goods, or is a professed dealer therein; *Moses v. Nead*, 1 Den. (N. Y.) 378; *Burnby v. Ballett*, 16 M. & W. 644; and is not extended to cases where it is evident that the purchaser relies upon his own judgment, or upon the *brand* upon the goods; *Emerson v. Brigham*, *ante*; *Winsor v. Lombard*, *ante*; but in *all* cases where the seller *says or does* anything which misleads a person in purchasing the article, upon his own judgment, or upon faith of the brand thereon, he is liable for fraud, even though he sold it *with all faults*. This is well illustrated in the case, *Shepard v. Kain*, 5 B. & Ald. 240, where the defendant advertised a vessel for sale, and represented it as a copper-fastened vessel, but that it was to be sold *with all faults*. The vessel lay in the water, so that its bottom could not be examined, and it turned out that she was only partially copper-bottomed, and was not what is known to the trade as a copper-fastened vessel. The court held that the defendants were liable, and that the words *with all faults* must be construed to mean *all faults which a copper-fastened vessel had*.

So where fish or beef or any articles of food are sold as merchandise in barrels that have been branded and inspected, or that bear a particular mark, or the name of a particular manufacturer, the vendor can be regarded as warranting only that the goods are of the class, kinds and description represented by the marks or brands, and, in the absence of an express warranty or representations amounting thereto, is not liable if the *quality* of the articles is not good; *Winsor v. Lombard*, *ante*; *Emerson v. Brigham*, *ante*; but if the vendor *knew* that the goods were bad, he would be liable for fraud; *Emerson v. Brigham*, *ante*. A description of goods in an invoice, as of a particular description or quality, is held to amount to a warranty that they are of that quality; *Hastings v. Lavinger*, 2 Pick. (Mass.) 220; *Bridge v. Wain*, 1 Starkie, 504; so as to articles of food or drink, there is an implied warranty on the part of a manufacturer thereof that the goods are merchantable. Thus, in *Holcombe v. Hewson*, 2 Camp. 391, the plaintiff was a brewer, and entered into a contract with the defendant, by the terms of which the defendant was to take all the beer he manufactured, and that if he did not, he should pay an advanced rent for the house he occupied. The beer proved bad, and not merchantable, and in an action by the brewer upon the contract, it was held that he must be regarded as having warranted the beer to be of a merchantable quality. And generally, in the sale, personally, of any kind or description, there is an implied warranty that the goods *are of the kind or description* for which they are sold, and of the quality designated in the contract; *Higgins v. Plimpton*, 2 Pick. (Mass.) 214; *Hastings v. Lavinger*, 11 Id. 97; *Osgood v. Lewis*, 2 Har. & G. (Md.) 495; and if the vendor *knows* that the property is not what it purports to be, or what the vendee supposes he is buying, or that it is unwholesome, deleterious, or dangerous, *silence* would be deceit of itself; *McDonald v. Snelling*, 14 Allen, 290; *Thomas v. Winchester*, 6 N. Y. 397; *Langridge v. Levy*, 2 Mees. & Well. (S. C.) 509.

In *all* cases of the sale of articles of food there is an implied warranty that they are *wholesome*, and not, by reason of disease, decay, or adulteration, injurious to health; this implied warranty grows out of a *duty* to the public on the part of

apply. But the vendor must in no case resort to any art or contrivance to conceal a defect, for if he does he will be answerable, as we have just seen, for willful deceit. "If I sell

the vendor, as well as out of the contract itself, and the fact that the vendor does not *know* that the articles are unwholesome or dangerous, does not absolve him from this duty or obligation, if there is any thing in the nature of the article itself that should put him on his diligence. Quite recently, in England, a grocer was indicted for selling adulterated tea, injurious to the health of those using it. The defendant showed that he did not *know* that the tea was adulterated, but it being shown that such adulteration could be readily detected by dealers in tea upon examination, the court held him amendable to punishment. See *Langridge v. Levy*; 2 M. & W. 519; *Thomas v. Winchester*, 6 N. Y. 397; *Goodrich v. People*, 5 E. D. S. (N. Y.) 549; *State v. Norton*, 2 Ired. (N. C.) 40. So, where goods are sold by sample, the law implies a warranty that the goods shall conform *in kind* to the sample, but not that the goods are sound or in good condition; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354; *Sands v. Taylor*, 5 Johns. (N. Y.) 404; *Gallagher v. Waring*, 9 Wend. (N. Y.) 20; *Mfg. Co. v. Lawrence*, 4 Cow. (N. Y.) 440; *Bradford v. Manly*, 13 Mass. 139; *Connor v. Henderson*, 15 Id. 319; *Beebe v. Roberts*, 12 Wend. (N. Y.) 413; and in the case of all executory contracts for goods there is an implied warranty that they shall be merchantable; *Hamilton v. Ganyard*, 34 Barb. (N. Y.) 204; and in all cases of the sale of personal property upon *inspection*, where the means of knowledge on the part of the vendor and vendee are equal, no warranty is implied, but if the article is such that the vendor is presumed to have some superior knowledge in reference to it, the law implies a warranty that it is of the kind and quality represented; *Lord v. Graw*, 39 Penn. St. 88; *Denning v. Foster*, 42, N. H. 165; but on the sale of notes and other negotiable securities, there is an implied warranty that they are genuine; *Thompson v. McCullough*, 31 Miss. 224; *Sill v. Road*, 15 Johns. (N. Y.) 240; *Ritchie v. Summers*, 3 Yeates (Penn.) 531; 6 Mass. 182. Where the purchaser *knows* that an article is not as represented, the law will not imply a warranty; *Wood v. Ash*, 1 Strob. (S. C.) 407; nor where the defects complained of are visible, or the sources of information are equally open to both parties; *Hudgkins v. Perry*, 7 Ired. (N. C.) 102; nor will a warranty be implied as to defects where there is an *express* warranty. The contract will be treated as covered by and included in that warranty, and excludes all idea of any other or further warranty; nor will a warranty be implied when there is a written bill of sale; *Sparks v. Merrick*, 65 N. C. 440. When a merchant sells goods to be sent to a distant market, it is said that the law will imply a warranty that *the goods are properly packed and fit for such shipment*. But that this warranty does not go to the extent that the goods *shall remain sound* for any particular time. The contract is answered if *at the time of shipment they were in a proper condition*; *Mann v. Evertonson*, 32 Ind. 355.

As to whether or not acts done or words used by a person on the sale of property was intended as a warranty, is a question of fact for the jury, and an express intent is not essential. It is enough if, in view of the nature, character, and description of the property, the situation of the parties and their facilities for knowledge in reference to the property, the plaintiff was justified in relying upon the acts done or statements made by the party, as the statement of a *fact* rather than the expression of an opinion. *Hawkins v. Pemberton*, 51 N. Y. 198; *Foster v. Caldwell*, 18 Vt. 176; *Bradford v. Bush*, 10 Ala. 386; *Blackman v. Mackay*, 1 Hilt. (N

a horse that has lost an eye, no action lies against me for so doing; but if I sell him with a false and counterfeit eye, there an action lieth." (r) If the vendor of a glandered horse has

(r) *Southern v. Howe*, 2 Roll. 5.

Y.) 266. No particular form of words are necessary to constitute a warranty. It is enough if the vendor, at the time of sale, makes assertions in reference to the property material to its value, that the vendee *does, in fact, and has a right* to rely upon as true. *Blackman v. Mackay, ante*. It is not the privilege of the vendee to rely upon every statement made by a vendor as to all matters in reference to which he has an equal opportunity with the vendor to form a judgment or opinion; he can not blindly trust the vendor and allow his own judgment to be overridden by his. He must not shut his eyes to visible defects, or those ascertainable by the exercise of a reasonable diligence. He must—in the absence of artifice or fraud to prevent it—do that which a prudent man would do under the same circumstances. Beyond that he is not bound to go. He need not make an unusual or extraordinary effort to ascertain the quality or character of the goods, but having done that which a prudent man similarly situated would have done, he may rely upon the statements of the vendor, and for all essential purposes they are a warranty to the full extent of their purport. *Lamme v. Gregg*, 1 Met. (Ky.) 444; *Dean v. Money*, 33 Iowa, 120; *Carter v. Black*, 46 Mo. 381; *Quintard v. Newton*, 5 Rob. (N. Y.) 72; *Bigler v. Flickinger*, 55 Penn. St. 279; *Terhune v. Bener*, 36 Ga. 648; *Jones v. Quick*, 28 Ind. 125.

A warranty may be implied from a *usage of trade*. Thus, where a *usage* was shown among tobacco dealers of Cincinnati, to warrant all tobacco of a particular kind to remain sound and merchantable for the period of four months after its sale, it was held that this was a reasonable usage, and being established as such, was operative as a warranty; *Fatman v. Thompson*, 2 Dis. (Ohio) 482; but, of course, in such cases, the usage must be general and well known, so as to fairly enter into and form a part of the contract of sale, and both the vendor and vendee must be aware of it, and contract with reference to it.

In reference to a warranty of title, the rule is, that when the property is in the possession of the vendor, there is an implied warranty of title, but, when the property is in the custody of a third person, the maxim *caveat emptor*, which, according to *Evans*, in his notes on sales of property, 32, is interpreted to mean "the devil take the hindmost," applies, and in such cases the vendee is bound to require an express warranty of title, or he is remediless upon its failure; *Storm v. Smith*, 43 Miss. 497; *Sparks v. Merrick*, 65 N. C. 446; *Linton v. Porter*, 31 Ill. 107; *Miller v. Van Tassel*, 24 Cal. 458; *Tatum v. Mohr*, 21 Ark. 349; *Johnson v. Meyers*, 34 Miss. 255; *Tipton v. Triplett*, 1 Met. (Ky.) 570; *Ward v. Cavin*, 1 Head (Tenn.) 506; *Williamson v. Sammons*, 34 Ala. 691; *Gross v. Vierski*, 41 Cal. 111.

In the sale of property every vendor *et jure de jure* is bound, where they know that the purchaser is laboring under a delusion in reference to it which materially influences his judgment, to remove that delusion, and, failing to do so, he is guilty of an actionable fraud, as much as though he had by positive false assertions induced the sale. Thus in *Hill v. Gray*, 1 Starkie, 434, the plaintiff employed an agent to sell a painting for him. The defendant, being desirous of purchasing it, pressed Butt to inform him who owned the picture, which he refused to do. In the course of negotiations for the picture, the defendant, being misled by circumstances, erroneously supposed that the picture was the property of Sir Felix Agar. Butt knew that it

resorted to any doctoring or contrivance for the purpose of suppressing the marks of the disease, and has thereby deceived the purchaser, the latter will be entitled to recover all the damages he has sustained by the deception; (s) but on a general sale of a horse, when there is no warranty, the rule of caveat emptor applies; and, except there be deceit, either by a fraudulent concealment or fraudulent misrepresentation, no action for unsoundness lies by the vendee against the vendor of the animal. (t)

1206. *Fraudulent concealment of the dangerous nature of articles delivered to a bailee to be warehoused or carried.*—Every person who conceals in boxes and packages articles known by him to be of an explosive, corrosive, or combustible and dangerous nature, and delivers them to another to be warehoused or carried with other goods by land or by sea, and fails to disclose the dangerous nature of the articles to the bailee, is guilty of a tortious act, and is responsible for all the consequences of his carelessness, unless the bailee knew of the dangerous nature of the articles, and the danger and risk attendant upon the receiving and dealing with them. And it is no answer to aver that the articles were well known in trade and commerce, and that the plaintiff knew

(s) *Mul'ett v. Mason*, L. R., 1 C. P. 559.

(t) *Hill v. Balls*, 2 H. & N. 299; 29 Law J., Exch. 45.

defendant labored under this delusion, but did not remove it, and the defendant, under this misapprehension purchased the picture. In action against the defendant for the price of the painting, he set up this matter in defense, as a fraud upon him.

LORD ELLENBOROUGH said, "Although this were the finest picture that Claude ever painted, it must not be sold under a deception. The agent ought to have cautiously adhered to his original stipulation, that he should not communicate the name of the proprietor, *and not to have let in a suspicion, on the part of the purchaser, which he knew enhanced the price.* He saw that the defendant had fallen into a delusion in supposing the picture to be *Sir Felix Agar's*, and yet *he did not remove it.*" For this fraud the court held that the contract was void. "This case said the learned judge "has arrived at its termination; since it appears that the purchaser labored under a deception, in which the agent permitted him to remain on a point which he thought material to influence his judgment, I am of opinion that the contract is void." The doctrine announced in this case, that the artful concealment of a fact exclusively within the knowledge of the vendor, and known by him to be material, is a fraud which will avoid a contract or sustain an action where damage results, has been recognized by numerous authorities in this country. *Engle v. Burns*, 5 Call (Va.) 463; *Prentiss v. Ross*, 16 Me. 30; *Story v. R. R. Co.*, 24 Conn. 94; *Truebody v. Jacobson*, 2 Cal. 269; *Trigg v. Reed*, 5 Humph. (Tenn.) 529; *McAdams v. Cotes*, 24 Mo. 223; *Durrell v. Haley*, 1 Paige (N. Y.) 492.

what they were, without an express averment that he knew them to be dangerous. (u)¹

"It is clearly a tortious act," observes CROMPTON J., "for the consequences of which shippers are responsible, to ship goods apparently safe and fit to be carried, and from which the shipowner is ignorant that any danger is likely to arise, without notice of such goods being dangerous, if the shipper is aware of such danger. Such shipment when the scienter is made out is clearly wrongful and tortious; but it does not seem that there is any authority decisive on the point as to whether the shipper is liable for shipping dangerous goods without a communication of their nature, when neither he nor the shipowner are aware of the danger. It seems very difficult to hold that the shipper can be liable for not communicating what he does not know." Lord ELLEN-

(u) *Hutchinson v. Guion*, 5 C. B., N. S. Barnes, 11 C. B., N. S. 553; 31 Law J., 149; 28 Law J., C. P. 63. *Farrant v. C. P.* 139.

¹ *Boston & Albany R. R. Co. v. Shandley*, 107 Mass. 568. See note 1, p. 713, vol. 1.

² The principle or rule of law was well settled in the case of *Williams v. The East India Company*, 3 East, 192, that a person who delivers to a common carrier a highly combustible or explosive compound for transportation, without notifying him of the nature of the article, is liable for all the damages resulting therefrom, and this doctrine has been recognized and acted upon in numerous cases since. The doctrine is predicated upon the principle that, in such a case, the shipper owes a duty to the carrier, to inform him of the character of the article, in order that he may reject it if he chooses, or if he receives it, may exercise proper precaution to prevent injury to himself or others therefrom, and where either the property or persons of others may be injured thereby, the duty is still stronger in a moral, although in a legal sense it is the same. The rule is in nowise dependent upon a contract, express or implied, but it is an absolute duty that the law imposes upon every member of society, and is expressed in that time-honored maxim, *sic utere tuo alienum non ledas*; *Brass v. Maitland*, 6 El. & Bl. 470; *Farrant v. Barnes*, 11 C. B. (N. S.) 553; *Boston & Albany R. R. Co. v. Shanley, et al.*, 107 Mass. 568. The same principle controls in such a case as upheld a recovery in *Thomas v. Winchester*, 6 N. Y. 397, against a druggist, for a careless sale of a poisonous drug for a harmless one; in *Carter v. Towne*, 98 Mass. 567, for an injury to a boy eight years of age, who was inexperienced in the use of it, by the explosion of gunpowder, which the defendant sold him; and in *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64, for knowingly selling naphtha to the plaintiff, who was ignorant of its explosive qualities, to be used in a lamp, and from the explosion of which he was injured; and in *George v. Skivington, L. R.*, 5 Exch. 1, against a chemist for injuries sustained by the plaintiff's wife, by the use of a hair wash made by the defendant, and the ingredients of which were known only to himself, and which he knew was to be used by her upon her hair. Thus, it will be seen, that in

BOROUGH'S dictum (*x*) would tend to show that knowledge of the party shipping is an essential ingredient. I entertain great doubt whether either the duty or the warranty extends beyond the cases where the shipper has knowledge, or the means of knowledge, of the dangerous nature of the goods when shipped, or where he has been guilty of some negligence as shipper, as by shipping without communicating danger, which he had the means of knowing, and ought to have communicated." (*y*)

1207. *Fraudulent sales with all faults*.—A sale of a chattel to a purchaser "with all faults," does not mean that the purchaser is to take with it all frauds. Such a stipulation, therefore, will not protect the vendor from an action for deceit, if he has resorted to any artifice to conceal a defect, or has made use of any false representation for the purpose of lulling to sleep the vigilance of the purchaser. Therefore, where a ship was sold, to be taken as she lay with all faults, and it was proved that the vendor had used means to pre-

(*x*) Williams v. East. Ind. Co., 3 East, 192. Gibbon v. Paynton, 4 Burr. 2298. Batson v. Donovan, 4 B. & Ald. 33, 37.

(*y*) Brass v. Maitland, 6 Ell. & Bl. 486.

the case of the sale of articles dangerous in their character, when the vendor is aware of their dangerous qualities, or ought to be aware of them, an absolute duty is imposed upon him which he can not shirk or evade, to see to it that through no fault of his, injury ensues to another.

In the case of Boston & Albany R. R. Co. v. Shanley *et al.*, *ante*, the defendants were held liable under the following circumstances: The Shanleys were doing business in North Adams, Mass., and ordered from one of the other defendants, ten cases of *dualin*—a highly explosive compound—and from one of the other defendants a quantity of *exploders*, used in exploding *dualin*. The plaintiffs, as common carriers, received both of these articles without knowing their nature, and neither the shipper of the *dualin*, or of the *exploders*, knew that the two articles were ordered, or that they were to be shipped together, but the plaintiff, not knowing that they were dangerous, or having any knowledge of their nature, or that there was any danger from combining the two, received them, and while being carefully transported over their line, they exploded, injuring the property of the carrier, and the property of others being transported by it. It was held that the shippers of the articles were liable, but that the *consignee* of the articles could not be held chargeable, as no duty had been violated by him, as he was not called upon to make any disclosures to the carrier. See, also, Barney v. Burnstinbinder, 64 Barb. (N. Y.) 612, where nitro-glycerine was shipped without notice of its character, and having sprung a leak, was taken to a warehouse at San Francisco for examination, and while being opened, exploded, damaging the warehouse and freight therein; it was held that the shipper was liable, even though the *immediate cause* of the explosion was the opening of the package.

vent purchasers from discovering certain defects in the vessel, and had also knowingly made a false representation of her condition at the time of the sale, it was held by MANSFIELD, C. J., that although the words "to be taken with all faults" were very large, and framed expressly to exclude the buyer from calling upon the seller for any defect in the thing sold; yet if the seller was guilty of any positive fraud in the sale either in the making a false representation or in using means to conceal a defect, the seller would be answerable in damages to the buyer for the deceit. (z) And where the vendor of a vessel which was to be taken with all faults, represented the vessel in his handbills and advertisements of the sale to have been built in 1816, whereas she had been launched the year before, and the difference of time materially affected her value, it was held that the purchaser was entitled to recover damages for the deceit, notwithstanding the stipulation that the vessel was to be taken with all faults. "The vendor," observes ABBOT, C. J., "ought either to be silent or to speak the truth. In case he spoke at all, he was bound to disclose the real fact." (a) "The meaning of selling with all faults," observes HEATH, J., "is, that the purchaser shall make use of his eyes and understanding to discover what faults there are; but I admit that the vendor is not to make use of any fraud or practice to conceal a defect." (b)¹

A stipulation that the thing sold is to be taken with all faults, and without allowance for any defect, error, or misdescription, will protect the vendor from all unintentional mistakes, mis-statements, and misdescription, (c) but not from the consequences of any willful deception.

(z) *Schneider v. Heath*, 3 Campb. 507.

(b) *Pickering v. Dowson*, 4 Taunt.

(a) *Fletcher v. Bowsher*, 2 Stark. 565. 784.

Baglehole v. Walters, 3 Campb. 154.

(c) *Taylor v. Buller*, 5 Exch. 779; 20 Law J., Exch. 21.

¹ The rule is that where a person designedly produces a false impression, in order to mislead or entrap another, or to obtain an undue advantage over him, *in every such case* there is a fraud. *Howard v. Gould*, 28 Vt. 524; *Peter v. Wright*, 6 Ind. 183; *Chester v. Dickenson*, 52 Barb. (N. Y.) 349; *Turner v. Johnson*, 2 Cr. C. (U. S.) 287.

SECTION II.

OF ACTIONS FOR FRAUD AND DECEIT, AND THE REMEDY BY INJUNCTION.

1208. *Actions for deceit—Parties to be made plaintiffs. (d)—*The person to whom a false representation is made to be acted upon, and who acts upon it, believing it to be true, and who sustains damage thereby, is the party to sue for compensation; but an action may also be brought by a person to whom the representation is indirectly made, as where it is made to one man in order to be communicated to another. Where the father of the plaintiff told the defendant that he wanted to purchase a gun for the use of the plaintiff, and the defendant, in order to effect the sale, warranted the gun to have been made by Nock, and that it was a safe and secure gun, and the father then purchased the gun and delivered it to the plaintiff, who, on the faith of the warranty, and believing it to be true, used the gun, and was injured by its bursting in his hand, it was held that the plaintiff was entitled to sue the defendant for damages, as there was fraud, and damage the result of that fraud, not from an act remote and consequential, but from one contemplated by the defendant at the time as one of its results. "We decide," observes the court, "that the defendant is responsible in this case for the consequences of his fraud whilst the gun was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew the gun was purchased." (e) And where the defendant, in the course of a negotiation for the sale of a public-house, made a false and fraudulent representation to one Bourner as to the receipts of the house, and thereby induced Bourner to agree to buy it, and Bourner being unable to complete the purchase, got the plaintiff to take his contract off his hands by repeating to him the false

(d) See *ante*.

(e) *Langridge v. Levy*, 2 M. & W. 532;

4 *Id.* 337. *Blakemore v. Brist. and Ex.*

Rail. Co., 8 Ell. & Bl. 1052; 27 Law J. Q. B. 167. *Farrant v. Barnes*, *ante*.

representation made by the defendant, and the defendant then carried out the bargain with the plaintiff, and took the plaintiff's money, knowing that the false and fraudulent representation had been communicated to the plaintiff, and that he was acting under the influence of it, it was held that the plaintiff was entitled to sue the defendant for the deceit, although the false representation had not been made to him directly by the defendant, but through the medium of a third party. "The defendant," observes BOSANQUET, J., "knowing that the fraudulent representation he had made to Bournier had been communicated to the plaintiff, with whom he was about to contract, and withholding an explanation or denial of Bournier's authority for the communication, and suffering the plaintiff on the faith of that communication to enter into the contract, was as much guilty of a deceit on the plaintiff as if he had in terms repeated the statement himself." (*f*)

So, if the vendor of a lamp represents the lamp to be fit and proper to be used, knowing that it is not, and intending it to be used by the plaintiff's wife, or any particular individual, the wife, joining her husband for conformity, or that individual, will be entitled to an action for the deceit, upon the principle that if any one knowingly tells a falsehood with intent to induce another to do an act which results in his loss, he is liable to that person in an action for deceit. (*g*)

1209. Parties to be made defendants—Principal and agent.—

If a fraudulent act has been committed by an agent without the knowledge of the principal, and the latter afterwards adopts the act, and takes the benefit of the fraud, he will be responsible in damages to the person who has been deceived and injured by the fraudulent act. (*h*) But if he repudiates the transaction as soon as he becomes acquainted with the fraud, and shuns all participation therein, he will not be responsible for the fraud, if it was committed by the agent without his sanction and authority, and the representation was not within the scope of the ordinary authority of an agent acting in such a matter. (*i*) Where a merchant employed a factor to sell silk for him, and the factor fraudulently

(*f*) *Pilmore v. Hood*, 5 B. N. C. 109.

(*g*) *Longmeid v. Holliday*, 6 Exch. 685.

766. See *George v. Skivington*, L. R., 5 Exch. 1.

(*h*) *Wright v. Crookes*, 1 Sc. N. R. 685.

(*i*) *Grant v. Norway*, 10 C. B. 688.
Cornfoot v. Fowke, 6 M. & W. 369.

sold one sort of silk for another, "and the doubt was whether this deceit could charge the merchant," HOLT, C. J., was of opinion that the merchant was answerable for the deceit of his factor, "though not criminaliter yet civiliter; for, seeing somebody must be a loser by this deceit, it is more reason that he that employs the deceiver should be a loser than a stranger." (*k*) "The principal and his agent are for this purpose completely identified." (*l*) The representation, if fraudulently made by the agent, within the scope of his authority, will bind the principal equally as if made by the principal. (*m*)

A servant or agent of a horse-dealer employed to sell a horse and receive the price, has an implied authority to warrant the horse; (*n*) for in such a case there is an ostensible authority to do that which is usual in the conduct of the business of a horse-dealer. (*o*) But a servant of a private owner, employed on a particular occasion to sell a horse, has no such implied authority; (*p*) à fortiori, therefore a servant, who is merely employed to deliver the animal to a purchaser, has not. (*q*) If a broker who is authorized to advertise a ship for a voyage warrants by his advertisement that she shall sail with convoy, the shipowners are bound by the warranty, although in giving it the broker may have exceeded his authority. (*r*) If an agent employed by the indorsees of a bill to get it discounted, and not restricted as to the mode of doing it, warrants the bill to be a good bill, his employers are bound by the warranty. (*s*)

1210. Joint-stock companies.—The shareholders of a joint-stock company can not be made individually responsible in damages in an action for deceit, for adopting and authorizing the publication of a false and fraudulent report respecting the pecuniary state and condition of the company, unless it be proved that the report has been signed by them, and was false to their knowledge at the time they attached their

(*k*) *Hern v. Nicholls*, 1 Salk. 289.

(*l*) *Ld. Denman, C. J., Fuller v. Wilson*, 3 Q. B. 67.

(*m*) *Wilson v. Fuller*, 3 Q. B. 1010. *Taylor v. Green*, 8 C. & P. 319. See *Proudfoot v. Montefiore*, L. R., 2 Q. B. 511.

(*n*) *Alexander v. Gibson*, 2 Campb. 555.

(*o*) *Howard v. Sheward*, L. R., 2 C. P. 148.

(*p*) *Brady v. Todd*, 9 C. B., N. S. 592; 30 Law J., C. P. 223.

(*q*) *Woodin v. Burford*, 2 Cr. & M. 392.

(*r*) *Rinquist v. Ditchell*, 2 Campb. 556 n.

(*s*) *Fenn v. Harrison*, 4 T. R. 171.

signatures to it; (*t*) but the company itself may be made responsible for fraud through the medium of acts done by the managers and shareholders in the management of its concerns. If, with a view to raise the marketable value of the shares of a tottering and insolvent company, a report fraudulently misrepresenting the real state of the concern, the real amount of its assets, and of the demands upon it, is received and adopted by the shareholders at a general meeting, and promulgated and published to the world to induce strangers to come forward and invest capital in the concern, this must be taken, as between the company and third persons, who receive and act upon the report to their detriment, to be a representation by the company: "otherwise companies of this sort would be in this extraordinary predicament that they might employ, nay, must employ, agents to carry on their concerns, and those agents, with the authority of the company, might make representations, be they ever so false and ever so fraudulent, and yet, nevertheless, the company may benefit by those misrepresentations, without being at all liable to be told, That is your fraud." (*u*)

But the representation in these cases must be within the scope and authority of the person making it; for where a representation on behalf of a public company was made by the mere law agent or solicitor of the company, who was acting *ultra vires* when he made the representation, the company was held not to be bound by his act. (*x*)

1211. *Of declarations for deceit.*—It is not necessary, in a declaration for a deceitful representation, to set out the representation in the precise words in which it was made. It is enough to state the substance and effect of it. (*y*) This is the case with declarations for the assertion of a false claim of lien by the defendant upon the plaintiff's goods; (*z*) a false assumption of authority to accept bills by procuration; (*a*) a false assumption of title to goods; (*b*) false representations by railway companies as to the time of the starting of their trains; (*c*) by

(*t*) *Barry v. Croskey*, 2 Johns. & H. 27.

(*u*) *Glasgow Natl. Exchange Co. v. Drew*, 2 Macq. 124. See, however, *West. Bank of Scotland v. Addie*, *ante*.

(*x*) *Burnes v. Pennell*, 2 H. L. C. 497. cited 2 Macq. Sc. A. 125.

(*y*) *Gutsole v. Mathers*, 1 M. & W. 503.

(*z*) *Green v. Button*, 2 C. M. & R. 707.

(*a*) *Polhill v. Walter*, 3 B. & Ad. 114.

(*b*) *Dyster v. Battye*, 3 B. & Ald. 448.

(*c*) *Dentan v. Gt. North. Rail. Co.*, 5 Ell. & Bl. 860; 25 Law J., Q. B. 129.

managing directors of joint-stock companies as to the amount of dividend guaranteed to the shareholders; (*d*) by secretaries of insurance companies as to the management and financial condition of the company; (*e*) false representation of authority to distrain; (*f*) false representations that the patterns and designs of silk goods had been copied from registered patterns; (*g*) false representations as to the character, credit, and circumstances of third parties; (*h*) or of a firm or company of which the party making the representation is a member; (*i*) false representations by agents of the sums due to them from their principals; (*k*) false representations of the character, quality or make of goods through the medium of counterfeit trademarks and labels; (*l*) and false assumption of agency and of authority to order goods on behalf of a named principal.

1212. *Declarations for a breach of warranty on the sale of a horse* set forth "that the defendant, by warranting a horse to be then sound and quiet to ride, sold the horse to the plaintiff, yet the said horse was not then sound and quiet to ride." (*m*) A declaration which stated, that in consideration that the plaintiff, at the request of the defendant, had bought a horse of the defendant, the defendant promised that the horse was sound, was held bad in arrest of judgment, as setting forth a warranty after a sale, and not a sale founded upon and induced by a warranty. (*n*)

1213. *Declaration by an agent against a principal for a false representation.*—Where a declaration stated that the defendant, being possessed of certain cattle, represented to the plaintiff that he, the defendant, was entitled to sell the said cattle, and requested the plaintiff to put them up to auction, and the plaintiff confiding in the representation, sold the cattle by auction, and, after deducting the expenses of the sale, paid

(*d*) Gerhard v. Bates, 2 Ell. & Bl. 479.

(*e*) Pontifex v. Bignold, 3 Sc. N. R. 390.

(*f*) Pawlings v. Bell, 1 C. B. 951.

(*g*) Barley v. Walford, 9 Q. B. 199.

(*h*) Corbett v. Brown, 8 Bing. 33. Tatton v. Wade, 18 C. B. 371. Swann v. Phillips, 8 Ad & E. 457.

(*i*) Devaux v. Steinkeller, 8 Sc. 202.

(*k*) Pewtriss v. Austen, 6 Taunt. 522. As to declarations against persons who have contracted as agents without autho-

city, see Randell v. Trimen, 18 C. B. 786.

(*l*) Morison v. Salmon, 2 Sc. N. R. 449. Crawshaw v. Thompson, 4 M. & Gr. 357; 5 Sc. N. R. 562. Rodgers v. Nowill, 5 C. B. 109. Blofeld v. Payne, 4 B. & Ad. 410. Sykes v. Sykes, 3 B. & C. 541.

(*m*) 15 & 16 Vict. c. 76, Sched. B.

(*n*) Roscorla v. Thomas, 3 Q. B. 236. Holt, C. J., Lysney v. Selby, 2 Ld. Raym. 1120.

over the purchase-money to the defendant, whereas the defendant was not entitled to sell the cattle, and afterwards the true owner brought an action against the plaintiff, and recovered £1,100 damages and £95 costs, which the plaintiff was obliged to pay, together with £300, his own costs of defending the action, whereupon the plaintiff requested the defendant to pay him the amount of the said damages and costs, but the defendant refused, it was held that the declaration disclosed a good cause of action. (o)

1214. *Declarations for fraudulently inducing an architect* to withhold his certificate of the completion of certain work, and thereby preventing the plaintiff from recovering his stipulated remuneration, should set forth that the plaintiff had done all things necessary to entitle him to the certificate, and that he had completed the work to the satisfaction of the architect, and that the architect with full knowledge thereof fraudulently neglected to certify in collusion with and by the procurement of the defendant. (p)

1215. *Of the plea of not guilty.*—Where an action was brought against the defendant for selling a certain lease, and certain fixtures and goodwill, for a larger price than they were worth, by means of a false and fraudulent representation, it was held that the plea of not guilty put in issue the sale by means of the fraudulent representation, and that the plaintiff was bound to prove both the sale and the misrepresentation. (q) And where the wrongful act complained of was, that the defendant represented himself to be the agent of the master of a vessel, and thereby induced the plaintiffs to enter into a charter-party with him, when in fact he was not such agent, and had no authority to charter the vessel, it was held that the plea of not guilty put in issue both the fact of the misrepresentation and the fact of the making of the charter-party, the two facts together constituting the cause of action. (r) Where the scienter is the gist of the action, it is put in issue by the plea of not guilty. (s)

Under the plea of not guilty, the defendant may show that

(o) *Adamson v. Jarvis*, 4 Bing, 69; 12 Moore, 241.

(p) *Batterbury v. Vyse*, 2 H. & C. 42; 32 Law J., Exch. 177.

(q) *Mummery v. Paul*, 1 C. B. 326.

(r) *Brink v. Winguard*, 2 C. & K. 657.

(s) *Thomas v. Morgan*, 2 C. M. & R. 498.

the representation is within the 9 Geo. 4, c. 14, s. 6, and that it was not made by writing signed by the defendant. (t)

1216. *Proof of fraudulent misrepresentation and deceit.*—"It is settled law," observes PARKE, B., "that, independently of duty, no action will lie for a misrepresentation, unless the party making it knows it to be untrue, and makes it with a fraudulent intention to induce another to act on the strength of it, and to alter his position to his damage." (u) In order, therefore, to maintain an action for deceit arising from a false and fraudulent misrepresentation, it must be proved either that the defendant knew his statement to be untrue, or that he pretended to a knowledge which he must have known that he did not possess at the time he made the representation, or that he stated a fact to be true for a fraudulent purpose, (x) and that he made it with the intention that the plaintiff should, either directly or indirectly, come to the knowledge of it, and act upon it.

1217. *Proof of the representation having been made to the plaintiff.*—Public announcements and representations issued by the authority and under the direction of the directors or managers of public companies, and intended by them for general circulation in share-markets, and amongst purchasers of shares, are deemed in contemplation of law, as we have seen, to be made to all persons who desire to have dealings with the company, and to become purchasers of shares. The allegation in a declaration that the representation was made to the plaintiff, is completely proved by showing that it was contained in a report or prospectus, published by the defendants, and sold or distributed by them, for the purpose of influencing the sale of shares and being perused by persons desirous of buying shares, and that the plaintiff perused it, and was induced by the statements and representations contained in it to buy shares. (y)

1218. *Proof that the plaintiff relied upon the representation, and not upon his own examination and judgment.*—"Cases frequently occur in which, upon entering into contracts, mis-

(t) Turnley v. McGregor, 6 M. & Gr. 46.

(u) Thom v. Bigland, 8 Exch. 731. Childers v. Wooler, 2 Ell. & Ell. 287.

(x) Taylor v. Ashton, 11 M. & W. 415.

(y) Scott v. Dixon, 29 Law J., Exch 62, n. Bedford v. Bagshaw, Id. 64.

representations made by one party are not in any degree relied upon by the other party. If the party to whom the representations were made, himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to render it incumbent upon a court of justice to impute to him a knowledge of the result which, upon due inquiry, he ought to have obtained, and thus the notion of reliance upon the representations made to him may be excluded. Again, when we are endeavoring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made by him who was supposed to be better informed; but if the subject is in its nature uncertain, if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge, and means of acquiring knowledge, and equal skill, it is not easy to presume that representations made by one would have much influence upon the other." (z)

Cases frequently occur in which it appears that a contract was entered into after erroneous representations made by one party, and yet without the other party having at all relied upon those erroneous representations. (a)

In an action for damages for a false representation by the defendant that he was authorized to accept a bill of exchange in the name of a public company, and to bind the company

(z) *The Master of the Rolls, Clapham v. Shillito*, 7 Beav. 149.

(a) *Shrewsbury v. Blount*, 2 Sc. N. R. 594. Holt, C.J., *Lysney v. Selby*, 2 Ld. Raym. 1120.

by the acceptance, the plaintiff must prove that he has sustained some actual pecuniary damage from the false representation. The mere fact of the bill coming into the plaintiff's hands does not per se import damage, as the plaintiff may have received the bill without having given any consideration for it. (*b*)

1219. Proof of warranties.—Although a warranty made orally on the completion of a written contract can not be introduced as part of the contract, if the contract is silent as to the fact of the warranty, (*c*) yet, if it can be shown that the warranty or representation was false to the knowledge of the person making it, and therefore, fraudulent, it may be given in evidence as a circumstance collateral to the contract, and may be made the foundation of an action for deceit: (*d*) for wherever a written contract or undertaking has been procured through the medium of falsehood and fraud, the fact may be proved by oral testimony, notwithstanding the existence of a writing embodying the terms of the bargain, but making no mention of the false representation. (*e*)

An unstamped written agreement may be given in evidence to prove fraud, if it is used merely for the purpose of showing that a person paying money has been imposed upon. (*f*)

1220. Proof of the terms and conditions of warranty by proof of public notices stuck up in an auction-room or repository where the thing warranted was sold.—If in an auction-room, or at a repository established for the sale of horses, the rules or conditions of sale are painted up in legible characters in a conspicuous position, the purchaser will be deemed to have had notice of the regulations, and will be bound by them, unless the vendor has resorted to some misrepresentation or contrivance to prevent the purchaser from reading them. And if by these rules or conditions it is stipulated that a warranty of soundness shall remain in force for a given period only, unless in the meantime a certificate of unsoundness is

(*b*) *Eastwood v. Bain*, 3 H. & N. 738; 28 Law J., Exch. 74; 7 W. R. 90.

(*c*) Addison on Contracts, 6th ed., pp. 19, 220.

(*d*) *Dobell v. Stevens*, 3 B. & C. 623. *Meyer v. Everth*, 4 Campb. 22. *Wright v. Crookes*, 1 Sc. N. R. 685. *Hutchin-*

son v. Morley, 7 Sc. 341. *Canham v. Barry*, 15 C. B. 597; 24 Law J., C. P. 100.

(*e*) *Davis v. Symonds*, 1 Cox, Eq. Ca. 405.

(*f*) *Holmes v. Sixsmith*, 7 Exch. 807.

procured from a veterinary surgeon, the purchaser must comply with the stipulation, or lose his remedy upon the warranty. (*g*)

1221. *Evidence of the breach of warranty of a horse—What constitutes unsoundness.*—"The rule as to unsoundness," observes PARKE, B., "is, that if at the time of the sale the horse has any disease, or has undergone any alteration of structure either from disease or accident, which actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress, or from its ordinary effects, will diminish the natural usefulness of the animal, such horse is unsound. I think the word 'sound' means, that the animal is free from disease at the time he is warranted. If we once let in considerations of the slightheadness of the disease and facility of cure, where are we to draw the line? A horse may have a cold, which may be cured in a day; or a fever, which may be cured in a week or month; and it would be difficult to say where to stop. Of course, if the disease be slight, the unsoundness is proportionally so, and so also ought to be the damages." (*h*) Convexity of the cornea, rendering a horse short-sighted, and causing him to shy, is unsoundness. (*i*) It is not enough for the plaintiff to give evidence inducing a suspicion that the horse was unsound at the time of the warranty. If he only throws the unsoundness into doubt he is not entitled to recover. (*k*)

1222. *Proof of manifest defects not covered by the warranty.*—If the defendant can prove that the defect complained of by the plaintiff was a manifest defect obvious to all observers, and that the plaintiff examined the horse, and knew of the defect at the time he bought the animal, the defect will be excluded from the warranty. If the horse was naturally ill-formed from turning out one of its fore-legs, so as to be incapable of doing much work without cutting the ankle with the shoe so as to produce lameness, this is not unsoundness, rendering the vendor liable in damages for a breach of war-

(*g*) Bywater v. Richardson, 1 Ad. & E. 508. Mesnard v. Aldridge, 3 Esp. 271.

(*h*) Kiddell v. Burnard, 9 M. & W.

669.

(*i*) Holyday v. Morgan, 28 Law J. Q. B. 9.

(*k*) Eaves v. Dixon, 2 Taunt. 343.

ranty. (*l*) The peculiar form of hock called "curby hock," which is a natural defect, is not an unsoundness, if it has not occasioned lameness up to the time of the sale, although such horses are very liable to throw out a curb, and become lame. (*m*) But bone spavin in the hock is unsoundness, although it may not produce lameness for years. (*n*) A natural malformation of the animal, constituting a patent defect visible to the eye of every observer, must be taken to be known to a purchaser who has examined the horse, and he will be deemed to have bargained for the warranty of soundness subject to the patent defect; but if the defect is not obvious, it must be proved that the purchaser was cognizant of it at the time he purchased, for the very fact of the warranty having been given would tend to throw him off his guard, and prevent him from making a close examination of the animal. (*o*)

1223. *Proof of vice*.—If a horse has been warranted free from vice, and the horse is proved to be a crib-biter, the warranty is broken. "The habit of crib-biting," observes PARKE, B., "may not indeed show vice in the temper of the animal, but as it is a habit decidedly injurious to its health, and tending to impair its usefulness, it comes within the meaning of the term vice." (*p*)

1224. *Proof of the use of counterfeit trade-marks*.—In actions for damages for the fraudulent use by the defendant of the plaintiff's trade-mark, it is necessary to prove that the plaintiff, being a manufacturer, has been accustomed to use a certain mark to denote that the goods so marked were of his manufacture, that such mark was well known and understood in the particular trade, and that the defendant had adopted the mark, and sold goods bearing such mark upon them, as and for the plaintiff's goods, with intent to deceive. (*q*) It must be proved that the mark closely resembled the plaintiff's mark and that it was used by the defendant to

(*l*) Alderson, J., *Dickinson v. Follett*,
1 M. & Rob. 300.

(*m*) *Brown v. Elkinton*, 8 M. & W.

132.

(*n*) *Watson v. Denton*, 7 C. & P. 85,

(*o*) *Holyday v. Morgan*, 28 Law J., Q.

B. 9.

(*p*) *Scholefield v. Robb*, 2 M. & Rob.

210.

(*q*) *Wilde, C. J., Rodgers v. Nowill*, 5
C. B. 125.

enable him to pass off his own goods as being of the plaintiff's make. (r)

1225. *Remedies in equity for a false representation.*—Where a false representation is made by one man to induce another to enter into a contract, and the person making the representation is no party to the contract, the Court of Chancery will compel the latter to make good his assertion as far as possible. The principle of equity, that where a person by misrepresentation draws another into a contract, such person shall be compelled, if possible, to make good the representation, applies not merely to cases where the statements were known to be false by those who made them, but to cases where statements, false in fact, were made by persons who believed them to be true, if in the due discharge of their duty they ought to have known, or if they had formerly known, and ought to have remembered, the fact which negatives the representation. (s) The principle is this that a representation made by one party for the purpose of influencing the conduct of another, and acted on by him, will in general be sufficient to entitle him to the assistance of a Court of Equity for the purpose of realizing such representation. (t) And it seems that in many cases of false and fraudulent representation, the remedy by action at common law for damages, and by bill in equity, is concurrent. (u)

1226. *Of the damages recoverable in actions for fraudulent misrepresentation and deceit.*—Damages are, as we have seen, recoverable from every defendant who has knowingly made a false statement to the plaintiff, with an intention that he should act upon it in reliance upon its truth, and the plaintiff has acted upon it, and been damnified; for “wherever a man wickedly asserts that which he knows to be false, and thereby draws his neighbor into a heavy loss, he is responsible for it, or for so much of the loss as was the necessary, natural, or probable, and known consequence of the misrepresentation.” (x) Damages also are recoverable, as we have seen, from persons who represent that to be true within their own

(r) *Crawshay v. Thompson*, 4 M. & Gr. 387; 5 Sc. N. R. 562. *Morison v. Salmon*, 2 Sc. N. R. 452. See *Seixo v. Provezende*, *post*.

(s) *Pulsford v. Richards*, 17 Beav. 94.

(t) Per Stuart, V.-C., *Thomson v.*

Simpson, L. R., 9 Eq. Ca. 506.

(u) *Ramshire v. Boulton*, L. R., 8 Eq. Ca. 294; 38 Law J., Ch. 594. *Leather v. Simpson*, L. R., 11 Eq. Ca. 398.

(x) *Pasley v. Freeman*, 3 T. R. 65 See *ante*.

knowledge which they do not know to be true, and so induce others to act upon the faith of the representation, and sustain damage, more particularly in those cases where the means of knowing the truth of the matter rest peculiarly or exclusively with the person making the representation. If a man assumes to be an agent when he is not so, he must answer for any damage which is the natural and direct result of confidence being given to the representation of authority. If he believed that he had authority to contract as agent when he had not, he is answerable for the consequences in an action of contract. If he knew that he had no authority, he is then responsible in an action for deceit. (*y*)

1227. *Special damages—Breach of warranty.*—If special damages have been sustained by reason of the misrepresentation and deceit, or breach of warranty, of a vendor, they may be recovered from the latter, if the plaintiff has claimed them in his declaration. Where a cable was warranted sound, and a purchaser, relying on the warranty, attached an anchor to the cable, and the cable was unsound and broke, and the purchaser lost his anchor, it was held that the value of the anchor might be recovered in addition to the price paid for the cable, but that the plaintiff must expressly claim it in his declaration. (*z*) But the damages must be such as may fairly and reasonably be considered in the ordinary course of things to be the probable result of the plaintiff's acting on the faith of the representation or warranty. If there are special circumstances rendering the misrepresentation or deceit peculiarly injurious to the plaintiff, the defendant will not in general be responsible for the increased damages resulting therefrom, unless the special circumstances were known to him at the time of the making of the representation. (*a*) However, there is a distinction, it seems, between an action on a breach of warranty and one for fraudulent misrepresentation; for damage which may be the necessary or probable result of a false representation would

(*y*) *Collen v. Wright*, 7 Ell. & Bl. 314. *Randell v. Trimen*, 18 C. B. 786; 25 Law J., C. P. 307. *Simons v. Patchett*, 7 Ell. & Bl. 568; 26 Law J., Q. B. 195.

(*z*) *Borradaile v. Brunton*, 2 Moore, 582; 8 Taunt. 535. As to damages re-

coverable for breach of warranty, see *Addison on Contracts*, 6th ed., pp. 1075, 1077.

(*a*) *Hadley v. Baxendale*, 9 Exch. 841; 13 Law J., Exch. 179. *Portman v. Middleton*, 4 C. B., N. S. 322; *post*, ch. 22, s. 1,

not necessarily be within the contemplation of the parties on a warranty. (*b*)

1228. *Special damages—False assumption of agency.*—Where the defendant, a land-agent, professed that he had, and supposed that he had, authority from a landlord to let an estate, and thereupon entered into an agreement in writing with the plaintiff, whereby he professed to bind the landlord to grant the plaintiff a lease of the estate for twelve years, and the plaintiff, supposing that the defendant had the authority he pretended to have, entered upon the land, and bought and paid for the straw and manure, and expended considerable sums in preparing the land for cultivation, and the landlord then refused to grant the lease on the ground that the defendant was not authorized to let the land on the terms of the agreement, and the plaintiff, relying on the representation of authority that had been made by the defendant, instituted a suit in the Court of Chancery to enforce a specific performance of the agreement, and gave notice to the defendant of the institution of the suit, and that the landlord defended on the ground that the defendant had no authority to sign the agreement on his behalf, and that if the suit failed from want of authority, the plaintiff would look to the defendant for costs, and the defendant did not withdraw his assertion of authority, but said he would resist any demand the plaintiff might have against him, and the suit went on, and it was established that the defendant had no authority to let the land on the terms specified, and the plaintiff had to pay the costs of the suit, it was held that he was entitled to recover these costs from the defendant, as well as the expenses he had incurred in preparing the land for cultivation. (*c*) So, in such a case, he would be entitled to recover the estimated value of the lease; but not expenses incurred by reason of his having re-sold his interest in the lease to a third party without notice to the defendant, such damages not necessarily or naturally resulting from the wrongful act of the defendant, but from the fact that the plaintiff had chosen to re-sell his interest. (*d*) So

(*b*) Mullett v. Mason, L. R., 1 C. P. 559. See Hughes v. Græme, 33 Law J., Q. B. 335.
 (*c*) Collen v. Wright, 8 Ell. & Bl. 647; 5 Law J., Q. B. 147; 27 Ib. Exch. 217. (*d*) Spedding v. Nevell, L. R., 4 C. P. 212.

where the defendant, a joint-owner of an estate, contracted, without authority from his co-owners, to sell it to the plaintiff, and on their failure to complete the sale the plaintiff sued them and failed, it was held that the plaintiff was entitled to recover from the defendant all costs, up to the time when it appeared that the defendant had no such authority, as well as the expenses he had incurred in the investigation of title, and the difference between the contract price and market price of the estate, but not losses he had incurred on the resale of stock bought for the purpose of stocking the land, as that was not shown to have been in contemplation of the parties at the time of the sale. (*e*)

1229. *Prevention of fraud by indictment.* (*f*)—All deceitful practices for defrauding, or endeavoring to defraud, another of his just rights by means of some artful device, or fraudulent contrivance, are punishable as misdemeanors at common law. Persons have been indicted and convicted for playing with false dice; also for causing an illiterate person to execute a deed to his prejudice by reading it over to him in words different from those in which it was written; also for persuading a woman to execute writings on her marriage as being a settlement of her property upon her, but which constituted an acknowledgment of a debt with a warrant of attorney to enter up judgment. (*g*) Where a man went about the country and offered blacking for sale as “Everett’s Premier,” representing it to be a well-known article of that name, but knowing that it was not so, and intending to cheat his purchasers by palming off upon them a spurious article as the true one, it was held that he was indictable for a misdemeanor. (*h*)

1230. *Indictments for obtaining, or endeavoring to obtain, money or goods by false pretenses.*—Shopkeepers also have been indicted and convicted for obtaining, or endeavoring to obtain, money from their customers by false pretenses, by preparing and selling spurious articles fraudulently represented by them to be genuine, in order that by means of the counterfeit

(*e*) Godwin v. Francis, L. R., 5 C. P. 295.

(*f*) By the Merchandise Marks Act, 1862, 55 & 26 Vict. c. 88, the fraudulent use of trade marks is made a misde-

meanor. See ss. 2, 3, 12, 13.

(*g*) Hawkins’ Pleas of the Crown, ch. 71.

(*h*) Reg. v. Dundas, 6 Cox Cr. C. 380.

they might obtain the price of the genuine article. This was the case where a tradesman prepared some baking powders of his own manufacture, and put them into printed wrappers and represented them to be the baking powders of a celebrated manufacturer, and sold them, and received the money for them as such; (*i*) where a shopkeeper obtained the price of silver for base metal, by knowingly and fraudulently representing an article of base metal sold by him to be silver; (*k*) where dealers in wares and merchandise knowingly and fraudulently misrepresented the quantity or weight of articles of merchandise, delivered by them to the order of a purchaser, for the purpose of obtaining, or who thereby obtained from such purchaser, the price of a larger quantity of goods than had been actually delivered. (*l*)

But a mere misrepresentation, at the time of a sale, of the quality of the goods sold, if it amounts only to a vaunting or exaggerated statement of the value of the article—the high-flown praise often bestowed by a vendor on the wares he sells—will not amount to an indictable offense, as where the vendor of spoons represented that they were “equal to Elkington’s A.” (*m*) But where the vendor of a gold chain falsely represented that it was 15-carat gold, when it was in reality only 6-carat gold, and the vendor knew it, his conviction was affirmed. (*n*)

Various statutes have been passed for the repression of fraud, and the punishment of persons who obtain money, goods, or securities under false pretenses; (*o*) but “these statutes,” observes POLLOCK, C. B., “were never, in my opinion, meant to apply to a mere fraud committed in the course of a mercantile transaction, and to make it the subject of an indictment, unless the matter was really and wholly a designed piece of swindling.” (*p*) To constitute an obtaining within the statute, it is necessary that there should be an intention wholly to deprive the owner of his property in the

(*i*) Reg. v. Smith, 26 Law J., M. C. 105.

(*k*) Reg. v. Roebuck, 25 Law J., M. C. 101.

(*l*) Reg. v. Sherwood, 26 Law J., M. C. 81.

Reg. v. Ragg, Bell, Cr. C. 214. Reg. v. Lee, 33 Law J., M. C. 129.

(*m*) Reg. v. Bryan, Dears & B., C. C. 265.

(*n*) Reg. v. Ardley, L. R., 1 C. C. R. 301.

(*o*) 24 & 25 Vict. c. 96, s. 88.

(*p*) Reg. v. Evans, 32 Law J., M. C. 38.

chattel; obtaining the loan of a chattel, therefore, by false pretenses, is not within the statute. (*q*)

1231. *Injunction to prevent fraud.*—Whenever a person has been injured in his trade or business, or has sustained some special or peculiar injury from a fraud committed by another, he is entitled to an injunction to prevent the continuance of the injury as well as to compensation in damages. But the court will not lend its assistance for the purpose of preventing mere falsehood, not interfering with the rights of another. It will not, therefore, restrain a tradesman from putting a false statement upon the goods he sells, such as a representation that they had obtained a prize-medal, when no such medal had ever been obtained. (*r*)

Frauds on the public affords no ground for a plaintiff coming into a court of equity for an injunction where he has himself no interest in the subject-matter by which the fraud is committed. In these cases the suit must be at the instance of the Attorney-General. (*s*)

1232. *Injunction to prevent the fraudulent use of trade-marks, names, &c.*—The assumption of a name by a stranger who has never before been called by that name is not the subject of a civil action, for by the English law there is no right of property in a person to the use of a particular name, except in connection with a trade or business, which right is recognized, and a person assuming it, colorably or otherwise, in invasion of another's rights, is guilty of a fraud for which a remedy lies either at law or equity. (*t*) Thus, it is a fraud on the part of a defendant to set up a business under such a designation as is calculated to lead, and does lead, other people to suppose that his business is the business of another person. (*u*) Where, therefore, the plaintiffs, trading under the name of "The Guinea Coal Company," had obtained a considerable reputation, the defendants, who started in the same street a business under the name of "The Pall Mall Guinea Coal Company," were restrained from using such name in the same street. (*u*)

(*q*) Reg. v. Kilham, L. R., 1 C. C. R. 261.

(*r*) Batty v. Hill, 1 H. & M. 264.

(*s*) Hall v. Barrows, 32 Law J., Ch.

(*t*) Du Boulay v. Du Boulay, L. R. 2 P. C. Ca. 430.

(*u*) Lee v. Haley, L. R., 5 Ch. App.

155.

There is no property, strictly speaking, in a trade-mark, but a person may acquire a right of using a particular mark for articles which he manufactures, so that he may be able to prevent any other person from using it. Where the mark denotes that articles so marked are manufactured by a particular person, and another person puts the same mark on his own goods, this is a fraud upon the original manufacturer who first used the mark, and on purchasers who buy the goods under the impression that they are manufactured by the person whose mark they bear; and this fraud may be redressed by injunction in this country, if it is committed here, (x) whatever may be the country of the manufacturer who has been defrauded, (y) and although the marks have been used in ignorance, and under the belief that they were merely fancy decorations. (z) Where the trade-mark has been used with the knowledge of its being the distinctive device of another manufacturer, the court will, in addition to an injunction against the future use of it, decree an account of profits, and compensation in respect of the past use after knowledge of the prior right. (a)

A trade-mark may be of the greatest possible value, even though in reality it may not affect the quality of the article on which it is impressed. It may either indicate that the article was made by a particular person or firm, and so serve as a guarantee for its excellence; or it may have a merely capricious value, as where the article is intended to be sold in a place where the brand is known, and from mere inveteracy of habit people choose to go on purchasing those articles only of the kind which are marked in that particular way, and to which they have always been accustomed. (b)

The principle upon which courts of law and equity proceed in granting relief and protection in cases of this sort is, that a man ought not to sell his own goods under the pretense that they are the goods of another man, and ought not

(x) *Holloway v. Holloway*, 13 Beav. 213. *Franks v. Weaver*, 10 Id. 303.

(y) *Collins' Co. v. Brown*, 3 Kay & J. 428. *Leather Cloth Co. v. American Leather Cloth Co.*, 1 H. & N. 271.

(z) *Millington v. Fox*, 3 Myl. & Cr. 338. *Cartier v. Carlisle*, 31 Beav. 292.

(a) *Edelsten v. Edelsten*, 1 De G. J. &

S. 185. *Leather Cloth Co. v. American Leather Cloth Co.*, *supra*. A trade-mark may exist in the title of a periodical publication. See *Maxwell v. Hogg*, L. R., 2 Ch. App. 307.

(b) *Hopkins v. Hitchcock*, 32 Law J., C. P. 154.

to be permitted to practice such a deception, nor to use the means which contribute to that end. He is not, therefore, allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person, (*c*) even although he may have some right to the name. (*d*) However, where the article sold bears upon its face evidence that it has passed through the hands of a manufacturer other than the original one, and therefore may not be genuine, a mere representation by the seller that he knows it to be manufactured by the original maker, is not such a degree of willful misrepresentation as to justify the grant of an injunction. (*e*)

Where goods marked with a fraudulent trade-mark were deposited in the hands of a bailee, the court granted an injunction against the bailee to prevent him from parting with the goods, and another injunction against the owner to prevent him from proceeding with an action against the bailee for refusing to deliver them up to him. (*f*) And where goods bearing a forged trade-mark were in the hands of a firm of forwarding agents, who were ignorant of the forgery, it was held that the persons whose right was infringed were entitled to have the spurious imitation of their mark removed from the goods, and to a lien on the goods for their costs. (*g*)

Two things are requisite to be proved to establish a fraud of this description. First, there must be such a general resemblance by one man of the trade-mark of another as to mislead the public, and this is sufficient although the marks are so far different that any one seeing them side by side would not be misled. (*h*) And, secondly, a sufficient distinctive individuality must be preserved, so as to procure for the wrong-doer himself the benefit of the deception which the general resemblance is calculated to produce. (*i*)

(*c*) *Perry v. Truefitt*, 6 Beav. 73.
Dixon v. Faucus, 30 Law J., Q. B. 137.
Dent v. Turpin, *Tucker v. Turpin*, 2 Johns. & Hem. 139; 30 Law J., Ch. 495.

(*d*) *Seixo v. Provezende*, L. R. 1 Ch. App. 192.

(*e*) *Ainsworth v. Walmsley*, L. R., 1 Eq. Ca. 518.

(*f*) *Hunt v. Maniere*, 34 Law J. Ch. 142.

(*g*) *Upmann v. Elkan*, L. R. 12 Eq. Ca. 140; 7 Ch. App. 130.

(*h*) *Seixo v. Provezende*, *supra*. *Wotherspoon v. Currie*, L. R., 5 Engl. & Ir. App. 508.

(*i*) *Croft v. Day*, 7 Beav. 84.

The original inventor of a new manufacture, and persons claiming through him, is alone entitled to designate such manufacture as "the original" and after the manufacture has obtained a reputation, an injunction will be granted to restrain another manufacturer from applying the designation of "original" to his goods. (*k*) But there is nothing to prevent a person who has become acquainted with the mode of compounding a particular preparation from preparing and selling it after the death of the original discoverer, as the preparation of such discoverer, provided he does not assert or suggest that his preparation is the manufacture of the successors in business of the original discoverer, or that his preparation only is genuine, &c. (*l*)

If it is found that the defendant is manufacturing printed labels which the plaintiff alone has a right to use, and the use of which on any goods not manufactured by the plaintiff would be a fraud on the plaintiff, the court will, at the instance of the latter, interfere by injunction to prevent the printing, manufacturing, and selling of such labels, and will not hold back until the whole fraud is brought to a completion by the sale of spurious goods with the spurious trademarks affixed. (*m*) The equitable interference of the court is founded on its jurisdiction to give relief in the shape of preventive justice, in order to protect and make more effectual a legal right, and "protect property from that which, if completed, would give a right of action." (*n*).

Where the plaintiff started omnibuses with particular words and devices marked upon them, an injunction was granted restraining the defendant from starting opposition omnibuses having the same words and devices marked upon them, so as to make it appear that the defendant's omnibuses belonged to, and were under the management of, the plaintiff. (*o*)

Where manufacturers have introduced a rare or superior article, and have given it a new name, by which it is known

(*k*) *Cocks v. Chandler*, L. R., 11 Eq. Ca. 446.

(*l*) *James v. James*, L. R., 13 Eq. Ca. 421.

(*m*) *Farina v. Silverlock*, 24 Law J., Ch. 634; 26 Id. 11; 6 De G. M. & G.

214.

(*n*) *Emperor of Austria v. Day*, 30 Law J., Ch. 706. *Edelsten v. Edelsten*, *supra*.

(*o*) *Knott v. Morgan*, 2 Keen, 219.

in the market, the court will restrain another manufacturer from bringing out a similar article, and calling it by the same name. (p) "The court, when it interferes in cases of this sort, is exercising a jurisdiction over legal rights; and although sometimes, in a very strong case, it interferes in the first instance by injunction, yet in a general way it puts the party upon asserting his right by trying it before a jury. If it does not do that, it permits the plaintiff, notwithstanding the suit in equity, to bring an action. In both cases the court is only acting in aid of, and as ancillary to, the legal right, and will not, therefore, at once interfere by injunction, and prevent a defendant from disputing the plaintiff's legal title. (q)

Where a trade-mark, the property of a partnership, has been used to denote the place where a particular article is manufactured, or the quality of the goods, it constitutes, as between the surviving partner and the estate of a deceased partner, a portion of the property of the partnership. Where it is used to denote the persons by whom the article is manufactured, the exclusive right of using it would, perhaps, vest in the surviving partners to the exclusion of the deceased. (r)

Where any particular article derives its celebrity from the place where it is grown or manufactured, such as wine made from a particular vineyard, a sale of the property would carry with it a right to the use of a trade-mark known in the market as denoting the growth of that particular property. (s)

The person entitled to a trade-mark may, unless it is a purely personal one, and imports that the goods sold are the manufacture of a particular individual, assign to another the right to use the mark in common with himself, or he may assign the exclusive use of it, covenanting that he will not use it himself. (t) If the trademark be local, *i. e.*, if it imports that goods be manufactured at a particular place, it is doubtful if

(p) *Braham v. Bustard*, 1 H. & M. 447. But the mere assumption of another person's name apart from any connection with trade or business, is not a tort. *Du Boulay v. Du Boulay*, *ante*.

(q) *Ld. Cottenham, Motley v. Downman*, 3 Myl. & Cr. 1. *Collins' Co. v. Reeves*, 28 Law J., Ch. 56. *Blanchard*

v. Hill, 2 Atk. 484.

(r) *Hall v. Barrows*, 32 Law J., Ch. 548; 33 Id. 204.

(s) *Leather Cloth Co. v. American Leather Cloth Co.*, 1 H. & M. 287, 8, Wood, V. C.

(t) *Burry v. Bedford*, 33 Law J., Ch. 465.

it could be assigned to persons carrying on business elsewhere. (u)

If the trade-mark itself contains a material misrepresentation as to the character of the goods to which it is applied, that will disentitle a complainant to an injunction, although the misrepresentation is so obvious that no purchaser would be deceived. (x) But the mere statement on the trade-mark that the article is "patent" is not such a misrepresentation, although no patent for it has been taken out, if the goods have, from many years usage, acquired the designation, in the trade generally, of patent. (y)

(u) Lord Westbury, C., in *Leather Cloth Co. v. American Leather Cloth Co.*, *supra*. See Kerr on Injunctions, p. 476

(x) *Leather Cloth Co. v. American Leather Cloth Co.*, 33 Law J., Ch. 199.

(y) *Marshall v. Ross*, L. R., 8 Eq. Ca. 651.

CHAPTER XIX.

OF MATRIMONIAL AND PARENTAL INJURIES, ADULTERY AND SEDUCTION.

SECTION I.—*Of the infringement of matrimonial and parental rights.*

1233. Rights of wives deserted by their husbands.
1234. Right of action of married women after they have obtained an order for protection.
1235. What amounts to desertion.
1236. Of the restitution of conjugal rights.
1237. Of judicial separation on the ground of adultery, cruelty, or desertion.
1238. What amounts to cruelty.
1239. Revival of condoned cruelty.
1240. What amounts to desertion without cause.
1241. Rights of married women after a decree for a judicial separation.
1242. Alimony in cases of judicial separation.
1243. Of adultery and the dissolution of the marriage contract.
1244. Adultery and desertion on the part of the husband.
1245. Willful neglect or misconduct on the part of the husband conducing to adultery on the part of the wife.
1246. Connivance or toleration of adultery.
1247. Connivance on the part of the wife.
1248. Condonation of adultery.
1249. Alimony in cases of dissolution of marriage.
1250. Orders for the settlement of property for the benefit of the innocent party and children.
1251. Power of the divorce court over marriage-settlements.
1252. Orders respecting the custody of children.
1253. Of the common law right of fathers to the custody of their infant children.
1254. Right of guardians for nurture to the custody of infant children.
1255. Inability of courts of common law to interfere with the right of the father to the custody of his children.
1256. Of the controlling power of the court of chancery over the father's right to the custody of his infant children.
1257. Jurisdiction of the court of chancery over the custody of the children of British subjects born abroad.
1258. Jurisdiction of the court of chancery over the children of foreigners in this country.
1259. Right of access of mothers to their infant children and to the custody of children under seven years or age.
1260. Of the right of the mother to the custody of her children on the death or transportation of the father.
1261. Of the obligation of parents to provide for their children.
1262. Evidence on the hearing of petitions—Competency of the husband and wife to give evidence.

- 1263. Trial of questions of fact before a jury.
 - 1264. Petitions for damages from adulterers.
 - 1265. Evidence at the trial of a claim for damages for adultery—Proof of the marriage.
 - 1266. Proof of marriage by certified extracts from parochial registers of marriages.
 - 1267. Proof of marriage through the medium of examined copies and certified extracts from non-parochial registers.
 - 1268. Of the damages recoverable in cases of adultery.
 - 1269. Evidence of the defendant's circumstances or property.
 - 1270. Application of the damages recovered—Payment of costs.
- SECTION II.—*Of seduction.*
- 1271.—Of the harboring of married women and inducing them to live apart from their husbands.
 - 1272. Of the seduction and loss of service of servants.
 - 1273. Of injuries to parents in being deprived of the services of their children through the tortious act of another.
 - 1274. Of injuries to parents from the seduction of their daughters.
 - 1275. Effect of the absence of the daughter from the parent's roof at the time of the seduction.
 - 1276. Pretended hiring of girls for purposes of seduction.
 - 1277. Seduction of married daughters.
 - 1278. Effect of proof that the defendant, though he seduced the girl, was not the father of the child of which she was delivered.
 - 1279. Effect of the seduction and loss of service having been occasioned by the plaintiff's own misconduct and neglect of his parental duties.
 - 1280. Of the parties entitled to maintain an action for seduction.
 - 1281. Of the pleadings in actions for seduction.
 - 1282. Evidence at the trial in actions for seduction—Proof of the relationship of master and servant.
 - 1283. Of the damages recoverable in actions for seduction.
 - 1284. Evidence in aggravation of damages—Proof that the defendant made his advances to the daughter under the guise of matrimony.
 - 1285. Evidence in mitigation of damages.
 - 1286. Damages recoverable in actions for inducing or persuading wives, servants, or workmen, to abandon their duties or neglect the fulfillment of a contract.
 - 1287. Indictment for the abduction of unmarried girls.

SECTION I.

OF THE INFRINGEMENT OF MATRIMONIAL AND PARENTAL RIGHTS.

1233. *Rights of wives deserted by their husbands.*—A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a

police magistrate, or if resident in the country, to justices in petty sessions, or in either case to the Divorce Court, or the judge ordinary thereof, for an order to protect any money or property she may acquire by her own lawful industry, (a)¹ and property which she may become possessed of after such desertion, against her husband, or his creditors, or any person claiming under him; and such magistrate, or justices, or court, if satisfied of the fact of the desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and

(a) As to the meaning of the term "lawful," see *Mason v. Mitchell*, 34 Law J., Exch. 68.

¹ In applications for divorces in the several states of the Union, the law of the place where the application is made controls, and not the place where the marriage was celebrated. The place of forum is presumed to be the place of domicile, and unless it is so in fact, the application can not be entertained; *Harrison v. Harrison*, 20 Ala. 627; *Hanberry v. Hanberry*, 27 Ala., 719; *Hause v. Hause*, 25 Ga. 473; nor, unless the statute so provides, is it essential that the *cause* for which the divorce is sought should have transpired in the state where the application is made. The simple question is, whether any statutory cause exists, without reference to the place where it transpired (*Hanberry v. Hanberry, ante*), provided the parties reside in the state where the application is made, so that the court has jurisdiction over them; *Neal v. Hashand*, 1 La. Ann. 315; *Harteau v. Harteau*, 14 Pick. (Mass.) 181; but, *contra*, see *Frost v. Frost*, 17 N. H. 251, where it is held that a divorce can not be granted for a cause that arose out of the state, when neither party resided in the state; and generally, unless the applicant is a resident of the state where the petition is filed, no divorce can be granted. *Hopkins v. Hopkins*, 35 N. H. 474; *Johnson v. Johnson*, 4 Paige (N. Y.) 460; *McNiel v. McNiel*, 3 Edw. 550; *Jacobs v. Jacobs*, *Wright* (Ohio) 631. But, at all events, it seems that if the applicant was a resident of the state when the *cause* arose, and at the time when the application was made, the petition will be entertained. *McNiel v. McNiel, ante*.

In New Hampshire it is held, where the marriage is celebrated in that state, and the parties continued to reside there for some time, and then the husband deserts the wife and goes to another state, and she, in order to support herself, also goes to another state, and the husband subsequently returns to the state, that, although the wife at the time of the filing of her libel in fact resides out of the state, yet the court has jurisdiction of a libel filed by her for a divorce, because she can not be regarded as having deserted him, and that she has a sufficient domicile in the state, by virtue of his residence there, to answer the requirements of the statute as to the residence of the applicant. *Martin v. Martin*, 15 N. H. 159.

In reference to special questions arising under applications for divorces, reference must always be had to the statute and the decisions of the court under it, and the practice or decisions upon the same question in one state is of no authority in another unless the statutes are identical. Therefore, it is of no practical importance to pursue these questions here.

property, acquired since the commencement of the desertion, (b) from her husband and all creditors and persons claiming under him; and such earnings and property will belong to the wife as if she were a feme sole: (c) but every such order, if made by a police magistrate or justices at petty sessions, must, within ten days after the making thereof, be entered with the registrar of the county court within the jurisdiction of which the wife is resident; and the husband, and any creditor or other person claiming under him, may apply to the court or to the magistrate, or justices by whom such order was made, (d) for the discharge thereof. If the husband or any creditor of, or person claiming under, the husband, shall seize, or continue to hold, any property of the wife after notice of any such order, he may be compelled at the suit of the wife, to restore the specific property, and also a sum equal to double the value of the property so seized or held after such notice as aforesaid. 20 & 21 Vict. c. 85, s. 21; 21 & 22 Vict. c. 108, s. 6.

1234. *Right of action of married women after they have obtained an order for protection.*—When an order of protection has been made, the wife, during the continuance thereof, is in the like position in all respects with regard to property and contracts, and suing and being sued, as if she had obtained a decree of judicial separation (s. 21). These provisions extend to property to which the wife becomes entitled as executrix, administratrix, or trustee. (e) It has been held that a retrospective effect can not be given to this order—so far as it affects the rights and liabilities of third parties—and, therefore, if a married woman commences an action after the desertion of her husband, but before she has obtained an order, the subsequent procurement of the order can not make valid the invalid proceeding, for it would lead to incalculable mischief if the words of the statute were construed to have that effect as regards third parties. (f)

(b) See *In the goods of Ann Elliott, L. R.*, 2 Prob. & Div. 274.

(c) See the *Married Women's Property Act*, 1870 (33 & 34 Vict. c. 93).

(d) It was held in *Ex parte Sharp*, 33 Law J., M. C. 152, that where the magistrate who had made the order died, his successor had no jurisdiction to discharge

it, but the 27 & 28 Vict. c. 44, now provides that his successor, or the justices at subsequent sessions, or the court, may discharge the order.

(e) 21 & 22 Vict. c. 108, s. 7.

(f) *Mid. Rail. Co. v. Pye*, 30 Law J., C. P. 315; 10 C. B., N. S. 179.

The affidavit in support of an application to the Divorce Court for an order under this section of the statute should state circumstances sufficient to satisfy the court of the fact of the desertion. It should set out the time of the husband's going away, and state whether the wife has had any subsequent communication with him, and if so, the nature of that communication, whether she knows where he is and what he is doing, and whether she has received any money from him, or any promise to contribute to her support, or to return to her. (g)

1235. *What amounts to desertion.*—Desertion, under s. 21 of the Divorce Act, 20 & 21 Vict. c. 85, means not only that the husband has absented himself from his wife, but has left her unprovided for; and such desertion must continue at the time of making the order, so that a bona fide offer on the part of the husband to return and provide for his wife would take away her right to have the order made. (*h*)

A married woman, whose earnings and property have been protected against her husband and his creditors by an order made under s. 21, on account of his desertion of her, may obtain an order from the Court of Chancery for the payment of a legacy given to her in general terms. (*i*) In case of her death, also, her personal property will descend to her next of kin, to the exclusion of her husband. (*j*)¹

- • (g) Sewell, *Ex parte*, 28 Law J., (i) Re Kingsley, 28 Law J., Ch. 80.
 Prob. & Matr. 8. (j) Re Stephenson, L. R., 1 Prob. &
 (h) Cargill v. Cargill, 27 ib. 70. See Div. 287.
post.

¹ In an action for a divorce, when the statute conflicts with the Divine Law, the courts have no other alternative than to enforce the statute so long as it remains unrepealed. It is not for the court to set aside, or refuse to enforce, a law of the state, except where it is unconstitutional or void as being opposed to public policy ; *Lanier v. Lanier*, 5 Heisk. (Tenn.) 463 ; and where the statute provides for the granting of a divorce on the ground of willful desertion, it is not necessary to show that the petitioner has endeavored to *induce* the husband or wife to return when the desertion was voluntary. But when the desertion alleged is the refusal of the wife to follow her husband to another state or domicile, attempts to induce her to do so must be shown ; *Lanier v. Lanier*, *ante*.

Desertion for a certain term, in many of the states, is made a cause for divorce, and, where the statute provides that *willful* desertion, &c. shall be a cause for divorce, it is construed to mean an *intentional* desertion. Malice need not be shown between the parties, or on the part of either; simply such a state of facts as show that the desertion was *intentional*, and with a purpose to reside apart from the other.

Phillips v. Phillips, 22 Wis. 256; Benkert v. Benkert, 32 Cal. 467; without the

1236. Of the restitution of conjugal rights.—Applications for the restitution of conjugal rights must be made to the Court for Divorce and Matrimonial Causes. (*k*) The court may compel the husband and wife to live under the same roof, but it can not constrain them to have intercourse with each other, nor to live together on terms of conjugal affection. (*l*) A husband who has been served with a decree in a suit for restitution of conjugal rights, ordering him to take

(*k*) 20 & 21 Vict. c. 85, s. 17; 21 & 22 Vict. c. 108, s. 19.

(*l*) Shelford on Marriage and Divorce. Rogers on Ecclesiastical Law.

consent of the other party; for where husband and wife voluntarily separate under an agreement to live apart, desertion can not be alleged by either. *Desertion* within the meaning of the term as used in the statutes, implies an abandonment of one against his will, and for no justifiable cause or excuse. *Fulton v. Fulton*, 36 Miss. 517; *Davies v. Davies*, 37 How. Pr. (N. Y.) 45; *Pillar v. Pillar*, 22 Wis. 558; *Little v. Little*, 63 N. C. 22. If the wife leaves the husband with his consent, it can not be said that she *deserts* him within the meaning of the term, although he subsequently requests her to return. *Conger v. Conger*, 13 N. J. 286. The desertion must be such as arises from the act of the husband and wife of his or her own accord, and against the will and without the consent of the other; *McCormick v. McCormick*, 19 Wis. 172; *Moore v. Moore*, 16 N. J. 275; and it must be without justifiable cause or excuse, for, where by reason of the conduct of one of the parties, as by the refusal or neglect of the husband to provide for the proper support of the wife, *Amsden v. Amsden*, *Wright* (Ohio) 66; or compelling her by his cruelty to leave him, it can not be said that she has deserted him voluntarily or willfully; *Washburn v. Washburn*, 9 Cal. 475; *Levering v. Levering*, 16 Md. 216; *Fera v. Fera*, 98 Mass. 257; *Hesler v. Hesler*, *Wright* (Ohio) 216; *Pidge v. Pidge*, 3 Met. (Mass.) 257. Mere absence does not amount to desertion, in the legal sense of the term. The facts and circumstances must be shown so that the court can judge for itself what the real intention was, and these facts must be shown by the petitioner even though there is no appearance by the petitioner, and he must show affirmatively, such facts as amount to a willful desertion, and this involves the showing that it was without just cause or excuse; *Rogers v. Rogers*, 18 N. J. 445; *Crossman v. Crossman*, 33 Ala. 486. The refusal of a wife to follow her husband to a foreign land has been held not to amount to desertion; *Bishop v. Bishop*, 30 Penn. St. 412; neither is an unjustifiable refusal of sexual intercourse for five years by a wife, desertion. *Magill v. Magill*, 3 Pittsb. (Penn.) 25; *Southwick v. Southwick*, 97 Mass. 327. So where the wife left her home with the husband's consent, with the intent of making a visit to her mother, her subsequent change of purpose and refusal to return was held not to amount to a desertion within the meaning of the term. *Conger v. Conger*, *ante*. So where a husband provides for his wife's support after she has left him. As where he gave a bond to the guardians of the poor for her support, it was held that he could not maintain a libel for a divorce on the ground of desertion; *Vanleer v. Vanleer*, 13 Penn. St. 211; neither does the mere fact that a wife refuses to follow her husband to another state, of itself amount to desertion. It must be shown that her refusal is unreasonable in view of the circumstances existing at the time; *Gleason v. Gleason*, 4 Wis. 64.

his wife home, is bound to take the first step by inviting her to return to him. If he does not, an attachment will be issued. (*m*) A deed of separation is no bar to the suit for the restitution of conjugal rights. (*n*)

The doctrine of the canon law, that, where husband and wife have both been guilty of adultery, there is *compensatio criminum*, and both are restored to the position of innocent parties, forms no part of the law of England. A suit, therefore, for the restitution of conjugal rights can not be maintained by a wife who has committed adultery, although the husband also has committed adultery. (*o*) A suspension of the cohabitation must be clearly proved, in order to warrant the interference of the court. (*p*)

1237. Of judicial separation on the ground of adultery, cruelty, or desertion.—By the 20 & 21 Vict. c. 85, s. 7, divorce *a mensâ et thoro* is abolished, and in lieu thereof the Court for Divorce and Matrimonial Causes is authorized to pronounce a sentence of judicial separation between husband and wife, which may be obtained (s. 16) either by the husband or the wife on the ground of adultery, or cruelty, or desertion without cause for two years and upwards. (*q*) A decree for a judicial separation, if made in the absence of the respondent, may be reversed. (*r*) A deed of separation is no bar to a suit for a judicial separation, although it may form a material element for the court to consider in investigating such a suit, (*s*) and although, if it contained a covenant by the wife not to sue for a judicial separation, such a covenant might perhaps be enforced in equity. (*t*) If, after the decree for judicial separation on the ground of cruelty, and while they are living apart, the husband commits adultery, the wife will be entitled to a dissolution of the marriage. (*u*)

The wife is entitled, in the discretion of the court, to ali-

(*m*) *Alexander v. Alexander*, 30 Law J., Prob. & Matr. 173.

(*n*) *Spering v. Spering*, 3 Sw. & Tr. 211; 32 Law J., Prob. & Matr. 116. See *Anquez v. Anquez*, L. R., 1 Prob. & Div. 177.

(*o*) *Hope v. Hope*, 27 Law J., Prob. & Matr. 43.

(*p*) *Orme v. Orme*, 2 Add. 384.

(*q*) *Brookes v. Brookes*, 28 Law J.,

Prob. & Matr. 18.

(*r*) 20 & 21 Vict. c. 85, s. 23. *Phillips v. Phillips*, L. R., 1 Prob. & Div. 169

(*s*) *Williams v. Williams*, L. R., 1. Prob. & Div. 178. See *Williams v. Baily*, *infra*.

(*t*) *Williams v. Baily*, *infra*. See *Brown v. Brown*, L. R., 7 Eq. Ca. 185.

(*u*) *Bland v. Bland*, L. R., 1 Prob. & Div. 237.

mony *pendente lite*, (*v*) and an order for such is good, although she is subsequently proved to have been guilty of adultery, and her petition is dismissed. (*w*) Such alimony is by the practice of the court payable to her personally, but if, she chooses to pay it into her attorney's hands, his lien upon it for his costs will attach. (*x*)

1238. *What amounts to cruelty*.—If a husband refuses his wife the common necessities of life, or treats her with gross insult and indignity; if he spits in her face, attempts to debauch her maid-servants, (*y*) or puts her unnecessarily into confinement, or under personal restraint; or strikes her, or threatens her with personal violence unjustifiably, and without adequate provocation, (*z*) and conducts himself so as to give her a reasonable apprehension of bodily harm if she continues to reside with him, he is guilty of cruelty, and entitles her to separation of bed and board. (*a*) Everything is, in legal construction, cruelty which tends to bodily harm, and in that manner renders cohabitation unsafe. Whenever there is a tendency to bodily mischief, it is a peril from which the wife is to be protected. It is not necessary to inquire from what motive the treatment proceeds. Nor is it necessary that the conduct of the wife, should be entirely without blame, for the imputation of blame to the wife will not justify the ferocity of the husband. Constant insult, constant vituperation, and charges of gross offenses, made in the presence of the wife and before her friends, servants, or strangers, and such injurious treatment as renders life unbearable, constitute good grounds for a separation, but mere turbulence of temper and petulance of manners are not sufficient. The assistance of the court, moreover, will not be afforded to a wife who has taken upon herself to avenge her own wrongs, and to maintain a contest of retaliation. (*b*) In order to establish the charge of cruelty, it is necessary to prove actual violence

(*v*) *Thompson v. Thompson*, L. R., 1 Prob. & Div. 553. *Jones v. Jones*, L. R., 2 Prob. & Div. 333.

(*w*) *Whitmore v. Whitmore*, L. R., 1 Prob. & Div. 96. See *Coombs v. Coombs*, ib. 218. As to an injunction against the payment of alimony *pendente lite*, see *Williams v. Baily*, L. R., 2 Eq. Ca. 731.

(*x*) *Ex parte Bremner*, L. R., 1 Prob. & Div. 254.

(*y*) *Saunders v. Saunders*, 1 Rob. Eccl. 549.

(*z*) *Waring v. Waring*, 2 Phill. 132.

(*a*) *Gregory's case*, 4 Burr. 1991. *Leete v. Leete*, 31 Law J., Prob. & Matr. 121. *Waddell v. Waddell*, ib. 123.

(*b*) *Holden v. Holden*, 1 Haggs. Cons. 458. *Evans v. Evans*, ib. 119. *Oliver v. Oliver*, ib. 364. *Paterson v. Paterson*, 3 H. L. C. 328. *Curtis v. Curtis*, 27 Law J., Prob. & Matr. 75.

of such a character as to endanger personal health or safety, or the reasonable apprehension of such violence. And the ground of the court's interference is the wife's (or husband's) safety, and the impossibility of her (or him) performing the duties of matrimony in a state of dread. (c) However, moral force only, if systematically exerted to compel the submission of a wife in such a manner, and to such a degree, as to injure her health and render a serious illness imminent, amounts to legal cruelty. (d) ¹

(c) *Milford v. Milford*, L. R., 1 Prob. & Div. 295.

(d) *Kelly v. Kelly*, L. R., 2 Prob. & Matr. 31; *ib.* 59.

¹ In some of the states, although not in all, intolerable severity or cruelty on the part of the husband towards the wife, or of the wife towards the husband, is a ground for an *absolute* divorce, and no good reason can be alleged why, if a divorce should be granted for *any* cause, it should not for this. To compel parties to live in marital relations to each other, subjected to brutal treatment which robs life of all its comfort, is of doubtful policy, to say the least. As to what constitutes cruelty, or intolerable severity, within the meaning of the term as used in the statutes, it may be said that it is not necessary that actual personal violence should be used, it is enough that such conduct is shown as shocks the moral sensibilities and shows a brutal or depraved disposition on the part of either the husband or wife, and renders it unsafe or improper for them to live together. Thus it has been held that groundless charges of adultery made against the wife are acts of gross cruelty, and sufficient to warrant the granting of a divorce on the ground of cruelty. *Sheffield v. Sheffield*, 14 Tex. 356; *Johnson v. Johnson*, 4 Wis. 135; *Hooper v. Hooper*, 19 Mo. 355. Actual violence need not be shown, although when it is shown it furnishes a full cause, if it is of such a character as endangers the life or health of either, and renders cohabitation unsafe. *Gracen v. Gracen*, 2 N. J. 459; *Odaur v. Odaur*, 36 Ga. 386; *Whispell v. Whispell*, 4 Barb. (N. Y.) 217; *King v. King*, 28 Ala., 315. But where the ground of divorce is predicated upon acts of personal violence alone, the evidence must show that the violence was intentionally inflicted, and that it was of such a character as to endanger the life, limbs, or health of the libellant, or as to raise reasonable apprehension of such danger. *Ford v. Ford*, 104 Mass. 198. And habitual drunkenness, under some circumstances, has been held sufficient. *Dunlap v. Dunlap*, *Wright* (Ohio), 557. Thus, in *Doan v. Doan*, 3 Penn. L. J. Rep. 17, it was held that frequent intoxication on the part of the husband, and the habitual use of profane, abusive, and insulting language towards the wife, of which she was kept in constant fear and terror, and neglecting to provide for her, and assaulting her without provocation, although only for once, is such indignity offered to her person as entitles her to a divorce. But in order to be a ground of divorce, the alleged cruelty must be habitual rather than occasional, and a divorce is never granted for a single act of cruelty, however harsh, rude, vulgar or coarse. *Bennett v. Bennett*, 24 Mich. 482; *Richards v. Richards*, 37 Penn. St. 225; *Cook v. Cook*, 11 N. J. 195; *Finley v. Finley*, 9 Dana (Ky.) 52; *Hill v. Hill*, 2 Mass. 150; *Vignas v. Vignas*, 15 Ill. 186; *Sheffield v. Sheffield*, *ante*; *Freeman v. Freeman*, 31 Wis. 335; *Boyce v. Boyce*, 23 N. J. Eq. 337; *Harmon v. Harmon*, 16 Ill. 85. Neither will a divorce be granted upon the ground of cruelty when the petitioner provoked the acts com-

Where it appeared that a married couple had for thirty years been continually quarrelling, and the wife petitioned for a judicial separation, the judge held that he had no power to separate them on that account; for married persons cannot be legally separated upon the disinclination of one or both of them to cohabit together leading to perpetual quarrels. (*e*) "If a woman gets drunk, and loses her self-possession and uses violence, or attempts to destroy the property or stock-in-trade of her husband, he may employ as much violence as is necessary to protect his property or himself; but he goes too far if he follows her away, and strikes her after she has ceased her violence. The law gives a man no authority to beat a drunken wife." (*f*) Where a husband sought to get rid of a drunken and passionate wife, who destroyed his furniture, the judge said, "I must be cautious about opening the court to cases of this description. The wife may have an unruly propensity in her drunken fits to destroy property, but there is no evidence of such *sævitia* as would justify me in decreeing a judicial separation." (*g*) And, conversely, it has been held, that habitual drunkenness on the part of the husband, although united with much annoyance and extraordinary conduct, does not amount to legal cruelty. (*h*) But the communication to the wife of venereal disease does, if willful, and the wilfulness is to be presumed in the absence of evidence to the contrary. (*i*)

1239. *Revival of condoned cruelty*.—If cruelty has been condoned by the wife on condition that she is received back and restored to her proper position as a wife in her husband's household and the condition is broken by the husband, the cruelty is revived, and the wife entitled to a judicial separation. (*j*) Where there have been acts of violence

(*e*) *Bostock v. Bostock*, 27 Law J., Prob. & Matr. 87.

(*f*) *Pearman v. Pearman*, 29 ib. 54.

(*g*) *Scott v. Scott*, 29 Law J., Prob. & Matr. 64.

(*h*) *Brown v. Brown*, L. R., 1 Prob. & Div. 46.

(*i*) *S. C.*, and *Boardman v. Boardman*, L. R., 1 Prob. & Div. 233. See *Morphett v. Morphett*, 38 Law J., Prob. & Matr. 23; L. R., 1 Prob. & Div. 702.

(*j*) *Cooke v. Cooke*, 32 L. J., P. & M. 81, 154.

plained of, and it is always competent to show the conduct of the petitioner as well as of the petitionee. *Von Glahn v. Von Glahn*, 46 Ill. 134; *Johnson v. Johnson*, 14 Cal. 447; *Davies v. Davies*, 37 How. Pr. (N. Y.) 45; *Mayhugh v. Mayhugh*, 7 B. Mon. (Ky.) 424; *Knight v. Knight*, 31 Iowa, 457.

followed by condonation, threats subsequently uttered of such a nature, and so expressed, as to satisfy the court that further cohabitation would be attended with danger to the party threatened, constitute a sufficient ground for a decree for a judicial separation. (*k*) The doctrine of revival, however, does not apply to the compromise of a divorce suit, for where a suit is in derogation of the marriage contract, the court will favor an arrangement that prevents the scandal of a public investigation. (*l*)¹

1240. *What amounts to desertion without cause.*—Desertion does not necessarily commence when cohabitation ceases. (*m*) A husband who absents himself from his wife for the bona fide purpose of obtaining employment, and continues absent with the concurrence of his wife, or without any communication to him of her disapproval of his absence, or any manifestation of a desire on her part for his return to her, can not be said to have deserted her within the meaning of s. 16 of the Divorce Act. "I think it clear," observes the Judge Ordinary, "that to constitute desertion without cause by the husband, it must be shown that he has willfully absented himself without cause from the society of his wife, and in spite of her wish, she not being a consenting party." (*n*) A voluntary cesser of cohabitation, therefore, upon the execution of a deed of separation, or the execution of such a deed subsequently to the cesser of cohabitation, is an answer to the charge of desertion, unless it be shown that the husband had fraudulently, by a pretense of an agreement which he never intended to fulfill, induced her to consent to such separation. (*o*) The "cause" mentioned, although not necessarily a distinct matrimonial offense on which a decree of

(*k*) Bostock v. Bostock, 27 ib. 88.

J., Prob. & Matr. 68. Haviland v. Haviland, 32 Id. 65.

(*l*) Rowley v. Rowley, L. R., 1 Sc. & Div. App. 63.

(*e*) Crabb v. Crabb, L. R., 1 Prob. & Div. 601. Parkinson v. Parkinson, L. R., 2 Prob. & Matr. 25.

(*m*) Gatehouse v. Gatehouse, L. R., 1 Prob. & Div. 331. See *ante*.

(*n*) Thompson v. Thompson, 27 Law

¹ Condonation is always conditional, consequently, where a reconciliation is had after the perpetration of acts of cruelty sufficient to entitle one to a divorce, and after such reconciliation, further acts of cruelty are perpetrated, this revives the former cruelty, and renders proof of it admissible, and it may operate as a cause for divorce. Burr v. Burr, 10 Paige (N. Y.), 20; Hughes v. Hughes, 19 Ala. 307 Phillips v. Phillips, 27 Wis. 282; Sullivan v. Sullivan, 34 Ind. 368.

judicial separation or dissolution of marriage could be founded, must be grave and weighty. Mere frailty of temper (unless amounting to cruelty), and habits distasteful to the husband, are not sufficient causes. (*p*)

Desertion under this section means that the husband has withdrawn from cohabitation, even although he has not left his wife unprovided for; (*q*) and such desertion must have continued for two years at the time of the making of the petition for a judicial separation, so that a bona fide offer of the husband to return and provide for his wife and take her home, he having a home prepared for her, would take away her right to a judicial separation. (*r*) But a mere vague intimation by the husband to the wife that she may rejoin him, not containing any definite offer of a home, will not deprive her of this right when once acquired. (*s*) Nor is an offer to return by a man who is then living with another woman a bona fide one. (*t*) Nor will the payment of an allowance by the wife to the husband for a short time, or even the signing of a deed of separation, prevent the desertion from being contrary to her wish, if she ceased payment of the allowance shortly after the execution of the deed, on the ground that it would induce him to keep away. (*u*) When once cohabitation has ceased to exist, whether by the adverse act of the husband or wife, or even by the mutual consent of both, desertion becomes from that moment impossible to either, till their common life and home have been resumed. (*v*)

1241. Rights of married women after a decree for a judicial separation.—After a decree for a judicial separation, the wife has the legal status of a feme sole in respect of wrongs and injuries, and suing and being sued in any civil proceeding, and her husband is not liable in respect of any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant (*s. 26*). (*w*)

(*p*) *Yeatman v. Yeatman, infra.*

(*q*) *Yeatman v. Yeatman, L. R., 1 Prob. & Div. 489.*

(*r*) *Cargill v. Cargill, 27 Law J., Prob. & Matr. 69.*

(*s*) *Cudlipp v. Cudlipp, Id. 64.*

(*t*) *Mallinson v. Mallinson, L. R., 1 Prob. & Div. 93.*

(*u*) *Nott v. Nott, L. R., 1 Prob. & Div.*

251. And see *Keech v. Keech, 38 Law J., Prob. & Matr. 7.* *Parkinson v. Parkinson, L. R., 2 Prob. & Matr. 27.*

(*v*) *Fitzgerald v. Fitzgerald, 38 Law J., Prob. & Matr. 14; L. R., 1 Prob. & Matr. 694.* See *Buckmaster v. Buckmaster, L. R., 1 Prob. & Matr. 713; 38 L. J., Prob. & Matr. 73.*

(*w*) See *Re Insole, L. R., 1 Eq. Ca. 471.*

1242. *Alimony in cases of judicial separation.*—The Divorce Court, after making a decree for a judicial separation, may also make a decree or order for alimony, for her comfortable subsistence in accordance with her husband's income (*x*) and her own earnings, where she is supporting herself, (*y*) and may (s. 24) direct the same to be paid either to the wife herself, or to any trustee on her behalf, to be approved by the court, and may impose any terms or restrictions which to the court may seem expedient; (*z*) and if alimony decreed, or ordered to be paid, is not duly paid, the husband will (s. 26) be liable for necessaries supplied to the wife. The payment of alimony will be enforced by writ of sequestration if necessary, (*a*) and the alimony may be increased by the court if the husband's income increases. (*b*)

1243. *Of adultery and the dissolution of the marriage contract.*—Adultery was formerly an indictable, and for about ten years was de facto a capital, offense, being made so by a statute passed A. D. 1650. (*c*) This statute became a nullity at the Restoration, and adultery has since been held to be a mere civil injury and ground for divorce. The Divorce Act, 20 & 21 Vict. c. 85, s. 27, enacts, that a husband (*d*) may petition the court for the dissolution of the marriage on the ground of adultery on the part of his wife, (*d*) and the wife (*d*) may petition for the dissolution of the marriage on the ground that her husband (*d*) has been guilty of incestuous adultery, or of bigamy with adultery, (*e*) or of rape, sodomy, or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensâ et thoro, (*f*) or of adultery coupled with desertion,

(*x*) *Hooper v. Hooper*, 30 Law J., Prob. & Matr. 49. See *Haigh v. Haigh*, 38 Law J., Prob. & Matr. 37; L. R., 1 Prob. & Div. 694.

(*y*) *Goodheim v. Goodheim*, 30 Law J., Prob. & Matr. 162.

(*z*) *Franks v. Franks*, 31 Law J., Prob. & Matr. 23. *Avila v. Avila*, Id. 176. *Fletcher v. Fletcher*, Id. 83.

(*a*) *Clinton v. Clinton*, L. R., 1 Prob. & Div. 215.

(*b*) *Louis v. Louis*, L. R., 1 Prob. & Div. 230. See *Williams v. Williams*, Id. 370.

(*c*) 2 Scobell's Acts, part 2, p. 121.

(*d*) These words have no application to the case of a union between two persons in any country where polygamy is lawful, and the court here has no jurisdiction over such marriages, for the term marriage, as understood in Christendom, is the voluntary union for life of one person with another, to the exclusion of all others. *Hyde v. Hyde*, L. R., 1 Prob. & Div. 130.

(*e*) *Horne v. Horne*, 27 Law J., Prob. & Matr. 50.

(*f*) *Ante.* *Ward v. Ward*, 27 Id. 63. *Milner v. Milner*, 31 Id. 159.

without reasonable excuse, for two years or upwards. But if it appears to the court that the petitioner has been in any manner accessory to, or conniving at, the adultery, (*g*) or has condoned it (s. 29), or that the petition is presented or prosecuted in collusion with either of the respondents, (*h*) the petition will (s. 30) be dismissed. And if in the opinion of the court the petitioner has been guilty of unreasonable delay in presenting or prosecuting the petition, or of cruelty towards the other party to the marriage, or of having deserted or willfully separated from the other party to the marriage before the adultery complained of, and without reasonable excuse, (*i*) or of such willful neglect or misconduct as has conduced to the adultery, (*k*) it is competent to the court (s. 31) to refuse to dissolve the marriage. (*l*) The court, however, may, in the exercise of its discretion, dissolve the marriage at the instance of the wife, although she has been guilty of adultery, if such adultery was caused by the coercion of the respondent, and was practised against the will and desire of the petitioner. (*m*) Misconduct conducing to adultery is not mere carelessness, but a knowledge by the husband of an intimacy distinctly dangerous, and a purposed or reckless disregard of it. (*n*)¹

(*g*) *Walton v. Walton*, 28 Id. 97. *Studdy v. Studdy*, Id. 105.

(*h*) See *Todd v. Todd*, L. R., 1 Prob. & Div. 121. *Barnes v. Barnes*, Id. 505.

(*i*) *Coulthart v. Coulthart*, 28 Law J., Prob. & Matr. 21. *Yeatman v. Yeatman*, L. R., 2 Prob. & Div. 187.

(*k*) *Du Terraux v. Du Terraux*, 28 Law J., Prob. & Matr. 25. *Cunnington v. Cunningham*, Id. 101. *Groves v. Groves*,

Id. 108. *Haswell v. Haswell*, 29 Id. 21. *Hughes v. Hughes*, L. R., 1 Prob. & Div. 219.

(*l*) *Boreham v. Boreham*, L. R., 1 Prob. & Div. 77. *Lempriere v. Lempriere*, Id. 569.

(*m*) *Coleman v. Coleman*, L. R., 1 Prob. & Div. 81.

(*n*) *Dering v. Dering*, L. R., 1 Prob. & Div. 531.

¹ Adultery is a cause for divorce *a vinculo* in all the states where divorces are permitted at all. But the mere fact of adultery on the part of one party, does not always furnish a ground for a divorce, although fully proved. *Ledoux v. Boyd*, 10 La. Ann. 663; *Williamson v. Williamson*, 1 Johns. Ch. (N. Y.) 488. Thus, where the husband had absented himself for five years, without being known to be alive by the wife, and she married another man, and cohabited with him, it was held that such cohabitation did not constitute a sufficient cause for divorce on the ground of adultery. *Valleau v. Valleau*, 6 Paige (N. Y.), 207. Neither does adultery on the part of the husband or wife at a time when they are insane, constitute a ground of divorce. *Wray v. Wray*, 19 Ala. 520. Nor where after knowledge of the adultery the parties continue to live together as husband and wife. *Jones v. Jones*, 18 N. J. 33. In such cases the offense is condoned. *Backus v. Backus*, 3 Me. 186; *Johnson v. Johnson*, 1 Edh. (N. Y.) 439; *Gardner v. Gardner*, 2 Gray (Mass.), 434. But, adultery committed by the husband and

A suit for dissolution of marriage can not be maintained against a lunatic on any ground whatever; (*o*) and if, at the time of the service of the citation, the respondent is so mentally deranged as to be unfit to answer the petition or to instruct her attorney, the suit will be stayed till she recovers her mental capacity. (*p*) But the committee of a lunatic may maintain a suit for a judicial separation on the ground of the adultery of the wife of the lunatic. (*q*) And a suit for nullity of marriage may be maintained by a lunatic through a guardian appointed by the court. (*r*)

1244. *Adultery and desertion on the part of the husband giving the wife a right to a dissolution of the marriage*, must, therefore, continue for two years or upwards without reasonable excuse. Where the husband on being reproached with his adulterous connection, declared he would go away and live with his paramour, and his wife said, "Go, and when you are tired of her, come back to me," and the husband took up his hat, but before he got out of the house his wife made him promise that he would return to her, but he never came back, and, two years and upwards having elapsed, the wife sued for a dissolution of the marriage, it was held that she had given no such assent or sanction to desertion as disentitled her to a decree. (*s*) A wife is not deprived of her right under s. 27 to a divorce on the ground of adultery coupled with desertion, for two years and upwards, by a subsequent offer on the part of the husband to return and cohabit with her. (*t*)

1245. *Willful neglect or misconduct on the part of the husband conducing to adultery on the part of the wife*.—The policy of the legislature seems to have been to deprive the husband

(*o*) Bawden v. Bawden, 31 Law J., Prob. & Matr. 94. See Mordaunt v. Mordaunt, L. R., 2 Prob. & Matr. 382.

(*p*) Mordaunt v. Mordaunt, L. R., 2 Prob. & Div. 109, *diss* Kelly, C. B.

(*q*) Woodgate v. Naylor, 30 Law J.,

Prob. & Matr. 197.

(*r*) Hancock v. Peaty, L. R., 1 Prob. & Div. 335.

(*s*) Haviland v. Haviland, 32 Law J., Prob. & Matr. 65.

(*t*) Cargill v. Cargill, 27 Id. 69.

or wife when sane, and when the offense has not been condoned, or the one has not been absent for the period of seven years, and not heard from, is a good ground of divorce. It is understood, of course, that the intercourse must be voluntary, for if it was accomplished by force, the wife can not be said to have committed adultery but is the victim of a rape, for which she is not responsible. *Mehle v. Lapeyralhire*, 16 La. Ann. 4; *Tewksbury v. Tewksbury*, 5 Miss. 109.

of a remedy by divorce if he has misconducted himself as a husband, and has contributed to his own dishonor, (*u*) not to punish neglect or misconduct unconnected with the relation of husband and wife. The neglect or misconduct of a husband, therefore, which disentitles him to a divorce, must be in his marital capacity, and a breach of some marital duty. If, therefore, the husband is convicted of felony and transported, and the wife, being deprived of the protection of her husband, then lives in adulterous intercourse with another man, the conviction and transportation of the husband do not constitute misconduct in the husband disentitling him to a divorce. (*v*) So where an infant under age, who had contracted a clandestine marriage with a prostitute, was sent out of the country by his guardians and prevented from communicating with his wife, and the wife relapsed into her old trade of prostitution, it was held that the involuntary desertion of the wife by the infant husband formed no bar to a suit by him for the dissolution of the marriage. (*w*) But where a person, having married a woman of loose character, separated himself from her against her will, and sent her to live at a place where she would be peculiarly subject to temptation, and she committed adultery accordingly, it was held that the husband's conduct had conduced to it. (*x*) The neglect, however, intended by the legislature is neglect conducing to the wife's original fall, not neglect conducing to any particular act of adultery committed subsequent to her fall. (*y*)

1246. *Connivance or toleration of adultery* on the part of the husband will deprive him of his right to the dissolution of the marriage. If, therefore, a husband, finding that his wife has committed adultery, foregoes his claim to a divorce in consideration of a sum of money, not condoning the offense, but allowing her to remain his wife, and allowing his remedy to be barred by a verdict in favor of the respondent and co-respondent, he will be taken to have given a tacit consent to any future intercourse between her and her paramour. A man so acting withdraws his objection to the intercourse that

(*u*) *Jeffreys v. Jeffreys*, 33 Law J., Prob. & Matr. 84.

(*v*) *Cunnington v. Cunnington*, 28 Id. 101.

(*w*) *Beavan v. Beavan*, 32 Id. 36.

(*x*) *Baylis v. Baylis*, L. R., 1 Prob. & Div. 395.

(*y*) *St. Paul v. St. Paul*, L. R., 1 Prob. & Matr. 439; 38 L. J., Prob. & Matr.

has taken place, and sells his assent to the prostitution of his wife, and can not afterwards complain of that which he has himself sanctioned. A man consenting to adultery with A, but not consenting to adultery with B, can not make the adultery with B a ground for a dissolution of the marriage. He can not be heard to say *non omnibus dormio*, or *non semper dormio*. Such language and such conduct are not to be endured. Connivance, therefore, by the husband to any one act of criminal intercourse on the part of the wife, may deprive him of redress by a dissolution of the marriage for a subsequent act of adultery not tolerated or connived at by him. (z) To establish connivance, it is requisite, not that the person conniving should be actually an accessory before the fact by doing anything to bring about the adultery, but that he should be cognizant that it would or must result from certain transactions that he approved of, and consented to. (a) Mere negligence, mere inattention, mere dullness of apprehension, mere indifference, will not suffice, there must be an intention on the husband's part that the wife should commit adultery. If such a state of things existed as would, in the apprehension of reasonable men, result in the wife's adultery, and the husband, intending and desiring such a result, refrains from interfering to prevent it, when he might have done so, he is guilty of connivance. (b) ¹

1247. *Connivance on the part of the wife.*—An agreement to live separate would amount to connivance if it were made with knowledge of the adultery, committed by the husband, and the probability of its continuance, even although it might be forced upon the wife by the pressure of circumstances—*e.g.*, to obtain an allowance. (c)

1248. *Condonation of adultery* is forgiveness of the conjugal offense, with full knowledge of all the circumstances. (d) "Judges of great eminence have said, that there is a great

(z) *Gipps v. Gipps*, 32 Law J., Prob. & Matr. 78. *Loving v. Loving*, 3 Hagg. 87. *Crewe v. Crewe*, Id. 126.

(a) *Glennie v. Glennie*, 32 Law J., Prob. & Matr. 17. *Phillips v. Phillips*, 31 Id. 59. *Allen v. Darcy*, 30 Id. 4.

(b) *Allen v. Allen*, 30 Id. 4. *Marris v. Marris*, 31 Id. 69.

(c) *Ross v. Ross*, L. R., 1 Prob. & Matr. 734.

(d) *Dempster v. Dempster*, 31 L. J., P. & M. 20. See *Newsome v. Newsome*, L. R., 2 Prob. & Div. 306.

¹ *Pierce v. Pierce*, 3 Pick. (Mass.) 299. *Wolf v. Wolf*, Wright (Ohio), 243 *Meyers v. Meyers*, 41 Barb. (N. Y.) 114.

difference between what would constitute condonation of the adultery of the husband and what that of the wife; that conduct which would be considered culpable in a husband would be praiseworthy in a wife; that forgiveness on the part of the wife, in the hope of reclaiming her husband, would be meritorious, while a similar forgiveness by the husband would be dishonorable. Passages to this effect abound in the judgments of Lord STOWELL and Sir J. NICHOLL." (e) The forgiveness of a wife, which is to take away the husband's right to a divorce, must not fall short of reconciliation, and this must be shown by the reinstatement of the wife in her former position, so that subsequent conjugal cohabitation must be proved. Mere words of condonation, however strong, can only be regarded as imperfect forgiveness, and unless followed up by reconciliation and the reinstatement of the wife in the position she occupied before she transgressed, are incomplete, and do not amount to legal condonation. There is no legal condonation where the act of forgiveness has not been accompanied or followed by conjugal cohabitation. (f) ¹

The fact of the adultery of one of the parties having been condoned is no bar to a petition for a divorce on account of

(e) *Peacock v. Peacock*, 27 Law J., Prob. & Matr. 71. (f) *Keats v. Keats*, 28 Law J., Prob. & Matr. 78.

¹ When it appears that the libellant had reasonable grounds to believe that the libellee had been guilty of adultery and continued to live with him, it will be presumed that the offense was remitted, and, unless an offense subsequent thereto is established, it will be a complete bar to a divorce upon that ground; *Johnson v. Johnson*, 4 Paige (N. Y.) 460; *Hall v. Hall*, 4 N. H. 462; but if subsequently a similar offense is committed, the condonation goes for nothing, and the original offense is revived and may be used as a part of the ground upon which to procure a divorce; *Langdon v. Langdon*, 25 Vt. 678; *Armstrong v. Armstrong*, 27 Ind. 186; *Armstrong v. Armstrong*, 32 Miss. 279. But cohabitation after knowledge of the offense is not *always* a bar. The court will take all the circumstances surrounding the parties into consideration, and if the wife is the libellee, it will consider her means of support, her necessities, &c., &c.; *Wood v. Wood*, 2 Paige (N. Y.) 108; and generally condonation on the part of the wife will be pressed with less rigor than condonation on the part of the husband. *Gardner v. Gardner*, 2 Gray (Mass.) 434; *Armstrong v. Armstrong*, 32 Miss. 279. A mere offer on the part of a wife to return and live with her husband after knowledge of the offense, not accepted by him, does not amount to a condonation. In order to have that effect the parties must actually cohabit together after knowledge of the offense. *Quarles v. Quarles*, 19 Ala. 363; *Betz v. Betz*, 6 Rob. (N. Y.) 691.

adultery afterwards committed by the other, (*g*) provided there has been no connivance in, or sanction of, the adulterous intercourse. (*h*) The adultery of the wife, therefore, if it has been condoned by the husband, is no bar to a suit by her for a judicial separation on the ground of adultery subsequently committed by him. (*i*)

When the issues are to be tried by a jury, the question whether or not there has been condonation is a question of fact to be decided by the jury, and not a question of law. It is for the court to direct the jury what will constitute condonation, and for the jury to determine whether, subject to that direction, the circumstances of the particular case amount to condonation. (*j*)

1249. *Alimony in cases of dissolution of marriage.*—On a decree (*k*) for a dissolution of marriage, the court may (s. 32) order the husband to secure such a sum of money for the support of the wife as it may deem reasonable, having regard (s. 32) to the wife's fortune, the ability of the husband, and the conduct of the parties. (*l*) And the payment may be ordered to be made weekly or monthly, 29 & 30 Vict. c. 32.

1250. *Orders for the settlement of property for the benefit of the innocent party and children of the marriage* may be made as to the property of the wife, where a sentence of divorce or judicial separation has been founded on adultery committed by her. (*m*)

1251. *Power of the Divorce Court over marriage-settlements.*—By 22 & 23 Vict. c. 61, s. 5, it is enacted that the Court of Divorce, &c., after a final decree of a nullity of marriage, or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial (*n*) settlements, made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole, or a portion of the property settled, either for the benefit of

(*g*) *Anichini v. Anichini*, 2 Curt. 210.

(*h*) *Gipps v. Gipps*, *ante*.

(*i*) *Seller v. Seller*, 28 Law J., Prob. & Matr. 99.

(*j*) *Peacock v. Peacock*, 27 Law J., Prob. & Matr. 71.

(*k*) *I. e.*, on the final decree, *Charles v. Charles*, L. R., 1 Prob. & Div. 260.

(*l*) *Fisher v. Fisher*, 31 Law J., Prob. & Matr. 1. *Morris v. Morris*, Id. 33. *Robotham v. Robotham*, 27 Id. 61.

(*m*) 20 & 21 Vict. c. 85, s. 45; 23 & 24 Vict. c. 144, s. 6. *Milne v. Milne*, L. R., 2 Prob. & Div. 295.

(*n*) *Bullock v. Bullock*, L. R., 2 Prob. & Matr. 389.

the children of the marriage, (*o*) or of their respective parents, or both, (*p*) as to the court shall seem fit. (*q*) Where there is no issue of the marriage, or if there has been, and the children are dead, the court can not vary or alter the marriage-settlements. (*r*) The court will not, at the prayer of an adulterous wife, deprive an innocent husband of any interest he takes under a settlement, however much it may benefit the children of the marriage. (*s*) In making an order under the above section, the court will take into consideration the conduct of the parties, as well as their pecuniary position. (*t*)

1252. Orders respecting the custody of children.—In any suit or proceeding for obtaining a judicial separation, or a decree of nullity of marriage, and on any petition for dissolving a marriage, the court may from time to time, before making its final decree, make such interim orders, (*u*) and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings (*v*) to be taken for placing such children under the protection of the Court of Chancery, 20 & 21 Vict. c. 85, s. 35. The power of the court under this section of dealing with the custody of and access to children exists only where there is a suit for obtaining a judicial separation, a decree of nullity, or of dissolution of marriage. Where a petition for dissolution of marriage, therefore, is dismissed, the court has no power to make an order as to the custody of, or access to, the children of the marriage. (*w*) The words, “just and proper,” are to be construed with

(*o*) Paul v. Paul, L. R., 2 Prob. & Matr. 93.

(*p*) March v. March, L. R., 1 Prob. & Matr. 440.

(*q*) Johnson v. Johnson, 31 Law J., Prob. & Matr. 29. Pearce v. Pearce, 30 Id. 182. Horne v. Horne, Id. 200. If the fund is in the Court of Chancery, application must be made to such court to carry out the order, Pratt v. Jenner, L. R., 1 Ch. App. 493.

(*r*) Dempster v. Dempster, 31 Law J., Prob. & Matr. 113. Thomas v. Thomas, 2 Sw. & Tr. 89. Corrance v. Corrance, L. R., 1 Prob. & Matr. 495. Graham v.

Graham, L. R., 1 Prob. & Div. 711. Sykes v. Sykes, L. R., 2 Prob. & Div. 163.

(*s*) Thompson v. Thompson, 32 Law J., Prob. & Matr. 39. See Smith v. Smith, L. R., 1 Prob. & Div. 587.

(*t*) Chetwynd v. Chetwynd, L. R., 1 Prob. & Div. 39. March v. March, *supra*.

(*u*) Thompson v. Thompson, 31 Law J., Prob. & Matr. 213.

(*v*) Milford v. Milford, 38 Law J., Prob. & Matr. 63.

(*w*) Seddon v. Seddon, 31 Law J. Prob. & Matr. 101.

reference to the circumstances affecting the suit, and not merely with reference to the rules by which courts of equity and of common law have been governed in questions respecting the custody of infants. (x) ¹

The above Act only applied to orders made before or as part of the final decree, but by the 22 & 23 Vict. c. 61, s. 4, it is enacted, that after a final decree of judicial separation, nullity of marriage, or dissolution of marriage, the court may, upon application (by petition) for this purpose, make, from time to time, all such orders and provisions with respect to the custody, maintenance, and education of the children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery, as might have been made by such final decree, or by interim orders, in case the proceedings for obtaining such decree were still pending: and all orders under this enactment may be made by the Judge Ordinary alone, or with one or more of the other judges of the court. (y) In the interval between a decree nisi for dissolution of marriage being pronounced and its being made absolute, the only order the court can make as to the custody of children, is an interim order under s. 35 of 20 & 21 Vict. c. 85. (z)

The court under these statutes has no greater power over infants than parents themselves have at common law. It can not, therefore, interfere with the liberty of children where the parents themselves, if living together unsuspected, could not interfere with it. It may order maintenance for children up to the age of twenty-one, for that is conferring a benefit upon them, but it can not control them in the free choice of a residence after the age of sixteen. (a) Up to that age, however, it has jurisdiction under s. 35 to make orders as to their custody. (b)

& (x) *Marsh v. Marsh*, 28 Id. 16; 2 Sw. Tr. 276. See *Chetwynd v. Chetwynd*, L. R., 1 Prob. & Div. 39. *Barnes v. Barnes*, Id. 463.

(y) *Webster v. Webster*, 31 Law J., Prob. & Matr. 184. *Milford v. Milford*,

L. R., 1 Prob. & Matr. 715.

(z) *Cubley v. Cubley*, 31 Law J., Prob. & Matr. 161.

(a) *Ryder v. Ryder*, 30 Id. 44.

(b) *Mallinson v. Mallinson*, L. R., 1 Prob. & Div. 221.

¹ The statutes of the several states generally regulate this matter. At common law the court had no power to take the custody of the children from the father. *Ahrenfelt v. Ahrenfelt*, 1 *Hoffman* (N. Y.) 497.

When a wife has been proved to have been guilty of adultery, the court will not give her access to, or the custody of, the children of the marriage. (c) It is otherwise as to access in the case of cruelty only. (a)

In all suits and proceedings, other than proceedings to dissolve any marriage, the court is to proceed and give relief (s. 22 of 21 & 22 Vict. c. 108), on principles and rules as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have hitherto acted and given relief.

As, in the ecclesiastical courts, acts of cruelty to children, committed in the presence of the mother, have, in some instances, been held cruelty to her, such acts may be alleged in a petition to the Divorce Court, praying for a judicial separation on the ground of cruelty, and also for an order respecting the custody of the children of the marriage; but at the hearing the court will confine the inquiry to the conduct of the husband and wife. In the majority of cases, enough will come out in the course of the inquiry to enable the court to give directions as to the custody of the children, and where this is not the case the court will require further evidence to be given before making any decree. (e) The court will not deal with a petition for custody of children under the 22 & 23 Vict. c. 61, s. 4, until both parties are before it. (f)

1253. *Of the common law right of fathers to the custody of their infant children.*—Every father has a right by the common law to the exclusive custody of his legitimate infant children, although they be within the age of nurture, (g) and with this right the Court of Probate and Divorce will not interfere under the Acts we have just been considering, unless the father is notoriously leading a dissolute life, (h) or there are other circumstances rendering the transfer of them to the custody of the mother just and proper. (i) If the father has been deprived of the custody of his children, it will be restored to him both by the courts of common law

(c) Bent v. Bent, 30 Law J., Prob. & Matr. 175. Clout v. Clout, Id. 176.

(d) Bacon v. Bacon, L. R., 1 Prob. & Div. 167.

(e) Suggate v. Suggate, 28 Law J., Prob. & Matr. 46.

(f) Stacey v. Stacey, 29 Law J., Prob.

& Matr. 63. Browne's Div. Pract., 2nd ed., p. 125, *et seq.*

(g) Cartledge v. Cartledge, 31 Law J., Prob. & Matr. 85.

(h) March v. March, L. R., 1 Prob. & Matr. 437.

(i) See Barnes v. Barnes, *ante*.

and the Court of Chancery (*post*, s. 2), so long as he has not by immorality and misconduct disqualified himself from being the legal guardian of his children, and forfeited his claim to the assistance of the court. A contract by the father for the abandonment of these rights, and for the maintenance and education of the child by a relation, or any other person, does not prevent him from claiming the custody of the child, and requiring the child to be delivered up to him.

(*j*) But when a parent has committed the care of an infant child to a relation who has brought it up, and had the guardianship and control of it for a lengthened period, the Court of Chancery will not interfere, and will not compel the restoration of the child to the parent, if the effect of the proceeding would be productive of serious injury to the position and prospects of the child. (*k*)¹

Whenever an infant is in the custody of the mother, or of any third party, the courts of common law will compel her or the person having the child to deliver it into the custody of the father, unless it appears to the court that the child will be improperly restrained, or its morals contaminated, by being placed in the father's custody. (*l*) The power of the father over the child seems to be subordinate, even in a court of common law, to the higher interests of the state; so that the court will not interfere in favor of a father who has been convicted of felony, and who is manifestly an improper person to have the guardianship of the infant. (*m*) The courts of common law have authority to restore the father to his rights, but they have no power to compel him to perform his duty.

Although a father is entitled to have the custody of his children up to their attaining the age of twenty-one years, the courts of law will not interfere, by habeas corpus to withdraw a female child from the custody of persons with whom it may be, and hand it over to the custody of the father, if the child has attained the age of sixteen years. Up to that

(*j*) Reg. v. Smith, 22 Law J., Q. B. 116.

(*k*) Lyons v. Blenkin, Jac. 245. Preston, *In re*, 5 D. & L. 233; 17 Law J., Q. B. 221. Fynn, *In re*, 2 De Gex & Smale 457; Anon. 2 Sim. N. S. 54.

(*l*) Creswell, J., Hakewill, *In re*, 12 C. B. 232. M'Clellan, *Ex parte*, 1 Dowl. P. C. 81; 13 C. B. 680.

(*m*) Blisset's case, Lofft. 748. Rex v. Wilson, 4 Ad. & E. 645, n. Bailey, *Ex parte*, 6 Dowl. P. C. 311.

¹ Ahrenfelt v. Ahrenfelt, *ante*.

age a female child is not entitled to withdraw herself from the father's protection, when there is nothing to show that he will not exercise proper parental care and protection over her; and persons who induce girls to leave their fathers before that age incur great danger of being convicted of abduction. (*n*) Parental control, however, ceases at the age of sixteen, so that a girl, after that age, has a right to say that she will not be controlled by either, or by both parents, as to where, or with whom, she will live. (*o*)

1254. *Right of guardians for nurture to the custody of infant children.*—Guardianship for nurture continues until the child has attained the age of fourteen years, and a guardian for nurture may, by habeas corpus, get possession of the child during that period, unless it be shown that he is scandalously immoral, or wants the child for an improper purpose, (*p*) for every guardian for nurture has by law a right to the custody of the child. (*q*)

1255. *Inability of courts of common law to interfere with the right of the father to the custody of his children.*—The courts of common law have professed themselves incompetent to control the right of the father to the custody of his infant children, and have decided that they have no power to interfere to take an infant child from the custody of its father, except for the purpose of preventing improper and unjustifiable restraint of the person of the child, and protecting it from personal ill-usage and gross cruelty. Thus, where an Englishwoman married a Frenchman, and then separated herself from him on account, as she alleged, of ill-treatment, taking with her her infant at the breast, only eight months old, and the foreign husband came to her house, seized the child, and carried it away with him half-naked in inclement weather, the Court of Queen's Bench held that it could not interfere for the purpose of taking the child from the father and restoring it to the mother, as the father had by the common law an undoubted right to the custody of his child. (*r*) And the courts of common law have decided that they have no jurisdiction to interfere to take a child out of the custody

(*n*) Reg. v. Howes, 30 Law J., M. C. 47. Reg. v. Timmins, Id. 45.

(*o*) Ryder v. Ryder, 30 Law J., Prob. & Matr. 44.

(*p*) Race, *In re*, 26 Law J., Q. B. 169.

(*q*) Com. Dig. Guardian (D).

(*r*) Rex v. De Manneville, 5 East, 221.

of its father, although the father's cruelty to the mother has rendered it impossible for her to live with him, and he is himself confined in jail, and cohabiting there with a profligate woman, who takes the child daily to the prison to see him. (s)¹

1256. *Of the controlling power of the Court of Chancery over the father's right to the custody of his infant children.*—The Court of Chancery, on the other hand, representing the sovereign as *parens patriæ*, exercises a general control over the maintenance and education of all the Queen's subjects within its jurisdiction, and will restrain the father from acquiring possession of the person of his infant children when he has deserted their mother, and has by immoral conduct proved himself to be unfit to have the guardianship of them, and the interference of the court is necessary to protect the child from temporal ruin or spiritual peril. (t) When the conduct of the father has been such as to render it impossible that the wife can live with him, and the court has therefore the duty cast upon it of deciding whether the children shall be brought up by one parent or the other, it will adopt that custody which seems best for the interests of the children.

The grounds upon which the court has deprived a father, who has deserted or driven away his wife, of the custody of his children, and placed them under the care of the mother, or a guardian appointed by the court, are notorious impiety and irreligion, profligacy and adultery, (u) teaching the children to swear, and introducing them to low company and immoral companions; (v) the public avowal by the father of his being an atheist, and the publication by him of books deriding the truth of the Christian revelation and denying

(s) *Skinner, Ex parte*, 9 Moore 278. *Rex v. Greenhill*, 6 N. & M. 255; 4 Ad. & E. 624.

(t) *Thomas v. Roberts*, 3 De Gex & Smale, 781; 19 Law J., Ch. 506. *Creuze*

v. Hunter, 2 Cox, 242.

(u) *Shelley v. Westbrook*, Jac. 266. *Warde v. Warde*, 2 Phill. 791.

(v) *Wellesley v. Wellesley*, 2 Bligh, N. S. 124.

¹ *Ahrenfelt v. Ahrenfelt, ante*; *People v. Humphreys*, 24 Barb. (N. Y.) 521; *Matter of Robinson*, 17 Abb. Pr. (N. Y.) 399. It is not enough to warrant the court in taking the custody of the children from the father, that he is occasionally drunk. It must be shown that his habits and example are such as render him an unfit person to have charge of them. *Bryan v. Bryan*, 34 Ala. 516; *Cadd v. Cadd*, 2 Johns. (N. Y.) Ch. 141; *People v. Merriam*, 8 Paige (N. Y.) 47; *Prather v. Prather*, 4 Dec. (Sc.) 33.

the existence of God. (*w*) There are no bounds to the interference of the Court of Chancery with the rights of the father to the custody of his children, whenever his misconduct has brought about a separation between himself and the mother of those children, and his natural rights to the custody of them clash with their true interests; but it is a jurisdiction which the court is extremely reluctant to exercise, (*x*) and it will not be exercised upon the mere consideration of what may be manifestly for the benefit of the children.

Before the jurisdiction can be called into action, the court must be satisfied, not only that it has the means of acting safely and efficiently, but that the father has so conducted himself as to render it essential to the safety of the children, or to their welfare in some very serious respect, that his acknowledged rights should be superseded or interfered with. (*y*) The mere fact of the father's having committed adultery, or of his keeping up an adulterous intercourse and being separated from his wife, has been held not to be sufficient of itself to warrant the interference of the court with his natural right to the custody of his children. (*z*) But it is now competent to the Divorce Court, whenever a decree has been pronounced for a judicial separation by reason of the adultery of the husband, to order the infant children of the marriage to be placed under the custody of the mother.

When the Court of Chancery is compelled, in consequence of the profligacy or immorality of the father, to remove female children from the contamination of his example, it will not accompany that measure with the great evil of separating one portion of the family from the other; "for if one child were to be brought up by the father and the other by the mother, that very circumstance would create factions in the family, which it is the bounden duty of the court, as far as possible, to guard against." (*a*)

1257. *Jurisdiction of the Court of Chancery over the custody of the children of British subjects born abroad.*—According to the doctrine of our law, the sovereign, as *parens patræ*, has

(*w*) *Shelley v. Westbrooke*, Jac. 266.

(*x*) *Ld. Cranworth, Hope v. Hope*, 23 Law J., 689.

(*y*) *Re Curtis*, 28 Law J., Ch. 458.

(*z*) *Ball v. Ball*, 2 Sim.

(*a*) *Warde v. Warde*, 2 Phill. 791.

an interest in the maintenance and education of all its subjects, whether they be resident within the realm or domiciled abroad. The child of a British father, born abroad, is a British subject, and is, to all intents and purposes, to be deemed as if born in England; and the Court of Chancery, as representing the sovereign, will afford its aid, when requisite, in favor of the children of British subjects born abroad. Relief may be sought, and the jurisdiction of the court exercised, on behalf of an infant that is not, at the time the jurisdiction is asked for, within the control of the court. It may be that a child is out of the jurisdiction under such circumstances, that no jurisdiction can be exercised because no order can be enforced; and in such a case there is not a want of jurisdiction, but a want of power of enforcing jurisdiction. If persons abroad have property here, the court will proceed against that property to enforce obedience to its decrees. (b)

1258. *Jurisdiction of the Court of Chancery over the children of foreigners in this country.*—The Court of Chancery exercises the same jurisdiction over the custody of foreign children in this country that it does over native children; and the reason is, that foreign children, as well as foreign adults, owe allegiance to the crown, and are, to a certain extent, subjects of the crown, as long as they are in this country. (c) But, although guardians in this country have been appointed, the court will not from any considerations of supposed benefit to foreign infants, interfere with the discretion or custody of a guardian who has been appointed by a foreign court of competent jurisdiction, and who wishes to remove them back to their native country to complete their education there. (d)

1259. *Right of access of mothers to their infant children and to the custody of children under seven years of age.*—The 2 & 3 Vict. c. 54, s. 1, enables the Lord Chancellor and the Master of the Rolls, upon the petition of the mother of any infant in the sole custody or control of the father, or of any person by his authority, or of any guardian after the death of the father, to make order for the access of the petitioner to such infant,

(b) *Hope v. Hope*, 23 Law J., Ch. 686.

(c) *Hope v. Hope*, 23 Law J., Ch. 688;
2 Eq. R. 1047, S. C.

(d) *Nugent v. Vetsera*, L. R., 2 Eq. Ca. 704. See *Foster v. Denny*, 2 Ch. Ca. 237.

at such times, and subject to such regulations as he shall deem just. The Lord Chancellor and the Master of the Rolls are also empowered (ss. 3, 4), on the petition of the mother of any infant under the age of seven years, to order that such infant shall be delivered to, and remain in the custody of, the mother, until the infant attains that age; but no order is to be made in favor of any mother against whom adultery shall be established. This statute does not destroy the right of the father to the sole custody of his infant child, but introduces new elements and considerations under which that right is to be exercised. "The Act," observes Sir G. TURNER, V. C., "proceeds upon three grounds. First, it assumes and proceeds upon the existence of the paternal right. Secondly, it connects the paternal right with the marital duty and imposes the marital duty, as the condition of recognizing the paternal right. Thirdly, the Act regards the interest of the child, for on no other grounds can I account for the distinction taken between the cases of children above and under seven years of age. These three grounds, then—the paternal right, the marital duty, and the interest of the child—are to be kept in mind in deciding any case under this statute." Unless there has been a clear neglect by the father of his duty as a husband in some important particular affecting the interests of the child, the court will not deprive him of his right to the custody of it; nor will it interfere to give the wife access to the child if it be proved that she is an habitual drunkard, or that intercourse between the mother and child would be likely to be prejudicial to the interests of the child. (e) Although the child is, at the time of the presentation of a petition by the mother, and continues to be, in the custody of the mother, the Court of Chancery has, within the equity of the Act, jurisdiction to interfere. (f)

1260. *Of the right of the mother to the custody of her children on the death or transportation of the father.*—On the death of the father, the surviving mother has an absolute right to the custody of her infant children, (g) and if the father is convicted of felony, and sentenced to be transported, the courts of com

(e) Halliday, *In re*, 17 Jur. 56.

(f) Tomlinson, *In re*, 3 De G. & Sm.

372.

(g) 2 & 3 Vict. c. 54, s. 1.

mon law will grant a habeas corpus to bring up the infants, that they may be delivered to the mother. (*h*)

1261. *Of the obligation of parents to provide for their children.*—By the common law, a father who gives no authority to another, and enters into no contract, is no more liable for goods supplied to his child than a brother, or an uncle, or a mere stranger would be. “In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person;” (*i*) but the 43 Eliz. c. 2, s. 7, for the relief of the poor, provides that the father and grandfather, and mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall at their own charges, relieve and maintain every such poor person; and the 4 & 5 Wm. 4, c. 76, s. 56, provides, that all parish relief given to the wife or to the child under the age of sixteen, not being blind, or deaf, or dumb, shall be considered as given to the husband or parent, as the case may be, and may be treated (s. 58) as a loan to the latter, and may be recovered in the mode thereby appointed (s. 59). A child left to starve, therefore, must apply to the parish, and the parish will compel payment of subsistence-money from the parent. (*k*)

1262. *Evidence on the hearing of petitions—Competency of the husband and wife to give evidence.*—By the 32 & 33 Vict. c. 68, the exception contained in the 14 & 15 Vict. c. 99, s. 4, and 16 & 17 Vict. c. 83, s. 2, as to husbands and wives not being competent or compellable to give evidence against each other “in any proceeding instituted in consequence of adultery,” (*l*) is repealed, (*m*) and the 3rd section of the first-mentioned Act provides that the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence,

(*h*) Bailey, *Ex parte*, 6 Dowl. P. C. 311

(*i*) Ld. Abinger, *Mortimore v. Wright*, 6 M. & W. 487. See *Ruttinger v. Temple*, 33 Law J., Q. B. 1; 4 B. & S. 491. Where the child is living with its mother, under an order of the Court of Chancery, see *Bazeley v. Forder*, L. R. 3 Q. B. 559.

(*k*) *Skelton v. Springett*, 11 C. B. 452. See *The Married Women's Property Act*, 1870 (33 & 34 Vict. c. 93), s. 14.

(*l*) See *Blackborne v. Blackborne*, L. R., 1 Prob. & Div. 563.

(*m*) See *Re Rideout's Trusts*, L. R., 10 Eq. Ca. 41.

provided that no witness, whether a party to the suit or not, shall be bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness has already given evidence in disproof of his or her alleged adultery. But this provision is for the protection of the witness only; if, therefore, the witness is willing to give evidence, counsel can not exclude it. (*n*)

Previously to the first-mentioned Act it was enacted by the 22 & 23 Vict. c. 61, s. 6, that on any petition presented by a wife, praying that her marriage might be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively should be competent and compellable to give evidence of or relating to such cruelty or desertion. And it was held, that when once in the witness-box upon those issues they might be cross-examined, and therefore re-examined, upon the issues of their own and of each other's adultery respectively. (*o*)

1263. *Trial of questions of fact before a jury.*—By 20 & 21 Vict. c. 85, s. 28, it is enacted, that either of the parties to a petition praying for the dissolution of the marriage may insist on having the contested matters of fact tried by a jury; and by s. 36 it is further enacted, that in all questions of fact arising in proceedings under the Act it shall be lawful for, but, except as thereinbefore provided (and above stated), not obligatory upon, the court to direct the truth thereof to be determined before itself, or before any one or more of the judges of the court, by the verdict of a special or common jury. In a suit for a judicial separation the parties can not, as in a suit for dissolution of marriage, demand as a matter of right, that the issues of fact be tried by a jury; but the court has a discretionary power, under the above section, to grant or refuse the application for a jury. It will generally, however, on the application of either party, direct questions of fact to be tried by a jury. (*p*) And in cases which have to be tried before the full court, in which there is likely to be any considerable controversy as to the facts, trial by jury will generally be

(*n*) *Hebblethwaite v. Hebblethwaite*, Prob. & Div. 233.
L. R., 2 Prob. & Div. 29.

(*p*) *Marchmont v. Marchmont*, 27 Law

(*o*) *Boardman v. Boardman*, L. R., 1 J., Prob. & Matr. 59.

directed. (g) Upon the trial of any question of fact before a jury, the court or judge has (s. 38) the same power, jurisdiction, and authority as any judge of any of the superior courts sitting at nisi prius. A bill of exceptions may be tendered, and a general or special verdict, subject to a special case, may be returned as in causes tried in the superior courts, and the matter of law heard and determined by the full court, subject to such right of appeal as is given by the statute (s. 39).

1264. *Petitions for damages from adulterers.*—By the 20 & 21 Vict. c. 85, s. 59, the action for criminal conversation is abolished, but by s. 33 it is enacted, that any husband may, either in a petition for dissolution of marriage, or for judicial separation, or by petition only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner, and such claim is to be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations, as actions for criminal conversation were formerly tried and decided in courts of common law, (r) and the damages to be recovered are in all cases to be ascertained by the verdict of a jury although the respondents or either of them may not appear.

1265. *Evidence at the trial of a claim for damages for adultery—Proof of the marriage.*—In order to establish a prima facie case for damages from a defendant who is charged with having committed adultery with the claimant's wife, it is necessary to prove a legal marriage between the claimant and the woman alleged to be his wife. (s) It is not enough to show that he and his alleged wife intended to celebrate, and did in their behalf celebrate, a lawful and formal marriage, and did afterwards cohabit as man and wife upon the faith of this bona fide belief, for the burden is on him to prove a clear legal marriage, whereby the relation of husband and wife is really created; and a mere proof of the ceremony which the parties suppose to be sufficient to constitute that relation is not enough. It must be shown to be sufficient according to law for that purpose. (t) ¹

(g) Ratcliffe v. Ratcliffe, Id. 60.

(s) Browne's Div. Pract., 2nd ed., p.

(r) See Seddon v. Seddon, 30 Law J., 124.
Prob. & Matr. 12.

(t) Catherwood v. Caslon, 13 M. & W.

¹ Marriage must be proved according to the law of the place where solemnized;

1266. *Proof of marriage by certified extracts from parochial registers of marriages.*—The 52 Geo. 3, c. 146, formerly provided (ss. 1–5) for the making and keeping, by the rector, vicar, curate, or officiating minister of every parish or chapel where marriages, &c., have been celebrated according to the rites of the Established Church, of a public register of such marriages, and for the transmission (ss. 6, 7) of annual copies of such registers to the registrar of the diocese, and for the making and preserving (s. 12) of alphabetical lists and indexes to be open to public search at all reasonable times, on payment of the usual fees. But this statute, so far as it relates to the registration of marriages, has been repealed by 6 & 7 Wm. 4, c. 86, which provides (s. 2) a general register office in London, keeping register of marriages, &c., and provincial registers (s. 9) in every union. Marriage-register books are to be furnished to the rector, vicar, or curate of every church or chapel, and to the registering officers of the various bodies of Dissenters, in whose chapels marriages are celebrated (s. 30), who are required (s. 31) to register therein all marriages, and forward (s. 33) certified copies thereof to the superintendent registrars, who are to send them (s. 34) to the Registrar-General, to be arranged for public inspection. By

265; 13 Law J., Exch. 334. *Morris v. Miller*, 1 W. Bl. 632; 4 Burr. 2057.

Patterson v. Gaines, 6 How. (M. S.) 550; but where not prohibited by law, it may be proved by any evidence that does not presuppose a higher class of evidence within the power of the party; *Carjalle v. Ferrie*, 26 Barb. (N. Y.) 177; *Stover v. Boswell*, 3 Dana (Ky.), 232; *Cunningham v. Burdell*, 4 Brad. (N. Y.) 343; and after it is once proved, every presumption in favor of its validity is made; *Fleming v. People*, 27 N. Y. 329; and as to whether a marriage in fact ever transpired between the parties is a question for the jury; *Calkvill v. Calhoun*, 1 N. & M. (S. C.) 285. Cohabitation as man and wife may be shown in proof of marriage, and by general reputation, except in cases for bigamy and crim. con.; *Northfield v. Vershire*, 33 Vt. 110; *Taylor v. Robinson*, 29 Me. 323; *Fenton v. Reed*, 4 Johns. (N. Y.) 52; so by acts of recognition and declarations of the parties; *Christy v. Clarke*, 45 Barb. (N. Y.) 529; *State v. Road*, 12 Vt. 396; *Com v. Hurly*, 14 Gray (Mass.) 411; *Corn v. Stump*, 53 Penn. St. 132; *Hammick v. Bronson*, 5 Day (Conn.) 290; *Donnelly v. Donnelly*, 8 B. Mon. (Ky.) 113; *Goldbeck v. Goldbeck*, 18 N. J. 42; but where no other proof exists, the presumption of marriage arising from such facts may be overcome by showing facts inconsistent therewith, as that the parties afterwards, without any apparent cause, separated and never lived together again; *Weatherford v. Weatherford*, 20 Ala. 548; so it may be shown that one of the parties had been previously married, and had not been divorced, and that the former husband or wife was then living. *Decker v. Morton*, 1 Redf. (N. Y.) 477; *Hill v. Burgen*, 3 Brad. (N. Y.) 432; *Cram v. Burnham*, 5 Me. 213.

s. 35 it is enacted, that every rector, vicar, or curate, and every registrar, registering office, and secretary, who shall have the keeping for the time being of any register book of marriages, &c., shall at all reasonable times allow searches to be made of any register-book in his keeping, and shall give a certified copy under his hand, of any entry or entries in the same, on payment of certain specified fees. Provision is also made for searches at the superintendent registrar's (s. 36), and the General Registrar Office (s. 39), and for the issue of certified copies under the hand of the superintendent registrar (s. 36), and under the seal of the Registrar-General. And all certified copies of entries, purporting to be sealed or stamped with the seal of the General Register Office, are to be received as evidence without any further or other proof of such entry; and no certified copy purporting to be given in the said office, which is not sealed or stamped as aforesaid, is to be of any force or effect.¹

1267. *Proof of marriage through the medium of examined copies and certified extracts from non-parochial registers.*—The 6 & 7 Wm. 4, c. 85, also provides (s. 4) for notices of intended marriages to be given to the Superintendent Registrar of Marriages, (*u*) who is (s. 5) to file such notices, and to furnish therefrom to the Registrar-General a book, to be called "the Marriage-Notice Book," which is to be open at all reasonable times to persons desirous of inspecting it. Provision is made for the appointment of registrars of marriages, for registering (s. 18) places of worship for the solemnisation of marriages in the presence (s. 20) of the registrar; for the registration (s. 23) of such marriages; for the making and delivering (s. 24) certified copies of the entries of marriage in the register to the superintendent registrar, to be kept by him with the records of his office. And by the 3 & 4 Vict. c. 92, and 21 & 22 Vict. c. 25, ss. 1 & 2, provision is made for the verification and deposit in the custody of the Registrar General of various non-parochial registers of marriages, &c., for the framing of lists of all such records and registers; for the making of searches, and the grant (3 & 4 Vict. c. 92, s. 5), of

(*u*) See *Holmes v. Simmons*, L. R., 1 Prob. & Div. 523.

¹ *State v. Marvin*, 35 N. H. 22; *Maxwell v. Chapman*, 8 Barb. (N. Y.) 579; *Verhalf v. Vanhousvenlengen*, 21 Iowa, 427.

certified extracts; also (s. 6) for the production in courts of justice of such original registers and records; for the issue (s. 9) of certified extracts therefrom, sealed with the seal of the General Register Office; for the admission of such certified extracts on the trial of causes, but not on criminal trials (s. 11), after notice given to the opposite party, in sufficient time before the trial to enable him to inspect the original register or record; also (s. 12) for the use of the original register or record in evidence after notice. In criminal cases, the original register or record is required (s. 18) to be produced, and notice given of the intention to use it.

Marriages of British subjects solemnized abroad, may be proved through the medium of certified copies of the consular registers, which are transmitted annually to the Registrar-General. (*v*) A marriage in India may be established by an authenticated copy of the register of marriages kept in India by public authority and transmitted to this country. (*γ*)

By 19 & 20 Vict. c. 119, s. 24, the Registrar-General is required to give to any one demanding the same a certified copy of the returns made to him, or an extract therefrom, with respect to any place of meeting for religious worship contained therein.

Marriages, therefore, may be proved by a copy or extract from the register, purporting to be signed and certified as a true copy or extract by the parish-officer, whether incumbent, rector, vicar, or curate, who has the custody of such register. (*z*) And the identity of the claimant and his wife with the parties named in the register, as having been married at the time and place therein mentioned, may be proved by any person who was present at the ceremony, or by any evidence sufficient to satisfy a jury of their identity. (*α*)

The fact of the marriage may also be proved by the testimony of an eye-witness of the ceremony, without the production of any examined or certified extract from the regis-

(*v*) 12 & 13 Vict. c. 68, ss. 11, 12, 18.
As to the admissibility of a certificate of a foreign marriage, *Abbott v. Godoy*, 29 Law J., Prob. & Matr. 57.

(*γ*) *Ratcliffe v. Ratcliffe*, 29 Law J.,

Prob. & Matr. 202.

(*z*) *Re Hall's Estate*, 22 Law J., Ch. 177; 14 & 15 Vict. c. 99, s. 14.

(*α*) *Birt v. Barlow*, 1 Doug. 174. See *Hubbard v. Lees*, L. R., 1 Exch. 255.

ter. (*b*) Where a witness deposed that he was present in a Wesleyan chapel, and that a form of marriage was there celebrated between A and B, in the presence of the registrar of marriages, and spoke to all the circumstances attending the ceremony, the entry in the registrar's book, a copy of which was produced at the trial, it was held that this was *primâ facie* evidence of the due solemnization of a marriage between the parties in a duly registered chapel, in which marriages might be legally solemnized. (*c*) Such formal proofs as the above, however, is not in all cases necessary, for where, in a suit for dissolution, the evidence was, that the parties left a certain place in order to be married, that they returned and stated that they had been married, and subsequently lived together as man and wife for many years, it was held sufficient; (*d*) the presumption in favor of marriage in such and similar cases being very strong. (*e*)

1268. *Of the damages recoverable in cases of adultery.*—The injury suffered by the husband from the seduction of his wife depends upon the circumstances and situation in life of the husband at the time of the seduction, upon the mode in which he fulfilled his marital duties, the terms upon which the husband and wife were living together, and upon the general character of the wife at the time she was led astray. These are circumstances for the proper and sole cognizance of the jury, and the court will not interfere with their estimate of damages unless it is manifestly and palpably outrageous. (*f*) Where the plaintiff's wife had not been criminally connected with the defendant alone, Lord ELLENBOROUGH directed the jury to award damages proportioned to so much of the plaintiff's loss of comfort, &c., as they might suppose to have been occasioned by the defendant's misconduct, and not to give damages for the whole of the injury that the plaintiff had sustained. (*g*) So proof of adulterous intercourse between the wife and other men prior to the commission of the adultery

(*b*) *St. Devereux v. Much Dew Church*, 1 W. Bl. 367.

(*c*) *Reg. v. Mainwaring*, 26 Law J., M. C. 11. See *Sichel v. Lambert*, 33 Law J., C. P., 137.

(*d*) *Patrickson v. Patrickson*, L. R., 1 Prob. & Div. 86. As to the proof of a

foreign marriage, see *Finlay v. Finlay*, 31 Law J., Prob. & Matr. 149.

(*e*) See *Gompertz v. Kensit*, L. R., 13 Eq. Ca. 369.

(*f*) *Wilford v. Berkeley*, 1 Burr. 609. *Duberley v. Gunning*, 4 T. R. 657.

(*g*) *Gregson v. Theaker*, 1 Campb 415, n.

with the defendant, may be given in evidence in reduction of damages, for the purpose of showing that the claimant has lost a wife who was worth nothing. (*k*)¹

A voluntary separation was no bar formerly to the husband's claim for damages in an action of crim. con. (*i*), but it may be now, under the Divorce Act, if it amount to such misconduct as would induce the court in the exercise of its discretion, under s. 31, to dismiss the petition, and is properly pleaded. (*k*) If the claimant connived at the adulterous intercourse, (*l*) or if he suffered or encouraged his wife to live in a state of prostitution, he could not, before the passing of the Divorce Act, come into a court of justice to ask for damages. His having suffered such connection with other men, was equally a bar to the action as if he had permitted the defendant to be connected with her. (*m*) But the infidelity of the husband was held to constitute no bar to his claim for damages from the adulterer, although it might be given in evidence in mitigation of damages. (*n*) All these circumstances, however, may now be pleaded as a defense to the petition for the dissolution of the marriage, as above stated, and if not so pleaded they are inadmissible. (*o*) If, however, they do not amount to a defense within the above section, they would, semble, be admissible in mitigation of damages, for previous to the passing of the Divorce Act, it might be shown in mitigation of damages that the husband neglected his wife, or treated her with coldness, and as a person whom he did not esteem or regard; also that the marriage was kept secret, and that the wife was allowed to live with her mother and pass as a single woman, and that she was not known by the defendant to be married at the time of the commission of the adultery. (*p*)

When the husband and wife are separated from each other

(*k*) Alderson, J., *Winter v. Henn*, 4 C. & P. 498. *Forster v. Forster*, 33 Law J., Prob. & Matr. 150, n.

(*l*) *Chambers v. Caulfield*, 6 East, 256.

(*m*) *Seddon v. Seddon*, 30 Law J., Prob. & Matr. 12.

(*n*) *Cibber v. Sloper*, cited 4 T. R. 655.

(*m*) Per Ld. Kenyon, *Hodges v. Windham*, 1 Peake, 54.

(*n*) *Bromley v. Wallace*, 4 Esp. 237.

(*o*) *Plumer v. Plumer*, 29 Law J., Prob. & Matr. 63; S. & S. 147, S. C.

(*p*) *Calcraft v. Earl Harborough*, 4 C. & P. 501.

¹ Even before marriage. *Conway v. Nicholl*, 34 Iowa, 533. So it may be shown that the husband treated his wife cruelly, and this may be proved by admissions of the wife. *Palmer v. Crook*, 7 Gray (Mass.) 418.

the wife's letters to her husband are admissible in evidence for the purpose of showing the state of her affections at the time of the writing of the letters; but to remove all grounds for any suspicion of collusion between the husband and wife, it should be proved that the letters were written at the time they bear date, and before there was any knowledge or suspicion of the adulterous intercourse. (*q*) Such letters are not to be rejected merely because they contain statements of specific facts calculated to influence the minds of the jury, and which are not strictly evidence. But the jury must be cautioned not to allow themselves to be influenced by the particular facts alluded to. (*r*)

1269. *Evidence of the defendant's circumstances or property* has been held to be inadmissible for the purpose of enhancing the damages, it being considered that the jury ought to give compensation for the injury sustained without reference to the wealth of the defendant. (*s*) But if the co-respondent has used his wealth for the purpose of seducing the respondent, the jury may, it seems, take it into consideration in assessing the damages. (*t*) Evidence of the humble condition in life, and of the poverty, of the defendant, has been received in mitigation of damages, for the purpose of showing that the allurements and temptations to the commission of the adultery did not emanate from the defendant. Letters, also, written by the claimant's wife before the commission of the adultery, soliciting the defendant's addresses, and enticing him into the adulterous connection, are admissible in evidence in mitigation of damages, but not proofs of misconduct subsequent to the commission of the adultery. (*u*)¹

1270. *Application of the damages recovered—Payment of costs.* (*x*) After verdict, or decree, the Court for Divorce and Matrimonial Causes is to direct in what manner the damages are to be applied, (*y*) and is empowered to settle the

(*q*) *Trelawney v. Coleman*, 1 B. & Ald. 90; 2 Stark. 197. *Edwards v. Crock*, 4 Esp. 38.

(*r*) *Willis v. Bernard*, 1 M. & Sc. 584; 8 Bing. 376.

(*s*) *Alderson, B., James v. Biddington*, 6 C. & P. 590.

(*t*) *Cowing v. Cowing*, 33 Law J., Prob. & Matr. 149.

(*u*) *Elsam v. Faucett*, 2 Esp. 562.

(*x*) See *West v. West*, L. R., 2 Prob. & Div. 196.

(*y*) See *Patterson v. Patterson*, L. R., 2 Prob. & Div. 189.

¹ *Rhea v. Tucker*, 51 Ill. 110.

whole, or any part thereof, for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife. (*z*) And whenever, in any petition presented by a husband, the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, the court may order the adulterer to pay the whole or any part of the costs of the proceeding; (*a*) or, if no sufficient justification has been proved for making him a co-respondent, (*b*) or, the husband has connived at the adultery, (*c*) may order the husband to bear his own costs. But, where the court of appeals has exercised its discretion with regard to costs, the Judge Ordinary will not interfere. (*d*) Under certain circumstances the wife will have to bear her own costs (*e*) as well as those of her husband. (*f*) The payment of costs may be enforced by writ of sequestration. (*g*)

SECTION II.

OF SEDUCTION.

1271. *Of the harboring of married women and inducing them to live apart from their husbands.*—Every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbor her, is liable to an action for damages, unless the husband has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has by some insult or ill-treatment, compelled her to leave him. Where a married woman came to the defendant's house and represented herself to have been very ill-used by her husband, who, she said, had turned her out of doors, and upon this representation the defendant received her into his house, and suffered her to continue there after he had received no-

(*z*) *Bent v. Bent*, 30 Law J., Prob. & Matr. 175. *Bellingay v. Bellingay*, L. R., 1 Prob. & Div. 168.

(*a*) 20 & 21 Vict. c. 85, ss. 33, 34.

(*b*) *Whitmore v. Whitmore*, L. R., 1 Prob. & Div. 25. And see *Conradi v. Conradi*, ib. 163.

(*c*) *Adams v. Adams*, L. R., 1 Prob. & Div. 335.

(*d*) *L—— v. H——*, L. R., 1 Prob. & Div. 293.

(*e*) *Heal v. Heal*, L. R., 1 Prob. & Div. 300.

(*f*) *Miller v. Miller*, L. R., 2 Prob. & Matr. 13. *Milne v. Milne*, ib. 202. See *Wait v. Wait*, ib. 228.

(*g*) *Dent v. Dent*, L. R., 1 Prob. & Div. 366. *Miller v. Miller*, L. R., 2 Prob. & Div. 54.

tice from the husband not to harbor her, Lord KENVON held that an action could not be maintained against him, as he appeared to have acted solely from principles of humanity, (*h*) and that, if a husband ill-treats his wife, so that she is forced to leave his house through fear of bodily injury, any person may safely, nay honorably, receive her and protect her. (*i*) Where the defendant persuaded and procured a wife to separate from her husband and live apart from him, it was held that he was responsible in damages to the latter, and that every moment a wife continues absent from her husband without his consent is a new tort, and every one who persuades her to do so does a new injury. (*k*)¹

1272. *Of the seduction and loss of service of servants.*—Every person who knowingly and designedly interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harboring him and keeping him as servant, after he has quitted his place, and during the stipulated period of service, whereby the master is injured, commits a wrongful act, for which he is responsible in damages. (*l*) And if a servant or apprentice quits his master or employer without just cause, before his term of service expires, and another retains and employs him against the will of the master, and with notice of his having deserted the service of the latter, an action for damages is maintainable against him, as the very act of giving the servant employment is affording him the means of keeping out of his former service. (*m*)

A taskworkman, who contracts with another by the job or piece, is the servant of that other until the work is finished, and no other person can, whilst such work is going on and is unfinished, lawfully employ the servant, if, by so doing, he causes him to leave his work unfinished, and has knowledge of the fact. Thus, where a journeyman shoemaker, living and working in his house, was employed by a shoe manufacturer to make a certain number of shoes at so much per

(*h*) Philp v. Squire, 1 Peake, 115.

(*i*) Berthon v. Cartwright, 2 Esp. 480.

(*k*) Winsmore v. Greenbank, *ante*.

(*l*) Lumsley v. Gye, 2 Ell. & Bl. 224.

(*m*) Blake v. Layton, 6 T. R. 221.

Fawcett v. Beavres, 2 Lev. 63. Adams

v. Bafeald, 1 Leon. 240. Hamilton v.

Vere, 1 Lev. 299; 2 Saund. 169.

¹ Palmer v. Crook, 7 Gray (Mass.) 418; Bennett v. Smith, 21 Barb. (N. Y.) 439.

pair, to be completed by a given time, and the defendant took the man into his service, and thereby caused him to leave a number of shoes unfinished, and neglected to discharge him after having received notice from the plaintiff of the subsisting engagement between such workman and himself, he was held responsible in damages to the plaintiff for the injury. (*n*) If the defendant has derived any benefit from the services of the servant or apprentice, the master is entitled to recover the value of it. (*o*)

The master may maintain an action for compensation for the loss of the services of his servant through the tortious act of another, whether the servant be a child or not, provided it appear that the child was capable of rendering, and did render, some service, however trifling; but if no service was, or could be, performed by the child, an action is not maintainable. However, if the tortious act is in effect a breach of contract, *e. g.*, the neglect of a railway company to carry a servant, who is a passenger on their railway, safely, the master of the servant is not entitled to sue the railway company, for the contract is not with him. (*p*)¹

1273. *Of injuries to parents in being deprived of the services of their children through the tortious act of another.*—A parent has no remedy for an injury done to his child by the wrongful act of another, unless the child is old enough to be capable of rendering him some act of service, and can be treated in law as his servant; but it is not necessary to allege or prove any contract of service beyond what the law will imply from the relationship of parent and child. (*q*) Thus, where the plaintiff brought an action against the defendant for carelessly driving over and injuring the plaintiff's child, whereby the plaintiff was deprived of the service of the child, and was obliged to expend a large sum of money in doctors and

(*n*) Hart v. Aldridge, Cowp. 54. Bac.
Abr. MASTER AND SERVANT (O).

(*o*) Foster v. Stewart, 3 M. & S. 201.

(*p*) Alton v. Midland Rail. Co., 34
Law J., C. P. 292.

(*q*) Evans v. Walton, L. R., 2 C. P.
815.

¹ Hays v. Borders, 6 Ill. 46; McKay v. Bryson, 5 Ired. (N. C.) 216; Stout v. Moody, 63 N. C. 67; but if the action is for seducing and employing, a knowledge that he is the servant of another must be proved; Conant v. Raymond, 2 Aik. (Vt.) 243; Stewart v. Simpson, 1 Wend. (N. Y.) 376; but, if ignorant when he first employed him if he continues the employment after knowledge, he is liable. Ferguson v. Tucker, 2 H. & G. (Md.) 182.

nurses, and it appeared that the child was only two years and a half old, and incapable of performing any act of service, it was held that the action was not maintainable. (r) If the father of a child incurs necessary expense in curing his child from an injury wrongfully inflicted by the defendant, he can not recover those expenses upon a declaration describing, as the cause of action, the obligation of the father to incur that expense.

1274. *Of injuries to parents from the seduction of their daughters.*—The law gives no remedy to the parent for the mere seduction of his daughter, however wrongfully it may have been accomplished. Incontinence on the part of a young woman can not be made the foundation of an action against the person who has tempted her and deprived her of her chastity; (s) but if she is living with her parent at the time of the seduction, and the seduction is followed by pregnancy and illness, whereby the parent is deprived of the filial services theretofore rendered to him, an action is maintainable against the seducer.

The foundation, therefore, of the action by a father to recover damages against a wrong-doer for the seduction of his daughter has been uniformly placed, from the earliest time, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of the service of the daughter, in which service he is supposed to have a legal right or interest. It has, consequently, always been held, that the loss of service must be alleged in the declaration of the cause of action, and be proved at the trial, or the plaintiff must fail. It is not enough for the father to show that his daughter was a poor person maintaining herself by her labor, that the defendant seduced her and got her with child, and that she became unable to maintain herself, and that the father was forced to maintain her at his own expense, and to pay for doctors and nurses to attend upon her, &c.; (t) or that the father had apprenticed her to the defendant, and paid him a large sum of money to instruct her in a trade, but that the defendant seduced her and got her with child, and rendered

(r) Grinnell v. Wells, 7 M. & Gr. 315; 5 East, 47, n.

1041; 8 Sc. N. R. 741.

(t) Grinnell v. Wells, 14 Law J., C. P.

(s) Saterthwaite v. Duerst, 4 Doug. 19.

her unable to learn the trade. (u) However slight the act of service may be, it must be a real genuine service, such as the parent may command. The making tea, or doing any household work at the command of the parent is, however, quite sufficient to constitute the relationship of master and servant when the girl is residing with her father and mother. (v)¹

(u) *Harris v. Butler*, 2 M. & W. 29 Law J., Exch. 1. *Evans v. Walton*, 539.

(v) *Thompson v. Ross*, 5 H. & N. 16;

supra.

¹ The action for the seduction of a daughter is *prima facie* predicated upon loss of service resulting therefrom, but *really*, and substantially, it is an action to compensate parents for the injury to their feelings, dignity, and honor by the seduction of a daughter. No recovery can be had, unless it can be shown that *some* services have been performed for the parent, but *any*, even the most trivial, service is sufficient; *Badgeley v. Decker*, 44 Barb. (N. Y.) 577; *Ingerson v. Millar*, 47 Barb. (N. Y.) 47; *Moran v. Dawes*, 4 Cow. (N. Y.) 412; mere residence with the parent, and rendering such general services as a daughter generally does, is enough; *actual* loss of service need not be shown, nor need it be shown that any actual loss pecuniarily has resulted; *Lee v. Hodge*, 13 Gratt. (Va.) 723; *Hewitt v. Prime*, 21 Wend. (N. Y.) 79; *Moran v. Dawes*, *ante*; *Knight v. Wilcox*, 14 N. Y. 413; it has been held enough that the parent *was entitled* to her services; *Mulverhall v. Millward*, 11 N. Y. 343; *Bartley v. Ritchmeyer*, 4 N. Y. 38; even though at the time she was in the service of another; *Ingerson v. Millar*, 47 Barb. (N. Y.) 47; or of the defendant; *Stiles v. Tilford*, 10 Wend. (N. Y.) 338; and even though the parent had given her her time, and she was, at the time of her seduction, working for a third person, and had her own wages, and the expenses of her sickness were paid by her employer; *Clark v. Fitch*, 2 Wend. (N. Y.) 459; and even though she was in the employ of another, and did not intend to return to her father's house; *Martin v. Payne*, 9 Johns. (N. Y.) 987; but in *all* cases he must be *entitled* to her services, *and must not have divested himself of the right to command them*, for if he has apprenticed her, his right of action is lost; *Clark v. Fitch*, *ante*; *Bartley v. Ritchmeyer*, 4 N. Y. 38; *Briggs v. Evans*, 5 Ired. (N. C.) 16; *Ball v. Bruce*, 21 Ill. 161; and where the action is brought by one who stands *in loco parentis*, actual service and the relation of master and servant at the time when the offense was committed, must be established; as where the action was brought by the *stepfather*; *Bartley v. Ritchmeyer*, *ante*; by a brother; *Millar v. Thompson*, 1 Wend. (N. Y.) 447; and any one, guardian, master, or other person standing in *loco parentis* at the time of the seduction, if she was *really* his servant; *Ball v. Bruce*, 21 Ill. 161; *Ellington v. Ellington*, 47 Miss. 329; so, where a daughter is over 21 years of age, the relation of master and servant at the time of the seduction must be established, or there can be no recovery. The fact that she was seduced, and then returned to her father's house, is not enough; she must have been his servant *at the time* of her seduction; *George v. Van Horn*, 9 Barb. (N. Y.) 923; *Nicholson v. Stryker*, 10 Johns. (N. Y.) 115; *Millar v. Thompson*, *ante*; *Vossell v. Cabe*, 10 Miss. 634; *Doyle v. Jessup*, 29 Ill. 460; *Ball v. Bruce*, 21 Id. 161; but if she resides there and performs any service, even though in return for her board, it is enough; *Lipe v. Eisenland*, 32 N. Y. 229. In order to create a right of action, mere seduction is enough, if followed by loss of service from any cause, even though neither pregnancy nor sexual disease transpired;

1275. Effect of the absence of the daughter from the parent's roof at the time of the seduction.—As the loss of service is the foundation of the action, it follows that the relation of master and servant must subsist between the plaintiff and the person seduced at the time of the seduction, for otherwise the defendant's act does not infringe upon the plaintiff's rights, or deprive him of anything then belonging to him. If, therefore, the daughter, at the time she was seduced, was at the head of an establishment of her own, and her father was living with her as a visitor in her own house, she can not be treated as being in the subordinate position of a servant, and the father can not maintain an action for loss of service. (*y*) If the daughter, at the time she was seduced, did not reside with the father, but was living away from home in the service of another person, the father has no ground of action for the seduction, (*z*)¹ unless the person with whom she is living inveigled her away from home into a pretended service, for the purpose of seducing her, although it be alleged in the declaration, and proved at the trial, that the absence was only temporary, and that she intended to return and live with her father after the term of service had expired. (*a*) But if she is away only on a temporary visit, and still forms part of her father's family, and makes herself serviceable to him when she is at home, such temporary absence constitutes no impediment to an action by the father for damages. (*b*) And if she is seduced while on her way home from her master's to her father's house, having been dismissed by her master, that is sufficient constructive service. (*c*) Whenever the girl is away in actual service, the mere fact of her mistress being in the habit, from time to time, of allowing her to go home

(*y*) *Manley v. Field*, 7 C. B., N. S. 96; 29 Law J., C. P. 79.

(*z*) *Dean v. Peel*, 5 East, 47. *Grinnell v. Wells*, 7 M. & Gr. 1042; 8 Sc. N. R. 471

(*a*) *Blaymire v. Haley*, 6 M. & W. 55. *Harris v. Butler*, 2 ib. 539.

(*b*) *Griffiths v. Teetgen*, 15 C. B. 344.

(*c*) *Terry v. Hutchinson*, L. R., 3 Q. B. 599.

White v. Nellis, 31 N. Y. 405; *Abrahams v. Kidney*, 104 Mass. 222; and the action may be maintained even though the seduction was accomplished by force, and against the consent of the daughter; *Daman v. Moore*, 5 Lans. (N. Y.) 454.

¹ The fact that the girl is in the employ of another does not necessarily prevent her parent from maintaining an action. *If he has a right to her services* when he sees fit to command them, a recovery may be had. The real test is, whether he has divested himself of that right. *Martin v. Payne*, *ante*; *Mulverhall v. Millward*, 11 N. Y. 343; *Stiles v. Tilford*, 10 Wend. (N. Y.) 338.

and assist her widowed mother in needlework, has been held to be insufficient to enable the mother to maintain an action for damages, (d) although the seduction actually is effected while she is on such a temporary visit, and during such visit she assists in the housework. (e) If the relation of master and servant is contracted after the seduction, the loss of service can not then be made the foundation of an action. The state of the case then is, that the master has taken into his service a servant whose services are less valuable to him by reason of antecedent occurrences, and there is no consequential injury of which he has any right to complain as against the seducer. (f)

1276. *Pretending hiring of girls for purposes of seduction.*—

If a person hires a girl as a servant, and withdraws her from her father's service for the very purpose of getting possession of her person and seducing her, this fraudulently concocted service does not put an end to the relation of master and servant previously subsisting between the daughter and her father, and does not throw any impediment in the way of an action by the latter for the seduction. Thus, where the plaintiff's daughter, who was residing with the plaintiff, and rendering him service in domestic matters, advertised for a situation as lady's maid, and the defendant, seeing the advertisement, proposed to engage her in that capacity for his sister, but afterwards hired her at weekly wages to take care of an empty house, where he seduced her and got her with child, it was held by ABBOTT, C. J., to be a question for the jury whether the daughter was withdrawn from her father's house by the defendant under a bona fide contract for her services, or the whole matter was a mere pretense and contrivance on the part of the defendant to get possession of her person. "If she was the servant of the defendant," observes his lordship, "the action certainly can not be maintained; but had she ceased to be the servant of her father, the plaintiff? If the jury be of opinion that the defendant practised a fraud and contrivance to procure her to leave her father's house, without any real intention to hire her as a servant, I am of opinion that the action is maintain-

(d) Thompson v. Ross, 29 Law J., 283.
Exch. 1.

(f) Davies v. Williams, 10 Q. B. 728; 16 Law J., Q. B. 369.

able." And afterwards, in summing up to the jury, his lordship said, "During the time that she was in her father's house she was his servant; was there an end put to that service? It is alleged by the defendant that there was, because he himself hired her for the purpose of keeping his own house, at the rate of 7s. per week; but if he did not in reality hire her with that intention, but with the wicked view of seducing her, then I am of opinion that the relation of master and servant was never contracted between them." (*g*)¹

1277. *Seduction of married daughters.*—Where a married woman separated from her husband, returned to her father's house and lived with him, performing various acts of service, it was contended that a married woman was not capable of making any contract of service; but the court held that, as against a wrong-doer, it was sufficient to prove that the relationship of master and servant *de facto* existed at the time of the seduction, and that, in the absence of any interference on the part of the husband, it was not competent to the defendant to set up the husband's right to the services of his wife as an answer to the action. (*h*)

1278. *Effect of proof that the defendant, though he seduced the girl, was not the father of the child of which she was delivered.*—If the defendant, though he seduced the girl, was not the father of the child of which she was subsequently delivered, and did not consequently cause the pregnancy and illness, and the consequent loss of service, there is no cause of action against him. (*i*)

1279. *Effect of the seduction and loss of service having been occasioned by the plaintiff's own misconduct and neglect of his parental duties.*—It is expected of every parent that he should be jealous of, and watchful over, the honor of his daughter, and protect her, as far as possible, from the advances and solicitations of notorious libertines. If, therefore, he introduces her to profligate acquaintances, encourages improper intimacies, and invites the injury of which he complains, he

(*g*) *Speight v. Oliviera*, 2 Stark. 495.

(*i*) *Eager v. Grimwood*, 1 Exch. 61;

(*h*) *Harper v. Lufkin*, 7 B. & C. 387. 16 Law J., Exch. 236.

¹ Even though the daughter was apprenticed to the defendant at the time of her seduction, yet, if it is shown that the defendant procured the daughter to enter his service with a view to her seduction, a recovery may be had. *Dain v. Wyckoff*, 18 N. Y. 45.

has no ground of action for damages. Where the defendant proposed to marry the daughter of the plaintiff, and was received and entertained as her suitor at the plaintiff's house, and the plaintiff then ascertained that the defendant was a married man and a great libertine, notwithstanding which he allowed him to continue his addresses to the daughter, on the strength of certain assurances which he gave to the effect that his wife was afflicted with a mortal disease, and could not live long, and then he would marry the daughter, and the defendant ultimately seduced her, it was held, that, as the plaintiff had by his own misconduct contributed to the injury of which he complained, he had no ground of action for redress. (*j*)¹

1280. *Of the parties entitled to maintain an action for seduction.* (*k*)—To entitle a person to maintain an action for the seduction of a girl, it must be proved, as we have seen, that the relationship of master and servant existed between the plaintiff and the person seduced at the time of the seduction. The action may be brought by any person with whom the seduced girl was residing at the time she was seduced, either in the character of a daughter and servant, or as a ward and servant, or as a servant only. Thus in the case of an orphan living with a relation, or a friend or benefactor, and rendering such domestic attendance and obedience as is usually rendered by a daughter to her father, the relation or benefactor is the proper person to sue for the wrong done; (*l*) and standing loco parentis, and being thus entitled to sue, he is permitted to recover damages beyond the mere loss of service, as when the action is brought by the actual parent. (*m*)

(*j*) Reddie v. Scoolt, 1 Peake, 316.

(*l*) Holt, 453, note.

(*k*) See 30 & 31 Vict. c. 142, s. 10, *ante*.

(*m*) Irwin v. Dearman, 11 East, 24, Edmonson v. Machell, 2 T. R. 4.

¹ If the plaintiff consented to or connived at the seduction of his daughter, he can not recover. Vassell v. Cabe, 10 Miss. 634; Smith v. Martin, 15 Wend. N. Y. 270; Seager v. Slingerland, 2 Cai. (N. Y.) 219; Fletcher v. Randall, Anth. (N. Y.) 267; Travis v. Barger, 24 Barb. (N. Y.) 614; Graham v. Smith, 1 Edw. (N. Y.) 267; nor if he was guilty of gross negligence; Graham v. Smith, *ante*; but these matters being in bar, must be specially plead. Travers v. Barger, *ante*. In a case where it was proved that the defendant slept with the daughter with the knowledge of the plaintiff, and without objection from him, such facts were held a bar to the action. Halles v. Wells, 3 Penn. Law J. 169.

1281. *Of the pleadings in actions for seduction.*—If a declaration by a parent for the seduction of his daughter contains no allegation of the loss of the service of the daughter, it is bad in arrest of judgment. “The loss of service must be alleged in the declaration, and must be proved at the trial, or the plaintiff must fail.” (*n*) The defendant either pleads, “Not guilty,” or that he did what is complained of by the plaintiff’s leave, and the plaintiff replies, taking issue upon the plea. (*o*) The plea of not guilty puts in issue both the fact of the seduction and the fact that the person seduced was the servant of the plaintiff. (*p*) Under this plea the defendant may show that the seduced girl was in the service of a third person, and was not at the time of the seduction residing with the plaintiff; also that he, though he had carnal knowledge of the seduced woman, was not the father of the child of which she was delivered, and, consequently, that the confinement and illness, and loss of service and expense, were not occasioned by the act of the defendant; (*q*) also that the illness and consequent loss of service were not occasioned by the act of seduction, but by the defendant’s leaving and abandoning the girl after he had seduced her; (*r*) also that the seduced woman entered the service of her master in a state of pregnancy, (*s*) or that the plaintiff was a party to his own dishonor, and by his own imprudence and misconduct has contributed to the injury of which he complains. (*t*)

1282. *Evidence at the trial in actions for seduction—Proof of the relationship of master and servant.*—As the loss of service is the foundation of the action for seduction, it is necessary to establish the relationship of master and servant between the plaintiff and the seduced girl, as well as to prove the fact of the seduction itself, in order to make out a case for damages. The relationship of master and servant must be shown to have subsisted at the time of the seduction, for, if it appears that the relationship was contracted afterwards, there is no injury to the plaintiff, and no ground of action to

(*n*) Tindal, C. J., *Grinnell v. Wells*, 7 M. & Gr. 1040.

(*o*) 15 & 16 Vict. c. 76, Sched. B. 38, 39.

(*p*) *Holloway v. Abel*, 7 C. & P. 528. *Torrence v. Gibbins*, 5 Q. B. 297.

(*q*) *Eager v. Grimwood*, 1 Exch. 61; 16 Law J., Exch. 236.

(*r*) *Boyle v. Brandon*, 13 M. & W. 738; 14 Law J., Exch. 344.

(*s*) *Davis v. Williams*, 10 Q. B. 728.

(*t*) *Reddie v. Scoolt*, 1 Peake, 316.

him. (*u*) It would seem also that no action is maintainable by the parent, if, at the time of the daughter's confinement, she is in the service of another. (*v*) Very slight evidence of actual service, such as milking cows, making tea, nursing children, will suffice to prove the fact of actual service. (*w*) And where a daughter is shown to have been living with her father at the time of the seduction, forming part of his family, and liable to his control and command, service will be presumed, and proof of acts of actual service will be unnecessary. (*y*) It is not necessary to produce the seduced daughter as a witness at the trial, if the seduction can be proved aliunde, though the withholding of her testimony may afford a strong topic of observation to the jury. (*z*)¹

1283. *Of the damages recoverable in actions for seduction.*—In estimating the damages to be given to a father for the loss of service of his daughter from seduction, the jury are not confined to the consideration of the mere loss of service, but may give damages for the distress of mind which the parent has sustained in being deprived of the society and comfort of his child, and by the dishonor which he receives. (*a*) The jury also must take into consideration the situation in life and circumstances of the parties, and say what they think, under all the circumstances, is a reasonable compensation to be given to the parent. (*b*) “In point of form,” observes Lord ELDON, “the action only purports to give a recompense for loss of service; but we can not shut our eyes to the fact, that it is an action brought by a parent for an injury to her child, and the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the ser-

(*u*) *Davies v. Williams*, 10 Q. B. 729. *Wilson*, 1 Peake, 77. *Coleridge, J.*, *Torrence v. Gibbins*, 5 Q. B. 300.

(*v*) *Hedges v. Tagg*, *supra*.

(*w*) *Buller, J.*, *Bennett v. Allcott*, 2 T. R. 168; *ante*.

(*y*) *Maunder v. Venn*, M. & M. 323. *Jones v. Brown*, 1 Esp. 217. *Fores v.*

(*z*) *Farmer v. Joseph*, Holt, 452.

(*a*) *Irwin v. Dearman*, 11 East, 23.

(*b*) *Andrews v. Askey*, 8 C. & P. 9.

Southernwood v. Ramsden, cited *ib.* 9.

¹ The action is personal, and where the seduction took place in the life-time of the father, neither his personal representatives nor the mother, can maintain an action. The right of action dies with the parent entitled to bring it. *George v. Van Horn*, 9 Barb. (N. Y.) 523; and in such a case the mother can not maintain an action even though she was subsequently charged with the daughter's maintenance. *Vassill v. Cole*, 10 Miss, 534.

vice of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example. (c)

1284. *Evidence in aggravation of damages—Proof that the defendant made his advances to the daughter under the guise of matrimony.*—Evidence is inadmissible to show that the defendant accomplished the seduction through the medium of a promise of marriage, for the purpose of enhancing the damages, as the breach of promise constitutes a distinct cause of action, in respect of which damages are recoverable by the daughter. “But you may ask,” observes Lord ELLENBOROUGH, “whether the defendant paid his addresses to her in an honorable way.” (d) “The jury do right,” observes WILMOT, C. J., “in a case where it was proved that the seducer had made his advances under the guise of matrimony, in giving liberal damages; and if the party seduced brings another action against the defendant for the breach of promise of marriage, so much the better. If much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly received the defendant, and permitted him to pay his addresses to his daughter.” (e)¹

If, in the course of the trial, a promise of marriage is inadvertently proved, the jury must be told to exclude the

(c) *Bedford v. McKowl*, 3 Esp. 120.
See per Lord Ellenborough, C. J., in *Irwin v. Dearman*, *supra*.

(d) *Dodd v. Norris*, 3 Campb. 520.
Elliott v. Nicklin, 5 Pr. 641.

(e) *Tullidge v. Wade*, 3 Wils. 18.

¹ In action for seduction, the plaintiff can not prove, in aggravation of damages that the seduction was effected under a promise of marriage. *Kniffen v. McConnell* 30 N. Y. 385; *Hagan v. Creagon*, 6 Rob. (N. Y.) 138; *Whitney v. Elmer*, 60 Barb. (N. Y.) 250; *Kip v. Berdan*, 1 Spen. (Ala.) 239; nor that the defendant procured an abortion on her; *Klapper v. Brommer*, 26 Wis. 372. The parent need not wait where pregnancy transpires, until the birth of the child, but may sue at once; *Brigg v. Evans*, 5 Ired. (N. C.) 16; and any facts, the natural consequence of the seduction, though they did not happen until after suit brought, may be shown in aggravation; *Hewitt v. Prime*, 21 Wend. (N. Y.) 79; but the plaintiff, while he may show the standing and character of his family in aggravation, can not show his special characteristics, as that he is a modest and retiring man, nor can the defendant show such facts in defense; *McRae v. Lilly*, 1 Ired. N. C. 118. In an action for seduction of a daughter, the plaintiff may show his own standing in society, and his own pecuniary condition as well as that of the defendant, in aggravation of damages, and may recover not only for loss of service, but for the wounded honor and lacerated feeling of himself and family, arising from the disgrace. *Grable v. Margrave*, 3 Scam. (Ill. 372; *Yundt v. Hartrunft*, 41 Ill. 9.

injury resulting to the seduced girl from the breach of promise of marriage, from their consideration, and leave it quite out of the question in determining the amount of the damages to be recovered by the father and master for the loss of service. (*f*)

1285. *Evidence in mitigation of damages.*—The loss that the father sustains by the seduction of his daughter depends, to a very great extent, upon the value of her previous character. *Prima facie*, it is to be presumed that she was a moral and virtuous girl at the time of her seduction, and contributed to the domestic happiness of her parents, but it is competent to the defendant to show that this was not the case, in order to diminish the loss and reduce the damages; and if evidence is given to impeach the character of the girl, it may be met and rebutted by evidence, on the part of the plaintiff, of her previous good character. The defendant may call witnesses to prove particular acts of sexual intercourse between the plaintiff's daughter and those witnesses prior to the period of the seduction, either for the purpose of reducing the damages, (*g*)¹ or for the purpose of showing that the defendant is not the father of the child, and, therefore, that his sexual intercourse with the daughter did not occasion the loss of service of which the plaintiff complains. (*h*) It may be shown that the seduced girl, prior to the seduction, was in the habit of keeping loose company or of giving utterance to loose language and immodest remarks; she may be asked, for instance, whether she had not admitted that some person other than the defendant was the father of her child; but before witnesses can be called to prove the nature of the language or of the remarks, she must be pointedly and expressly asked

(*f*) *Id.*

(*h*) *Eager v. Grimwood*, 1 Exch. 61;

(*g*) *Verry v. Watkins*, 7 C. & P. 308. 16 Law J., Exch. 236.

¹ But the character of the house where she lived can not be shown by *general reputation* to be a bawdy house, nor would the fact that it was such a house necessarily affect the character of the daughter for chastity. In order to effect that, particular acts of unchastity on her part must be proved. But *quere*. If the action is by the parent, would not such evidence be admissible if he was shown to have *known* the character of the house, or if he *ought* to have known it, on the ground of his *negligence*? *Kiffen v. McCollum*, 30 N.Y. 285; and in order to render previous unchastity admissible in mitigation, it must have been known to the defendant at the time of the seduction; *Lea v. Henderson*, 1 Cold. (Tenn.) 146, and *subsequent* unchastity can not be shown; *Mann v. State*, 34 Ga. 1.

in her cross-examination, whether she ever used the particular language or the precise remarks intended to be given in evidence against her. (*i*)¹

Where the whole of the cross-examination in an action for seduction went to show that the person seduced had conducted herself immodestly and kept improper company, witnesses were allowed to be called to prove her general good character and modest deportment, and the general respectability of the family. (*k*) But where the daughter was cross-examined to show that she had submitted herself to the defendant's embraces under circumstances of extreme indelicacy, and had been guilty of great levity of conduct, Lord ELLENBOROUGH refused to allow witnesses to be called to the general character of the daughter, saying she had had ample opportunity of setting her conduct right in the course of her re-examination. (*l*) And where evidence was given on the part of the defendant to prove that the girl, previous to her acquaintance with him, had had a child by another man, Lord ELLENBOROUGH restricted the evidence tendered by the plaintiff in reply thereto to disproving the specific breach of chastity alleged by the defendant, and would not allow him to give general evidence of his daughter's good character for chastity and respectability. (*m*)²

1286. *Damages recoverable in actions for inducing or persuading wives, servants, or workmen to abandon their duties or neglect the fulfillment of a contract.*—If a servant or contractor is induced not to perform the work or contract which he has undertaken to perform, through the malicious persuasion of the defendant, damages far beyond the value of the subject-

(*i*) *Carpenter v. Wall*, 11 Ad. & E. 803.

(*l*) *Dodd v. Norris*, 3 Campb. 518.

(*k*) *Bate v. Hill*, 1 C. & P. 100.

(*m*) *Bamfield v. Massey*, 1 Campb. 460.

¹ So far as actual loss of service is concerned, the previous unchaste character of the daughter has no effect in mitigation, nor so far as actual expenses and trouble in taking care of her are concerned, and if nothing more is claimed it can not be shown in mitigation, but, when damages for wounded honor and lacerated feelings are claimed, such facts are admissible, not as a bar to the action, but to *mitigate or reduce* the damages; *Fletcher v. Randall*, Anth. N. P. (N. Y.) 267; *Akerly v. Haines*, 2 Cai. (N. Y.) 292; *Hagan v. Creagan*, 6 Rob. (N. Y.) 338; *State v. Shean*, 32 Iowa, 88; *State v. Sutherland*, 30 Id. 570.

² The fact that the defendant offered to marry the daughter, but the plaintiff refused his consent, can not be shown in mitigation; *Ingersoll v. Jones*, 5 Barb. (N. Y.) 661; but previous unchastity may be shown in mitigation.

matter of the contract may be recoverable from the wrongdoer. (*n*) The measure of damages is not to be confined to the loss of the services of the servants who were actually enticed away, but the jury are justified in giving ample compensation for all the damage resulting from the wrongful act. (*o*) Where the plaintiff alleged that his wife left him and lived apart from him, during which time a considerable fortune was left to her separate use, and that, she being willing to return to the plaintiff, the defendant unlawfully persuaded her to continue to live away from the plaintiff, whereby he lost the assistance of his wife in his domestic affairs and the advantage of her fortune, £3,000 damages were recovered for the wrong done. (*p*)

1287. *Indictment for the abduction of unmarried girls.*—Whoever unlawfully takes, or causes to be taken, any unmarried girl, being under the age of sixteen years, out of the possession, and against the will, of her father or mother, or of any other person having the lawful care or charge of her, may be indicted and convicted of a misdemeanor. (*q*) And whoever fraudulently allures, takes away, or detains any woman under the age of twenty-one years, who has any interest in any real or personal estate, or is presumptive heiress, or co-heiress, or next of kin, &c., to any one having such interest, out of the possession, and against the will, of her father or mother, or other person having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, may be indicted for felony; and, if convicted, he is incapable of taking any estate or interest in any property of the woman, or in which she shall have any interest, or which may come to her as heiress, co-heiress, or next of kin, &c. (*r*)¹ The taking and detaining, from motives of lucre, of any

(*n*) Crompton, J., *Lumley v. Gye*, 2 Ell. & Bl. 230; 22 Law J., Q. B. 463.

(*o*) *Guntor v. Astor*, 4 Moor, 15.

(*p*) *Winsmore v. Greenbank*, Willes, 580.

(*q*) 24 & 25 Vict. c. 100, s. 55. Reg. v. Timmins, 30 Law J., M. C. 45.

v. Manktelow, 22 Id. 115.

(*r*) 24 & 25 Vict. c. 100, s. 53.

¹ These matters are regulated by statute for special instances. See *State v. Ruhl*, 8 Iowa, 147; *Stowe v. Heywood*, 7 Allen (Mass.), 118; *Com. v. Nickerson*, 5 Id. 513; *Rice v. Nickerson*, 9 Id. 478; *Carpenter v. People*, 8 Barb. (N. Y.) 603; *Mandeville v. Gurnsey*, 51 Id. 99; *State v. Tidwell*, 5 Strobb. (S. C.) 1; *State v. Farrar*, 41 N. H. 53.

woman over twenty-one, who is entitled to any real or personal estate, &c., against her will, with intent to marry or carnally know her, subjects the wrong-doer to a similar punishment and disability. (s)

(s) **Id.**

CHAPTER XX.

OF ACTIONS EX DELICTO—PARTIES THERETO—NON-JOINDER
AND MIS-JOINDER OF PARTIES.SECTION I.—*Of actions ex delicto and the parties to be made plaintiffs in such action.*

1288. Parties to be made plaintiffs in actions of tort founded on contract.

1289. Of the remedies which tenants in common and joint tenants have against each other.

1290. Rights of the survivor of two joint tenants or tenants in common.

1291. Trustee and cestui que trust.

1292. Bailees of goods.

1293. Master and servant.

1294. Husband and wife.

1295. Actions by married women after a judicial separation, or an order for protection.

1296. Infants.

1297. Heir-at-law, devisee, and personal representatives.

1298. Administrators.

1299. Trustees of bankrupts.

1300. Transfer of rights and liabilities ex delicto to trustees of bankrupts.

1301. Right of the trustees to the bankrupt's wife's choses in action.

1302. Of the number of the plaintiffs in action ex delicto—Joint and separate rights of action.

SECTION II.—*Of actions ex delicto and the parties to be made defendants in such actions.*

1303. Tenants in common.

1304. Corporations.

1305. When a joint-stock company is responsible for the tortious acts of the directors and managers.

1306. Trustees and commissioners of public works.

1307. Military and naval officers.

1308. Master and servant.

1309. Principal and agent.

1310. Subsequent ratification and adoption of a wrongful act by parties for whose use and benefit the act was done.

1311. What amounts to evidence of ratification of a wrongful act.

1312. Servants and agents.

1313. Husband and wife.

1314. Infants.

1315. Executors and administrators.

1316. Wrongs committed by a deceased person within six months before death.

1317. Actions against the executor of a prebendary, vicar, or incumbent of a benefice.

1318. Liabilities of executors and administrators for their own wrongful acts.

1319. Trustees in bankruptcy.

1320. Of the continued liability of a bankrupt to actions ex delicto and to arrest.

1321. Of the number of the defendants in actions ex delicto—Parties jointly and severally liable.

SECTION III.—*Of non-joinder and mis-joinder of parties—Amendment before and at the trial.*

1322. Amendment of non-joinder and mis-joinder before trial.

1323. Amendment at the trial.

1324. Amendment after notice or plea
in abatement of non-joinder
of parties.

1325. Mis-joinder of defendants.

1326. The effect of marriage, death,
and bankruptcy upon the
proceedings in an action.

SECTION 1.

OF ACTIONS EX DELICTO AND THE PARTIES TO BE MADE
PLAINTIFFS IN SUCH ACTIONS. (a)

1288. *Parties to be made plaintiffs in actions of tort founded on contract.*—Where a contract creates a duty, the neglect to perform that duty, as well as the negligent performance of it, is a ground of action for a tort. Both the non-feazance and the mis-feazance constitute a wrongful act, for which the remedy is by action of contract or of tort, at the option of the party injured. (b) Whenever the goods and chattels or materials of an employer are placed in the hands of a workman to be worked upon, any loss or injury to the chattels and materials, from the negligent execution of the work, forms a ground of action upon a tort as well as upon a contract. So if I deliver goods to a carrier to be carried for hire, and the goods are lost or injured through the negligent performance of the work of carrying, an action of contract or of tort is maintainable against the carrier, at the option of the owner of the goods. (c)

But it is said to be a rule of law that, whenever a wrong is founded upon a breach of contract, the plaintiff who sues in respect thereof must be either a party or privy to the contract, in order to establish a duty on the part of the defendant towards the plaintiff, and show a wrong done to the latter. (d) Thus, where the defendant had contracted with the Postmaster-General to supply a certain number of stage-coaches, and keep them in good working order and condition, and fit for the road, and, through his neglect to do the necessary repairs, one of the coaches broke down and injured the coachman, it was held that the coachman could not

(a) Parties to be made plaintiffs in particular actions have already been considered under their appropriate heads. See *Index in voce*.

(b) *Boorman v. Brown*, 3 Q. B. 526;

11 Cl. & Fin. 1.

(c) *Coggs v. Bernard*, Smith's L. C. 6th ed., 177.

(d) *Tollit v. Sherstone*, 5 M. & W. 288.

maintain an action against the coachmaker, as the negligence and breach of duty on the part of the coachmaker were grounded purely upon a breach of contract, and the coachman was neither a party nor privy to that contract. (e) So where a person sent his luggage with his servant by a railway, and himself went by a later train, and the railway company received the luggage as the servant's, it was held that the master could not sue for its loss. (f) But every person who exercises an employment is bound, as we have seen, to take especial care to do his work so as not to injure another by the negligent performance of that work, whether what he does is done merely to please himself, or by virtue of a contract made with another. If materials furnished to a workman to be manufactured or worked upon are injured by the negligent execution of the work, the owner of the materials, or the person who furnished them to the workman, is the person to be made plaintiff in an action for the neglect of duty; but if the person or the property of a stranger is injured by the negligent execution of the work, the injured stranger is the person to be made plaintiff.

Every person who enters upon the performance of the work of carrying merchandise or passengers is bound to exercise due and proper care and skill in the performance of the work, whether the work is done under a contract or gratuitously, (g) and every person who has been injured by the negligent performance of the work of carrying is entitled, as we have seen, to an action against the carrier, although he is no party to the contract under which the work was done. (h)

There are other cases, also, in which a third person, though not a party to a contract, may sue for the damage sustained if it be broken. As, for example, if an apothecary administers improper medicines to his patient, or a surgeon unskillfully treats him, and thereby injures his health, the apothecary and the surgeon will be liable to the patient, although the father or friend of the patient may have been

(e) *Winterbottom v. Wright*, 10 M. & W. 115. *Blakemore v. Brist. and Exeter Rail. Co.*, 8 Ell. & Bl. 1049; 27 Law J., Q. B. 167.

(f) *Becher v. Great East. Rwy., L. R.*,

5 Q. B. 241.

(g) See *Austin v. Gt. West. Rail. Co.*, L. R., Q. B. 442.

(h) *Collett v. Lond. and North-West. Rail. Co.* *Marshall v. York, &c., ante.*

the contracting party with the apothecary or surgeon: for, though no such contract had been made, the apothecary, if he gave improper medicines, or the surgeon, if he took him as a patient and unskillfully treated him, would be liable to an action for a mis-feazance. (*i*)

If a mason contract to erect a bridge or other work in a public road, which he constructs, but not according to the contract, and the defects of which are a nuisance to the highway, he may be responsible for it to a third person who is injured by the defective construction, and he can not be saved from the consequences of his illegal act in committing the nuisance on the highway, by showing that he was also guilty of a breach of contract, and responsible for it. And it may be the same when any one delivers to another, without notice, an instrument in its nature dangerous, as a loaded gun which he himself has loaded, and that other person to whom it is delivered is injured thereby; or if he negligently places it in an improper situation easily accessible to a third person, who sustains damage from it, not supposing that a loaded gun would have been placed in such a spot. (*j*)

Whenever an action of tort is founded upon a contract, it proceeds upon the assumption that the contract is good in law, and can be enforced by action; if, therefore, the contract is verbal when by law it is required to be in writing, no duty is created by it, and an action founded upon such contract is not maintainable. (*k*)

1289. *Of the remedies which tenants in common and joint tenants have against each other.*—If two several owners of houses have a river or stream in common, and one of them corrupts it, the other shall have an action against him for damages. And whenever one tenant in common misuses the common property, or commits waste, he is responsible to his co-tenant in common for the injury he has done. If there be two tenants in common of a wood, and one of them leases his part to the other, who cuts down young timber trees and does waste, he shall be punished for a moiety of the waste, and the lessor shall recover a moiety of the place wasted: but one

(*i*) Parke, B., *Longmeid v. Holliday*, 6 Exch. 767. *Dixon v. Bell*, 5 M. & S. 198.
 Gladwell v. Steggall, 8 Sc. 67; 5 B. N. C. 733.

(*k*) *Carrington v. Roots*, 2 M. & W.

(*j*) Parke, B., *Longmeid v. Holliday*,

tenant in common can not maintain an action in the nature of waste against the other, for cutting down trees of a proper age and proper growth, for this is no injury to the inheritance; but he is entitled, in an action of account, to recover a moiety of the value of the tree. (l)¹

By the common law, indeed, joint tenants and tenants in common had no remedy against each other where one alone received the whole profits of the estate; for he could not be charged as bailiff or receiver to his companion, unless he actually made him so; but by 4 Anne, c. 16, s. 27, it is provided, that joint tenants and tenants in common, and their executors and administrators, may have an action against the others as bailiffs, for receiving more than their just share or proportion. (m)

1290. *Rights of the survivor of two joint tenants or tenants in common.*—In case of the death of one of two joint tenants of lands or chattels, the whole interest in the property passes, as we have seen, to the survivor; but in the case of the death of one of two tenants in common of real property, the share and interest of the deceased passes to his heir-at-law, and in the case of a tenancy in common of chattels, to the personal representatives of the deceased. But in the case of the death of one of two tenants in common of a patent, the right of action for an infringement of the patent in the lifetime of the deceased tenant in common, survives to the other, and the latter is consequently entitled to recover the whole of the damages. (n)

1291. *Trustee and cestui que trust.*—In the case of a permanent injury to real property in the occupation of a tenant

(l) *Martyn v. Knowllys*, 8 T. R. 145; Engl. & Ir. App. 464.

ante.

(n) *Smith v. Lond. and North-West.*

(m) See *Jacobs v. Seward*, L. R., 5 Rail. Co., 2 Ell. & Bl. 69.

¹ If one tenant in common of a mill uses it to the injury of a stranger, the other co-tenant, not participating in the act, is not liable therefor. *Simpson v. Leavey*, 8 Me. 138. So, where a stranger does an act upon the premises by permission of one joint tenant, he is not liable to the other. *Sheperd v. Young*, 2 La. Ann. 238. So, where two joint owners of hay deposited it in the barn of a third person, it was held that one of them had no right to break the barn open to get the hay. *Croc' er v. Carson*, 33 Me. 436. So, where one tenant in common erects a dam upon the joint estate and raises the water so as to flood the separate estate of the other tenant, he is liable to him therefor. *Great Falls Co. v. Worcester*, 15 N. H. 412; see note 1, page , vol. 1.

to whom it has been demised by a cestui que trust, the trustee in whom the legal estate in reversion is vested is the proper person to sue for the injury to the reversion, and not the cestui que trust, who has only an equitable interest. "The cestui que trust," observes TINDAL, C. J., "has no interest in law; if he enters, his possession is considered the possession of the trustee, and any disposition made by him and adopted by the trustee is considered the disposition of the trustee." (o)

1292. *Bailees of goods*.—We have seen that many persons who have only a special property in goods may maintain an action for damages done to them, or for the conversion, detention, or loss of them; such as a carrier, who is the mere instrument of conveyance, or a workman, to whom goods have been sent to be repaired or worked upon, or a warehouse-keeper, who has them for safe custody, or an auctioneer or shopkeeper, to whom they have been sent to sell, (p) or the master of a vessel, or of a canal-boat, who is intrusted with the possession and management of the vessel or boat, and its tackle and furniture, (q) and many others, to whom goods have been delivered for a special purpose, and who do not pretend to any absolute property in them. (r)

1293. *Master and servant*.—The master is entitled, as we have seen, to maintain an action for damages for a personal injury to his servant, whereby he has been deprived of the services of the latter, and for expenses incurred by him in curing his servant's personal injuries, and recovering the benefit of his services. "Courts of justice have allowed all the circumstances of the case to be taken into consideration with a view to the calculation of the damages." (s) The master may claim, and will be entitled to recover, damages not only for the loss of the services of his servant up to the time of the commencement of the action, but, if the servant continues disabled, down to the time when it appears by the evidence that the disability may be expected to cease. (t) A parent whose child was, before the injury it sustained, capa-

(o) Vallance v. Savage, 7 Bing. 599.

(p) Williams v. Millington. 1 H. Bl.

84. Colwell v. Reeves, 2 Campb. 576.

(q) Pitts v. Gaince, 1 Salk. 10. Moore

v. Robinson, 2 B. & Ad. 817.

(r) Martini v. Coles, 1 M. & S. 147.

(s) Abbott, C. J., Hall v. Hollander, 4 B. & C. 663; *ante*.

(t) Hodson v. Stallebrass, 11 Ad. & E. 301; *post*, ch. 22. PROSPECTIVE DAMAGES.

ble of performing acts of service, may, as we have seen, maintain an action for damages for the loss of the services of the child, if he can prove that the child was living with him, and rendered him some sort of personal service. (*u*) The servant himself, also, is entitled to an action for the damage he has sustained by the tortious act; for loss of wages, bodily pain, and the expenses he has incurred in procuring medical advice and medicine, food and lodging, which would otherwise have been provided for him by his master. The servant himself, who sustains bodily pain and anguish, is the only person entitled to damages in respect thereof. (*v*)

1294. *Husband and wife.* (*w*)—If a man marries a woman seized in fee of certain lands and tenements, he gains a freehold interest therein in right of his wife; and if he is the actual occupier of them, he is, of course, entitled to sue for all damage done to his beneficial occupation and enjoyment of the property. If the wife, on her marriage, was possessed of chattels real, such as leasehold interests, estates by statute merchant, statute staple, &c., the husband will be entitled to them as a gift in law, and may, during the marriage, deal with them as the owner of them; but if he fails to make any transfer or disposition of them in his lifetime, and his wife survives him, she will then take them by survivorship. The husband can not devise them, but he may transfer them by deed. (*x*) If the wife's estates have, prior to the marriage, been conveyed to trustees, the husband will then have no legal interest in the property, and no right to maintain an action for any damage that may be done to it.

If the husband, having an interest in the wife's real estate, grants leases thereof during their joint lives, reserving rent to himself and making his wife no party to the lease, then, as the reversion is in the husband, he is the proper person to sue for damage done to his reversionary estate, (*y*) and for double value under 4 Geo. 2, c. 28, s. 1, for holding over by tenants after notice to quit. (*z*) If a feme sole hath a right to have common for life, and she marries, and the husband is

(*u*) *Ante.* Hall v. Hollander, 4 B. & C. 662. Property Act, 1870," 33 & 34 Vict. c. 93.

(*v*) Gladwell v. Steggall, 5 B. N. C. 736. (*v*) Bac. Abr. BARON AND FEME, C.

(*y*) Wallis v. Harrison, 5 M. & W. 142.

(*z*) Harcourt v. Wyman, 3 Exch. 824.

(*w*) See "The Married Woman's 18 Law J., Exch. 453.

hindered in his enjoyment of the right of common, he alone may have an action for damages. (*a*)

Actions for the conversion of the goods of a feme covert before her marriage, and for wrongs done to her before marriage, should be brought by the husband and wife jointly, as the chose in action in case of the death of the husband would survive to the wife; but if the wife sues alone on such chose in action, she will be entitled to damages, unless the non-joiner of the husband is pleaded in abatement. (*b*) The marriage operates, as we have seen, as an absolute gift in law to the husband of all the goods and chattels and personal property of the wife. The husband, therefore, after the marriage, may demand possession of the chattels of the wife in the hands of a stranger; and if the latter has no lien upon them or right to detain them, and refuses or neglects to deliver them up to the husband, the latter may maintain an action for the detention or conversion of them without joining the wife, as the tort is to the husband; but if the action is brought for the conversion of deeds and securities relating to property and choses in action which would survive to the wife in case of the death of the husband, the wife would be properly joined with the husband for conformity. (*c*)

So absolute is the husband's right to all chattels and personal property which come to his wife's hands after marriage, that if the wife buys wearing apparel out of money settled to her separate use, and received by her from her trustees, such wearing apparel vests by law in the husband as the legal owner thereof; and the same rule prevails with regard to money and all kinds of personalty, as soon as it is placed by the trustees in the hands of the wife in the execution of the trusts. (*d*) In actions for the recovery of damages for a personal wrong or violence done to the wife, where the action would survive to her in the case of the death of her husband, the wife ought to be joined as a plaintiff, although the declaration sets forth and claims some special damage accruing to the husband; but where there is no injury to the

(*a*) *Baker v. —*, 2 Bulstr. 14.

(*b*) *Milner v. Milnes*, 3 T. R. 627.
Morgan v. Cubitt, 3 Exch. 612. *Dalton v. Mid. Count. Rail. Co.*, 13 C. B. 474.

(*c*) *Avling v. Whicher*, 6 Ad. & E. 257.

(*d*) *Carne v. Brice*, 7 M. & W. 183.
Bird v. Peagrum, 13 C. B. 649. See
 "The Married Women's Property Act
 1870," 33 & 34 Vict. c. 93.

person of the wife, and the action would not survive to her, the wife ought not to be joined, she having no legal interest in the damages to be recovered. (*e*) The husband, for example, is alone entitled to sue for the loss of the services of his wife through the tortious act of the defendant, and for the expenses he has incurred in doctors and nurses in curing her of injuries resulting from an assault upon her by the defendant; but when damages are sought to be recovered for the bodily pain suffered by the wife from personal violence, or for injury to her personal feelings from slanderous attacks upon her, the wife must be a plaintiff in the action, and the husband be joined with her for conformity. (*f*)

By the old law, therefore, it was often necessary to bring separate actions for the recovery of the entire damage resulting from an injury to the person of the wife, in one of which the husband alone was made plaintiff, and in the other the wife was joined for conformity; but now, by the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 40, it is enacted, that in any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated if the court or a judge shall think fit; but it is provided that in the case of the death of either plaintiff, such suit, so far only as relates to the causes of action, if any, which do not survive, shall abate.

If a defendant has been guilty of a fraudulent representation that a chattel is fit for use, knowing that it is not, and making the representation in order that the chattel may be used by the plaintiff's wife, and the wife uses it and is injured, both the husband and wife may be properly joined in an action for the deceit, but the wife can not be joined with the husband where the action is founded merely on a breach of warranty without proof of willful deceit. (*g*) If a person professing to sue as the husband of an injured female, is not in truth her husband, he has no right to maintain the

(*e*) *Saville v. Sweeney*, 4 B. & Ad. W. 6.
523.

(*f*) *Dengate v. Gardiner*, 4 M. & 761.

(*g*) *Longmeid v. Holliday*, 6 Exch.

action. It is a good plea in bar, therefore, to an action professing to be an action by husband and wife, for an injury done to the wife, to plead that the female plaintiff is not the wife of the male plaintiff. (*h*)

Where the husband and wife were seized of a messuage for their joint lives and the life of the survivor, and all the estate and interest of the husband became vested in the defendant, who permitted waste during the lifetime of the husband, it was held that the wife who survived her husband could not maintain an action against the defendant in respect of such waste. (*i*)

1295. *Actions by married women after a judicial separation, or an order for protection.*—When a married woman is living separate from her husband under a decree for a judicial separation, she is considered as a feme sole for the purpose of suing for damages for any wrong or injury that she may have sustained. (*j*) But until a decree for a judicial separation has been obtained, she ought, although she is living apart from her husband, to sue in his name for any trespass that may have been committed in her dwelling-house. (*k*)¹

1296. *Infants* have a right to sue by guardian or prochein ami to recover damages for injuries done to their persons or property through the tortious act of another.²

1297. *Heir-at-law, devisee, and personal representatives.*—All causes of action in respect of injuries of a continuing nature to real property descend with the property to the heir-at-law on the death of the ancestor, or vest in the devisee, remainderman, or personal representative, in whom the legal estate in the land may be vested by deed, will, or administration. (*l*)

The heir-at-law is the proper person to maintain an action for the entire damage resulting from a nuisance of a continuing nature to land which comes into his possession by

(*h*) Chantler v. Lindsey, 16 M. & W.

82.

(*i*) Bacon v. Smith, 1 Q. B. 345.

(*j*) 20 & 21 Vict. c. 85, s. 26; *ante*.

(*k*) Boggett v. Frier, 11 East, 301.

(*l*) Vivian v. Champion, 2 Ld. Raym. 1126.

¹ This is only the case where provision is specially made by statute therefor.

² And can only sue in that way, and in *all* cases when defendants in a cause, the plaintiff must see to it that there is a guardian *ad litem* appointed, or the judgment will be set aside on *audita querela*, or by proceedings in equity.

descent. Thus, where one John Rolf built a house so near to the house of Richard Rolf that the eaves of his said house did overhang the house of Richard, and pour water thereon, and afterwards both John and Richard died, and their respective houses descended to their respective sons and heirs-at-law, and the heir of Richard, on request made to him by the heir of John, did not reform the wrong, whereupon the latter brought an action against the heir of Richard, who did demur in law, it was adjudged that the action was maintainable, because the defendant did not on request reform the nuisance which his father had made, but suffered it to continue to the prejudice and damage of the plaintiff, son and heir of him to whom the wrong was done. (*m*)

So, where a nuisance erected on the land of a devisor in the lifetime of such devisor was continued afterwards in the time of the devisee, it was held that the devisee should have an action for it, for the continuance thereof is a new erecting of such nuisance. (*n*)

When the reversionary interest of a deceased leaseholder, who has underlet the premises demised to him, becomes vested in his personal representatives, they are, of course, the proper persons to sue for damages in respect of permanent injuries to the property of a continuing nature, diminishing the value of their reversionary estate. When the damage done to real property was not of a continuing nature, but accrued wholly in the lifetime of the testator, the heir-at-law, devisee, or remainderman, could not sue in respect of it; neither could the personal representative, in consequence of the old maxim of the common law, *actio personalis moritur cum personâ*. Thus, if trespassers entered upon the land and cut down trees, or gathered, carried away, and sold growing crops and fruit; or set fire to buildings, and caused them to be utterly consumed, the heir could not sue, because the damage was sustained in the lifetime of the ancestor, and the personal representatives could not recover the damages that had been sustained, because they were personal to the deceased, and the remedy died with him. (*o*) But by 3 & 4

(*m*) 2 Hen. 413; 31 Ed. 3, Voucher, 272, cited in Penruddock's case, 5 Co. 101 a. Gillon v. Boddington, cited 5 B. & C. 268.

(*n*) Some v. Barwish, Cro. Jac. 231.
(*o*) Adam v. Bristol, 2 Ad. & E. 389.
Raymond v. Fitch, 2 C. M. & R. 597.

Wm. 4, c. 42, s. 2, reciting that there was no remedy provided by law for injuries to the real estate of any person deceased, committed in his lifetime, it is enacted, that an action of trespass or case may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person.

On the death of an owner of goods and chattels in the hands of bailees and depositaries, the right of property in the chattels vests in the personal representatives, and if the bailee has no lien upon them, or interest in them, or right to detain them as against the owner, the personal representatives may demand possession of them; and if the bailee refuses to deliver them he may be sued for the detention or conversion of the property. (*p*) Being themselves the owners of the property on the death of the testator or intestate, they are the proper persons to sue in respect of trespasses committed by persons who take the goods out of their actual or constructive possession, or out of the custody of their servants or agents; (*q*) but they can not, at common law, sue in respect of any detention or conversion of the property in the lifetime of the deceased owner, nor for a trespass in taking it away, by reason of the maxim *actio personalis moritur cum personâ*. To remedy this, it was enacted by 4 Ed. 3, c. 7, that executors shall have actions for a trespass done to their testators in respect of the goods and chattels of the said testators carried away in their lifetime, and recover their damages in like manner as they whose executors they be should have had if they were in life. By 25 Ed. 3, c. 5, the benefit of this statute is extended to the executors of executors; and administrators are within the equity of the statute. It has been held that an action is maintainable by executors under this statute against a defendant for cutting down and carrying away a growing crop of wheat from the testator's land in his lifetime, because corn growing is a chattel; but that if the

(*p*) *Hollis v. Smith*, 10 East, 292.

(*q*) *Adams v. Cheverel*, Cro. Jac. 11.

defendant had cut down the corn and let it lie, no action would have been maintainable by the executor; nor if grass had been cut and carried away by the defendant; because grass is part of the freehold. (r)

As actions for personal wrongs die with the person, it follows that executors and administrators can not maintain an action for a libel upon their deceased testator or intestate, or for an insult or false imprisonment, or any act of negligence or violence causing injury to the person, not ending in death. But if the declaration of the cause of action, though framed in tort, is in substance for a breach of contract which has damaged the personal estate of the testator, the action is maintainable, as the substance, and not the form, of the thing must be regarded.¹ Thus, if a person contracts with a coach-

(r) *Emerson v. Emerson*, 1 Ventr. 187.

¹ It is not the *form* of the action, but the *substance*, that furnishes the test of survivorship. If the cause of action is purely tortious, it dies with the person, but if it grows out of a contract, it survives, whatever may be the form of action adopted, as an action for false warranty. *Booth v. Northrup*, 27 Con. 325. An action may survive in favor of an estate, when it will not survive against it. Thus, where A has received the property of B, and wrongfully converted it, and B dies, his administrator may maintain an action of *trover* therefor, the cause of action surviving to the estate. But if A converts the property of B wrongfully and dies, an action of *trover* can not be maintained against his personal representatives therefor, the action not surviving against the estate. *Wright v. Eldred*, 2 D. Chip. (Vt.) 4. The only remedy in such a case is to waive the tort and proceed in form *ex contractu*. *Jones v. Hoar*, 5 Pick. (Mass.) 285; *Cooper v. Crane*, 4 Halst. (N. J.) 173. But where the wrongdoer received no benefit from the act, the entire cause of action dies upon the death of either of the parties; but, where the deceased by a tortious act acquires the property of another, as by converting his goods, cutting his trees, forcibly carrying away his goods, although in form, an action *ex delicto* will not lie against his administrators; yet the person whose property was thus disposed of may, in some cases, waive the tort and maintain an action for its value. But where the deceased acquired no gain by the act complained of, the entire cause of action dies with him. At common law there is no remedy whatever, either to or against executors for torts of any kind; but the statute of Edward 3 enables executors to bring that species of action for injuries to the property of the testator in his lifetime, and by the common law, when the tort is such that it can be waived and an action of *assumpsit* maintained therefor, the person injured may waive the tort and proceed in *assumpsit* for the value of the property. *Cranth v. Plympton*, 13 Mass. 453; *Middleton v. Robinson*, 1 Bay. (S. C.) 61; *Pitts v. Hale*, 3 Mass. 321; *McEvers v. Pitkin*, 1 Root (Conn.) 216; *Jones v. Hoar*, 5 Pick. (Mass.) 285; *Cooper v. Crane*, 4 Halst. 173.

The old rule of the common-law, that all tortious actions, or actions for injuries conceived in tort, died upon the death of either party, was found to be unjust, harsh, and oppressive, and as a consequence, it was gradually relaxed, until the doctrin

proprietor to be safely and securely carried from one place to another, and through the negligence of such proprietor or his servant the coach be overturned, in consequence of which

was finally established that, in all cases where the deceased *had actually had the property of the other party, so as to derive a benefit therefrom*, so that a promise to pay therefor could be presumed or implied, while an action for the tort could not be maintained, yet the tort could be waived, and assumpsit maintained for the *value* of the property; *Lemine v. Dorrell*, 2 Ld. Rayd. 1216; *Hitchin v. Campbell*, 2 W. Bl. 827; *King v. Leith*, 2 T. R. 144; *Faltham v. Terry*, cited in *Lindon v. Hooper*, Cowper, 419; *but for the tort itself no action whatever will lie*. Thus, where A enters upon the premises of B and cuts down his trees there standing, but had not taken them away, and sold them, and dies, B can not proceed against the estate of A for the injury done to him, for the whole matter rests in tort, and no implied assumpsit can be raised, for the deceased *had no gain from the tort*; *Jones v. Hoar*, 5 Pick. (Mass.) 285; *Lightly v. Clouston*, 1 Taunt. 112. The whole matter vesting in damages, no implied promise can be raised; *Bailey v. Birtles*, T. Rayd. 71; *Hambly v. Trott*, Cowp. 377. But whenever the act is such that the tort can be waived, and the law will imply a promise to pay for the property, the only remedy against an estate is upon the implied promise; *Cooper v. Crane*, *ante*; *McLaughlin v. Dorsey*, 1 H. & M. (Ind.) 224; *Bailey v. Birtles*, T. Rayd. 71.

In *Hambly v. Trott*, Cowp. 371, the right to maintain an action *ex delicto*—in that case *trover*—was fully discussed, and the right denied, in a very able and exhaustive opinion by Lord MANSFIELD, and the doctrine advanced is that, where the testator in his lifetime had *converted* the goods of another, an action of *trover* will not lie against the executor therefor, and, while the question was not actually decided in the case, it was broadly intimated by the learned judge, that a recovery could be had against the estate where the goods had been *sold* by the testator, or *converted* by him in his lifetime. In reference to the question as to what actions survive against an estate, he said, “When the cause of action is money due, or a contract to be performed, gain or acquisition by the testator, by the work and labor, or *property of another*, or a *promise of the testator, express or implied*; where these are the causes of action, the action survives against the executor. *But where the cause of action is tort, or arises ex delicto, supposed to be by force and against the King's peace, there the action dies*, as battery, false imprisonment, trespass, words (slander or libel, Ed.), nuisance, obstructing ancient lights, diverting a water-course, escape against a sheriff, and many other cases of the like kind.”

As to those which survive or die *in respect of the form of action*, in some actions the defendant could have *waged his law*, and, therefore, no action in this form lies against the executor. But now other actions are substituted in their room, upon the very same cause, which *do* survive, and lie against the executor. No action, where in form the declaration must be *quare vi et armis il contra parem*, or where the plea must be *not guilty*, can lie against the executor. *Upon the face of the record, the cause of action arises ex delicto*, and all *private* criminal injuries and wrongs, as well as all *public crimes*, are *buried with the offenders*.

But in most, if not all the cases where *trover* lies against the testator, another action might be brought against the executors, which would answer every purpose. An action on the custom of the realm against a common carrier, is for a *tort*, and supposed crime; the plea is *not guilty*, and, therefore, it will not lie against the executor. *But assumpsit, which is another action for the same cause, will lie*. So,

the passenger so contracting dislocates or fractures a limb, and owing to his confinement in procuring a cure, his personal property sustains an injury, although he during his life-

if a man take a horse from another, and brings him back again, trespass will not lie against the executor, although it would against the testator, *but an action for the use and hire of a horse*, will lie against the executor.

There is a case in Sir Thomas Raymond (Bailey v. Birtles, 71), which sets this matter in a clear light. There, in an action upon the case, the plaintiff declared "that he was possessed of a cow, which he delivered to the testator in his lifetime, to keep the same for the use of him, the plaintiff; which said cow the said Richard afterwards sold, and *did convert and dispose of the money to his own use*, and that neither the said Richard, in his life, nor the defendant, after his death, ever paid the said money." Upon this state of the case, no one can doubt but the executor was liable for the value. But the special injury charged compelled him to plead that the testator was not guilty. The jury found him guilty. It was moved in arrest of judgment, because this is a *tort* for which the executor is not liable to answer, but *moritur cum personâ*. For the plaintiff it was insisted that, though an executor is not chargeable for a *misfeasance*, yet for a *nonfeasance* he is. . . . The court held that "it was a *tort*, and that the executor ought not to be chargeable." Sir Thomas Raymond adds (see Saville, 40), a difference taken, "That was the case of Sir Henry Sherrington, who had cut down trees upon the Queen's land, and converted them to his own use in his lifetime. Upon an information against his widow after his decease, MANWOOD, Justice, said: "*In every case where any price or value is set upon a thing in which the offense is committed, if the defendant dies, his executor shall be chargeable, but where the action is for damages only, in satisfaction of the injury done, his executor shall not be liable.*" These are the words Sir Thomas Raymond refers to.

"Here, therefore, is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself, at the expense of the sufferer, as beating or imprisoning a man, &c., there the person injured has only a *delictum* in damages to be assessed by a jury. But where, besides the crime, *property is acquired which benefits the testator*, then an action for the value shall survive against the executor. As, for instance, *the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator, for the value or sale of the trees, he shall.* So far as the *tort* itself goes, an executor shall not be liable; and, therefore, it is that all public and private crimes die with the offenders, and the executor is not chargeable. *But so far as the act is beneficial, his assets ought to be answerable, and his executor, therefore, shall be chargeable.*" But, in this case the judgment was arrested, upon the ground that *trover* would not lie, but that the form of action should be *assumpsit for money had and received*. In this case the court seem to regard it as essential to a recovery from the executor, for the value of property converted by the testator, *that it should have been sold by the testator*, for he remits the plaintiff to his remedy *for money had and received*, which could not lie unless it had been sold and converted into money. See Jones v. Hoar, 5 Pick. (Mass.) 285; Lightly v. Clouston, 1 Taunt. 112; Bennett v. Francis, 2 B. & P. 554; Lindon v. Hooper, Cowper, 419; King v. Leith, 2 T. R. 144; Hitchin v. Campbell, 2 W. Bl. 827; Lemine v. Dorrell, 2 Ld. Rayd. 1216.

Thus it will be seen that *in all cases where the cause of action rests in tort, and one of the parties dies, no recovery can be had against his executor for the injury, and*

time, would have the option to sue the proprietor either on contract or tort, still his representative may after his death maintain an action on the contract to carry him safely, and

that in no case can there be a recovery against the estate, except in those cases where the party can waive the tort and bring assumpsit therefor. Thus it has been held that an action for diverting a water course dies with the person; *Holmes v. Moore*, 5 Pick. (Mass.) 257; so that the following actions have been held *not* to survive an action of trespass for cutting down trees, or trespass on the freehold generally; *Williams v. Breeden*, 1 B. & P. 329; an action for a penalty, or an action of debt, given by special statute for cutting down trees; *Little v. Conant*, 2 Pick. (Mass.) 527; an action for overflowing another's land will not survive to the executor of the person injured; *McLaughlin v. Dorsey*, 1 H. & McH. (Md.) 224; an action for obstructing a highway, whereby the plaintiff's horse was killed; *Hawkins v. Glass*, 1 Bibb. (Penn.) 246, an action for *mesne profits*, while the testator was *wrongfully* in possession; *Harker v. Whittaker*, 5 Watts. (Penn.) 474; an action against the estate of a postmaster for money feloniously taken out of a letter by his clerk; *Franklin v. Law*, 1 Johns. (N. Y.) 376; an action of debt against the executor of a sheriff for an escape in the sheriff's life time; *Martin v. Bradley*, 1 Cai. (N. Y.) 124; an action for a fraud of the deceased; *Traup v. Smith*, 20 Johns. (N. Y.) 43; actions for assault and battery, false imprisonment, slander or libel, nuisance, escape against a sheriff, and *all* merely personal wrongs, arising from the wrongful or negligent acts of another, die with the person; *Cravath v. Plympton*, 13 Mass. 453; so, an action for deceit; *Newsom v. Jackson*, 29 Ga. 61; *Cutting v. Tower*, 14 Gray (Mass.), 183; an action for trover; *Barnard v. Harrington*, 3 Mass. 228. Actions for replevin *survive* as to the plaintiff, *but not* as to the defendant. *Miller v. Baldwin*, 4 Mass. 480; *Lehay v. Brady*, 1 Daly (N. Y.) 449; *Emerson v. Bleakley*, 2 Abb. Ct. of App. (N. Y.) 22.

Trover, trespass de bonis asportatis and replevin may be brought by an executor, but not *against* him. *Mellen v. Baldwin*, *ante*; *Cherry v. Hardin*, 4 Heisk (Tenn.) 199. So, where the statute makes certain acts of an officer a *tort*, no action at law can be maintained therefor against his executors. *Maies v. Sprague*, 9 R. I. 541. An action for breach of promise to marry; *Wade v. Kalbfleisch*, 58 N. Y. 202; libel; *Moore v. Bennett*, 65 Barb. (N. Y.) 338; ejectment, nor actions in the nature of, do not survive the death of the defendant. *Benjamin v. Smith*, 17 Wend. (N. Y.) 208. An action of waste survives *to* but not *against* an executor. *Rutherford v. Aiken*, 3 Sup. Ct. Rep. (T. & C. N. Y.) 60. An action of trespass survives *to* but not *against* an estate. *Snyder v. Craig*, 2 Johns. (N. Y.) 227. And where the action is purely *tortious* it does not survive, even though by statute assumpsit may be brought therefor; *People v. Gibbs*, 9 Wend. (N. Y.) 29; and, generally, unless the nature of the act is such that a contract can be implied, the action does not survive at common law. Thus, actions for personal injury resulting in *instant* death by the negligence of a carrier of passengers, do not survive; but if the deceased lived after the injury was inflicted, for however short a period of time, an action lies, but the action is upon the contract, and not in tort. *Yertone v. Wiswell*, 1 How. Pr. (N. Y.) 8. Thus, in *Bancroft v. Boston & Worcester R. R. Co.*, 11 Alle (Mass.), 35, the plaintiff's intestate survived, although wholly insensible, for about fifteen minutes after the injury, and the court held that a recovery could be had. BIGELOW, J., in giving the opinion of the court, said: "The length of time during which life remains is not material in determining whether the cause of action survives.

recover damages for the injury which has accrued to his personal estate from the breach thereof. Where the plaintiff suing as administrator set forth in his declaration that the defendant was employed by the intestate in his lifetime to act as his attorney to investigate the title to an estate the intestate had purchased, that the defendant entered upon the employment, but neglected to investigate the title, and caused the intestate to accept a defective title by representing it to be a good title, showing special damage to the personal estate, it was held that the action was clearly maintainable, as the intestate in his lifetime might have sued in contract as well as in tort. (s) But as regards personal injuries unconnected with contract causing the death of the party injured, it has been enacted, by the 9 & 10 Vict. c. 93, that whenever the death of a person has been occasioned by any wrongful act, or by neglect or default, such as if death had not ensued would have entitled the injured party to maintain an action, and recover damages in respect thereof, then the person who would have been liable if death had not ensued shall be liable to an action for damages, to be brought in the name of the executor or administrator of the person deceased, or by the persons beneficially interested.

(s) Knight v. Quarles, 4 Moore, 541.

Suppose a person should receive an injury by which one of the main arteries was severed, and life thereby extinguished in five minutes. If he was a soldier or sailor and received such injury in actual service, there can be no doubt that a nuncupative will made by him would be good. The time, though brief, would be sufficient to enable him to do a valid legal act. Could there be any doubt, then, that under the same circumstances, a cause of action would accrue to him against a party who negligently caused the injury which would survive to the administrator? *Time*, then," adds the learned judge, "can not be the test by which the right of the personal representative to sue can be tried; nor can the presence or absence of consciousness or sensibility be the standard." And in the same opinion he gives the test thus, "*The continuance of life after the accident, and not insensibility or want of consciousness, is the test by which to determine whether a cause of action survives.*" See also *Hallenbeck v. Berkshire R. R. Co.*, 9 Cush. (Mass.) 478.

An action under a statute for selling liquor to an habitual drunkard, survives, *Kilham v. Cae*, 48 How. Pr. (N. Y.) 144. An action for fraudulent misrepresentation in reference to property sold, survives. *Haight v. Hoyt*, 19 N. Y. 464. So an action against an attorney for negligence in the conduct of the plaintiff's business. *E'der v. Bogardus*, Lator's Supt. (N. Y.) 116. But, in determining what actions survive to or against an executor, reference must always be had to the statute of the state where the claim is sought to be enforced, as the common law rules have been essentially changed in many of the states.

1298. Administrators.—An action is maintainable by an administrator for a wrongful seizure by the defendant of the intestate's goods made between the death of the intestate and the grant of the letters of administration; (*t*) and an action is maintainable in respect of goods wrongfully sold after the death of the intestate, and before the grant of the letters of administration. (*u*)

1299. Trustees of bankrupts may bring or defend any action, suit, or other legal proceeding relating to the property of the bankrupt. (*v*) Such trustees also, where any portion of the property of the bankrupt consists of things in action, may institute suits in their official names, and such things shall, for the purposes of such action, &c., be deemed to be assignable at law, and to have been duly assigned to such trustee. (*w*) In all actions by or against trustees of a bankrupt, the character in which the plaintiff or defendant is stated on the record to sue or be sued is not in any case to be considered in issue, unless it is specially denied. (*x*) By the 106th, 107th, and 108th sections, provision is made for the admission in evidence in all courts of the various proceedings in bankruptcy, provided they purport to be sealed or signed as therein mentioned. And by the 109th section, judicial notice is to be taken of the various seals of the Court of Bankruptcy, and of the signature of the judge or registrar of any such court. The production of the certificate of appointment of the trustee in bankruptcy, under the seal of the court (see s. 18) would therefore (semble) be conclusive evidence of his title, although the seal was not in fact affixed till after the commencement of the action. (*y*) A party to a suit, however, may, by his conduct and actions in dealing with trustees in bankruptcy, have so recognized their title as

(*t*) *Tharpe v. Stallwood*, 5 M. & Gr. 777.

(*u*) *Foster v. Bates*, 12 M. & W. 226.

(*v*) 32 & 33 Vict. c. 71, s. 25. As to their power to compromise disputes, see s. 27.

(*w*) Sect. 22. As to a trustee in bankruptcy fraudulently omitting to prosecute an action, see *Benfield v. Solomons*, 9 Ves. 84. *Smith v. Moffat*, L. R., 1

Eq. Ca. 397.

(*x*) Reg. Gen. H.L. T., 16 Vict., 1 Ell. & Bl. App. lxxix.

(*y*) *Kelly v. Morray*, L. R., 1 C. P. 667. The 18th section, however, has the words "and such appointment shall date from the date of the certificate," which were not in the Act, 24 & 25 Vict. c. 134, under which the above case was decided.

to be afterwards precluded from requiring formal proof of it. (z)

1300. *Transfer of rights and liabilities ex delicto to trustees of bankrupts.*—We have already seen that all the real and personal estate and effects of bankrupts, with certain exceptions, are vested in the trustees in bankruptcy. The trustees, therefore, are the proper parties to maintain an action for injuries done to real or personal property, which has become vested in them by reason of the bankruptcy; (a) but they can not maintain an action for injuries to the person of the bankrupt. They can not sue, for example, for damages for a libel upon him, although the injury occasioned thereby to the man's reputation may have been the sole cause of his bankruptcy; nor can they sue for damages for an assault upon the bankrupt, or for the seduction of his servant; (b) and the same may be said of some purely personal injuries arising out of breaches of contracts, such as contracts to cure or to marry; and if in these cases a consequential damage to the personal estate follows from the injury to the person, that damage may, nevertheless, be so dependent upon, and inseparable from, the personal injury, which is the primary cause of action, that no right to maintain a separate action in respect of such consequential damage will pass to the trustees. But where the primary and substantial cause of action is not, properly speaking, personal to the bankrupt, but the injury to the person is the consequence of an injury to the personal estate, the injury to the personal estate is the primary and substantial cause of action, and such right of action will pass to the trustees as part of the personal estate. (c)

Where a plaintiff who had become bankrupt complained that the defendant had seized his goods under a false and pretended claim of right; that he was thereby much annoyed and prejudiced in his business, and believed to be insolvent; and that by means of the premises certain of his

(z) *Dickinson v. Coward*, 1 B. & Ald. 677. *Inglis v. Spence*, 1 Cr. M. & R. 432.

(a) *Michell v. Hughes*, 6 Bing. 689, although the bankrupt of whom they are trustees was an uncertificated bankrupt at the time of their appointment, *i.e.*, if the trustees under the first bankruptcy

do not interfere: *Morgan v. Knight*, 33 Law J., C. P. 168.

(b) *Howard v. Crowther*, 8 M. & W. 601.

(c) *Drake v. Beckham*, 11 M. & W. 319. *Hodgson v. Sidney*, L. R., 1 Exch. 313.

lodgers, being induced to believe that he was in embarrassed circumstances, and that the defendants were entitled to seize the goods for a debt, quitted the house, and the declaration then claimed special damages, it was held, that as the jury were entitled upon the declaration as it stood to give vindictive damages for the personal injury far beyond the mere value of the goods, a plea of the bankruptcy of the plaintiff, and of the transfer of the causes of action to the assignees, afforded no answer to the plaintiff's claim. (*d*) "There is no doubt," observes Lord CAMPBELL, "that a cause of action which is exclusively confined to injury to property will pass to the assignees, but there is a difficulty when there is a mixed case of injury to the person and injury to property. It may be that in such a case the law will give an action to the bankrupt for the personal injury sustained by him, and an action to the assignees for the injury done to the property." (*e*)

If the bankrupt, notwithstanding his bankruptcy, continues in the possession and occupation of land which has been demised to him, he may maintain an action for trespasses or injuries done to the land, if the trustees do not interpose and take the lease. (*f*) But if he goes away and abandons the possession of the premises, he has no right of action, (*g*) unless he returns and resumes possession with the assent of the trustees or the landlord, before any other person has entered and become the occupier of the property. (*h*) If the trustees think fit to take to the lease, they are then the proper parties to sue for any trespass or injury committed upon the demised premises. (*i*)

1301 *Right of the trustees to the bankrupt's wife's choses in action.*—When a right of action of the bankrupt's wife is of such a character that if vested in the bankrupt alone, it would have passed to the trustees, such right of action passes to the trustees, subject to the condition that it is reduced into possession by them during the joint lives of the husband and

(*d*) *Brewer v. Drew*, 11 M. & W. 625.

(*e*) *Rogers v. Spence*, 12 Cl. & Fin. 720. But see per Bramwell, B., in *Hodgson v. Sidney*, *supra*; and *Morgan v. Steble*, L. R., 7 Q. B. 611.

(*f*) See s. 23, which provides that if the trustees disclaim any lease or other

onerous property, the lease shall be deemed to be surrendered from the date of the order of adjudication.

(*g*) *Clarke v. Calvert*, 8 Taunt. 752.

(*h*) *Topham v. Dent*, 6 Bing. 515.

(*i*) *Hancock v. Caffyn*, 8 Bing. 367.

wife, and that may be done in a joint action by the trustees and the wife. (*j*)

1302. *Of the number of the plaintiffs in actions ex delicto.—Joint and separate rights of action.*—Joint tenants of lands, and all persons having a joint interest in property, real or personal, should be joined as plaintiffs in actions for damages for injuries done to their joint property, as we have already seen. Tenants in common should also, as we have seen, be joined as plaintiffs in actions for injuries to their common property, such as trespasses upon their land, nuisances to their estates, and for all trespasses and injuries to their common property; because, though their estates are several, yet the damages survive to all, and it would be unreasonable for them to bring several actions for one single injury. (*k*) If a nuisance to the land of two tenants in common be continued after the death of one of them, the devisee of the deceased tenant in common should join the survivor in an action for such nuisance. (*l*)

Trustees in bankruptcy taking, as they do, a joint interest in the bankrupt's estate, should all be joined as plaintiffs in an action brought by them in their representative character in respect of injuries to such estate. (*m*)

But parties can not properly be joined as plaintiffs in an action where the wrong done to one is no wrong to the other, as in the case of false imprisonment, assault, and personal injuries. (*n*) If slander is published concerning two partners, containing imputations injurious to them in their trade and affecting their joint interests, they may sue jointly for damages. (*o*)¹

Where the duty springs out of a joint contract, if either of the parties has a separate interest, he may sue separately

(*j*) *Richbell v. Alexander*, 30 Law J., C. P. 268.

(*k*) *Hare v. Celey*, Cro. Eliz. 143.
Some v. Barwish, Cro. Jac. 231.

(*l*) *Bac. Abr.*, Joint-Tenants, &c., K.

(*m*) *Snelgrove v. Hart*, 2 Stark. 424.
Jones v. Smith, 1 Exch. 831.

(*n*) *Barratt v. Collins*, *ante*.

(*o*) *Le Fanu v. Malcolmson*, 1 H. L. C. 637; *ante*.

¹ All parties should be made plaintiffs who have a legal interest in the subject-matter of the action sued for, when the interest is joint, and the interest has not been severed; *Sawyer v. State*, 4 Wash. (U. S.) 227; but where severance has been made, each may sue separately; *Hall v. Leigh*, 8 Cr. (U. S.) 50; but this does not apply to tortious actions unless the interest was severed before the injury occurred.

in respect of such separate interest. (*p*) Thus, where the defendants, who carried on the business of accountants, were called in to adjust the accounts and settle the balance due to each of three partners separately, it was held, that the defendants owed a duty as well to each member of the firm as to the three, that there was a contract with each partner individually, as well as a contract with the firm collectively, and that one partner alone might maintain an action for the damage sustained by him individually by reason of the negligence of the defendants in making out the accounts. (*q*)

Provision is made, as we shall presently see (*post*, s. 3), by the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, for amending a non-joinder or mis-joinder of plaintiffs, either before or at the trial, upon such terms as the court or a judge may think proper.

By 23 & 24 Vict. c. 126, s. 19, it is enacted, that the joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given in favor of the plaintiffs by whom the action is brought, or of one or more of them, or, in case of any question of mis-joinder being raised, then in favor of such one or more of them as shall be adjudged by the court to be entitled to recover: Provided always, that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favor judgment is not given, unless otherwise ordered by the court or a judge.

SECTION II.

OF ACTIONS EX DELICTO AND THE PARTIES TO BE MADE DEFENDANTS IN SUCH ACTIONS. (*r*)

1303. *Tenants in common.*—If one tenant in common misuse that which he has in common with another, he is answerable

(*p*) *Eccleston v. Clipsham*, 1 Wms. Saund. 154.

(*q*) *Story v. Richardson*, 8 Sc. 291; 6 B. N. C. 123.

(*r*) Parties to be made defendants in particular actions have already been considered under their appropriate heads, see Index, *in voce*.

to the other in an action for misfeazance. (*s*) He is responsible to his co-tenant in common, as we have seen, for cutting down trees, or pulling down walls, or the doing of any act tending to the lasting injury of the common property. (*t*) So an action of trespass is maintainable by one tenant in common against his co-tenant in common for digging and carrying away brick-earth or turf, as it destroys the subject-matter of the tenancy in common, and amounts in contemplation of law to an actual ouster. (*u*) The putting of a lock upon a gate, however, by one tenant in common, without more, is not sufficient evidence of ouster to sustain an action of trespass. (*v*)

1304. Corporations.—A corporation, by accepting a grant of land from the crown upon certain conditions as to the repair of sea-walls and defenses, may render themselves liable to an action of tort at the suit of any party sustaining any private and peculiar damage from the non-repair of such sea-walls, &c. (*w*) A corporation may also be made responsible in an action for a trespass in breaking and entering a close, and for seizing goods, for every corporate body is liable in tort for the tortious acts of its agents and servants acting in the ordinary service of the corporation, without any order or authority under its common seal. (*x*) A corporation may give a warrant to distrain without deed, and thus render itself responsible for a wrongful distress, and the jury may infer the agency of the corporation in the matter of a wrongful distress or seizure of goods from the fact of their having received the proceeds of the seizure. (*y*)

Individuals constituting a foreign corporation can not be made personally liable for its contracts or torts in this country; (*z*) but the corporation, if it carries on business here, may (semble) be sued on a cause of action arising in this country and service upon the head officer of the English branch is sufficient. (*a*)

(*s*) *Ld. Kenyon, C. J., Martyn v. Knowllys*, 8 T. R. 145.

(*t*) *Holt, C. J., Waterman v. Soper*, 1 *Ld. Raym.* 737. *Cubitt v. Porter, ante.*

(*u*) *Wilkinson v. Haygarth*, 12 Q. B. 845.

(*v*) *Jacobs v. Seward*, L. R., 5 Engl. & Ir. App. 464.

(*w*) *Mayor, &c., of Lyme Regis v.*

Henley, 1 B. N. C. 240.

(*x*) *Maund v. Monm. Rail. Co.*, 4 M. & Gr. 452; 5 Sc. N. R. 457.

(*y*) *Smith v. Birm. Gas Co.*, 1 Ad. & E. 526.

(*z*) *General Steam Nav. Co. v. Guillou*, 11 M. & W. 877.

(*a*) *Newby v. Colt's Patent Fire-Arms Co.*, L. R., 7 Q. B. 293.

An action for a wrong lies against a corporation where the thing done is within the purpose of the corporation, and it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual. Therefore, where an action was brought against the London General Omnibus Company for interfering with the rights of the plaintiff, by driving their omnibuses in such a manner as to molest him in the use of the highway, it was held that as the company was incorporated for the purpose of driving omnibuses, and the whole of the wrongful acts charged in the declaration of the cause of action were acts connected with the driving of their vehicles along the public highway, and were, therefore, within the purpose of their incorporation, an action for damages was maintainable against them. "We think it extremely important," observes ERLE, J., "where such companies admit that they have in fact intentionally committed a wrong, that the public should have a remedy against them, and not be driven to an action against their servants and others whom they have employed, and who may be entirely incapable of giving the recompense which the law may award." (b)

A corporation may become liable in damages for the improper and careless construction and management of dangerous premises and dangerous machinery; (c) for an assault and battery, or false imprisonment, committed by its servants in the exercise of its orders, or in the discharge of their duty, without proof of any authority under seal from the corporation. (d) But where a corporation have employed a solicitor to conduct legal proceedings, the corporation are not necessarily liable for unlawful acts of which the solicitor may have been guilty in the conduct of the proceedings, (e) nor is his appearance to conduct a prosecution necessarily evidence as against the company that they ratified the assault complained of. (f) A corporation aggregate may, as we have seen, be made responsible for the negligence and unskillfulness of its

(b) *Green v. Lond. Gen. Omnibus Co.*, 29 Law J., C. P. 13.

(c) *Cowley v. Mayor, &c., of Sunderland*, *ante*.

(d) *Eastern Co. Rail. Co. v. Broom*, 6

Exch. 314. *Goff v. Gt. North. Rail. Co.* *ante*.

(e) *Eggington v. Mayor of Lichfield*, 5 Ell. & Bl. 112.

(f) *Walker v. South-East. Rwy., L. R.*, 5 C. P., 643.

servants in the execution of the ordinary work and business of the corporation, without any proof that the work was ordered under the common seal. (*g*)

It has been thought that an action for a malicious prosecution is not maintainable against a corporation aggregate, (*h*) but express malice may be imputed to, and proved against, a corporation, and an action of libel may consequently be maintained against a corporation for the publication of libelous intelligence through the medium of their servants, acting in the course of their ordinary employment in the management of an electric telegraph. (*i*) If it be essential to the conversion of property by a corporation that the act of conversion should have been authorized by them under their common seal, a jury may, from proof that the conversion was committed by the servants and agents of the corporation in the exercise of their ordinary employment and service, presume that the act was done under the common seal. (*j*) And in the case of corporations called into existence for trading purposes, and carrying on trade through the medium of their servants and agents, the corporation may be made responsible for a conversion of property by such servants and agents, acting in the ordinary course of their employment in the business of the corporation. (*k*) If the wrongful act was not done by the servant or agent of the corporation in the exercise of his ordinary employment, or in the discharge of his ordinary duties as servant of the corporation, it must be shown that the corporation has ratified and adopted the act.

1305. *When a joint-stock company is responsible for the tortious acts of the directors and managers.*—We have already seen that railway companies and joint-stock companies are responsible for the tortious acts of their directors and managers, when acting in the discharge of their official duties, and within the scope of their authority as the managers of the company. Where the plaintiff set forth that he was entitled to certain “ear-marked shares” in a railway company,

(*g*) *Scott v. Mayor, &c., of Manchester*, *ante*.

(*h*) *Stevens v. Mid. Co. Rail. Co.*, 10 Exch. 352.

(*i*) *Whitfield v. S.-E. Rail. Co.*, 27 Law

J., Q. B. 229; Ell. Bl. & Ell. 121.

(*j*) *Yarborough v. Bank of England*, 16 East, 6.

(*k*) *Giles v. Taff Vale Rail. Co.*, 2 Ell. & Bl. 831

that these shares had been wrongfully declared forfeited, that the forfeiture had been confirmed at a general meeting of the shareholders of the company, and the shares directed to be sold, it was held that there was a good cause of action against the company. So, where the directors had been guilty of a wrongful act of omission in not registering the plaintiff's name in their books, whereby the plaintiff was deprived of the ordinary privileges of a shareholder, and of any profits that might have arisen upon the shares, it was held that the company was responsible for the wrongful act of the directors. (*l*)

But where the directors have acted beyond the scope of their authority the company is not responsible for their acts, but the directors themselves are the parties to be made personally responsible in damages. Thus, where directors have signed false and fraudulent reports of the state and circumstances of a joint-stock company, such directors, and not the company, are the proper parties to be sued for the damages resulting from the misrepresentation. No body of shareholders can authorize directors to put forward fraudulent representations and false accounts of the transactions of the company, so as to render the company at large responsible for the fraud. That is a course which no body of shareholders could sanction against a single dissentient, or against a single absent, shareholder. Where, therefore, false reports of the actual condition and circumstances of a joint-stock company were knowingly and designedly printed and circulated by the defendants and others in concert with them, with their signatures attached, and the plaintiff, relying upon the representations contained in these reports of the flourishing state of the concern, bought shares in it, and lost his money, and incurred serious liabilities, it was held that he was entitled to maintain an action for damages against the defendants. (*m*)

1306. *Trustees and commissioners of public works.*—We have already seen that commissioners acting strictly in the execution of a statutory authority, and not exceeding their jurisdiction or powers, are not personally responsible, nor are their officers

(*l*) *Catchpole v. Ambergate, &c., Rail. Co.*, 1 Ell. & Bl. 120.

(*m*) *Davidson v. Tulloch*, 3 Macq. 783.

or servants acting under them personally responsible, in an action for damages, to a private individual who has sustained damage from their authorized acts; (*n*) but if they act in a careless and oppressive manner, and are guilty of negligence or misconduct in the execution of the statutory authority, they are, as we have seen, responsible in damages for the consequences of their acts. (*o*) Under certain Acts of Parliament, trustees and commissioners acting in the discharge of public duties are, as previously mentioned, relieved from all personal liability whilst acting in the execution of the powers of the statute, but are charged with the duty of imposing rates and collecting a fund, out of which all the expenses incurred in carrying the Act into execution are to be made good.

When it is provided by statute that commissioners or trustees appointed for the execution of public works shall be sued by their clerk, or treasurer, or public officer, an action is not maintainable against such officer, except where it could have been supported against the commissioners or trustees themselves; (*p*) but whenever there has been a breach of duty on the part of the commissioners or trustees causing a private injury to another, an action is maintainable against their clerk or public officer to recover compensation for such breach of duty. (*q*) The clerk is not in general personally liable to make compensation out of his own private means, he being only the nominal defendant; but the funds of the trustees or commissioners may be made answerable for satisfaction of the damages. (*r*)

1307. *Military and naval officers* are not responsible for arrests made by them in the exercise and discharge of their military and naval authority; (*s*) but if they exceed their authority, and make arrests for offenses which are not military offenses, and over which they have no jurisdiction or authority, they will be responsible in damages for their unlawful acts. (*t*)

1308. *Master and servant*.—The maxim, *qui facit per alium facit per se*, renders the master liable, as we have already

(*n*) See *Cracknell v. Mayor, &c.*, of Thetford, L. R., 4 C. P. 629, as to commissioners for the improvement of navigation.

(*o*) *Boulton v. Crowther*, 2 B. & L. 706. *Sutton v. Clarke*, 6 Taunt. 43. *Harris v. Baker*, 4 M. & S. 29.

(*p*) *Hall v. Smith*, 2 Bing. 158.

(*q*) *Cane v. Chapman*, 5 Ad. & E. 617.

(*r*) *Wormwell v. Hailstone*, 6 Bing. 676.

(*s*) *Bradley v. Arthur*, 4 B. & L. 305.

(*t*) *Warden v. Bailey*, 4 Taunt. 67.

seen, for all the negligent acts of the servant in the course of his ordinary employment. (*u*)

1309. *Principal and agent.* (*w*)—In order to make the principal liable in tort for an injury caused by the wrongful act of the agent, it must be shown that the act was within the scope of the authority given by the party against whom the action is brought, for if the servant was not acting in the due course of his employment for his master, but in contravention of his duty to him, and against his interest, the master is not, as we have seen, responsible for the consequences of the act. (*y*) Where a railway passenger was taken into custody by a railway servant by command of a superintendent, for traveling on the railway without having paid his fare, with intent to avoid payment thereof, (*z*) and the charge fell to the ground, and an action was brought against the company for an unlawful imprisonment, it was held that they were liable in damages, for it must be presumed that a superintendent of traffic, or of police, and all officers in authority, upon the line or at the station, had power on behalf of the company to determine whether the servant of the company should, or should not, arrest persons for criminal frauds upon the company. (*a*)

1310. *Subsequent ratification and adoption of a wrongful act by parties for whose use and benefit the act was done.*—"He that receiveth a trespasser, and agrees to a trespass after it is done, is no trespasser," observes Lord COKE, "unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a precedent commandment, for in that case omnis ratihabitio retrotrahitur et mandato priori æquiparatur." (*b*) But to make the subsequent ratification equivalent to a precedent commandment, the act of trespass must have been committed in the name, and avowedly on behalf and for the benefit, of the party subsequently ratifying it. If the trespass was not done for his use or benefit, or he is not in a situation to have originally commanded the act, then his subsequent assent does not make

(*u*) *Ante*. Sharrod v. Lond. and N. W. Rail. Co., 5 Exch. 585.

(*w*) See *ante*.

(*y*) Coleman v. Riches, 16 C. B. 104; 24 Law J., C. P. 125. Udell v. Ather-ton, 7 H. & N. 181.

(*z*) See 8 Vict. c. 20, ss. 103, 104.

(*a*) Goff v. Gt. North. Rail. Co., 30 Law J., Q. B. 148, qualifying and explaining Roe v. Birkenhead, Lanc., &c. Rail. Co., 7 Exch. 41.

(*b*) 4 Inst. 317. Dallas, C. J., Hull v Pickersgill, 1 B. & B. 282.

him a trespasser. (c) "It is a known and well-established rule of law," observes TINDAL, C. J., "that an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him. In that case the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent and with all the consequences which follow from the same act if done by his previous authority. Such was the precise distinction taken in the Year Book, 7 Hen. 4, fo. 35, where it was held that if a bailiff took a heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority as bailiff at the time; but if he took it at the time as bailiff of the lord, and not for himself, without, however, any command of the lord, yet the subsequent ratification by the lord made him bailiff at the time." (d)

1311. *What amounts to evidence of ratification of a wrongful act.*—But to make a man a trespasser by relation from having ratified and adopted an act of trespass done in his name, and for his benefit, it must be shown that the act was ratified and adopted by him with full knowledge of its being a trespass, or of its being tortious, or it must be shown that in ratifying and taking the benefit of the act, he meant to take upon himself, without inquiry, the risk of any irregularity, which might have been committed, and adopt the transaction, right or wrong. Promises to make inquiries, expressions of disapprobation of the conduct of the agent, accompanied by offers of compromise and overtures to purchase peace by returning the property taken, or paying the value of it, are of themselves no evidence of the ratification of the wrongful act. (e)

1312. *Servants and agents.*—All persons procuring, commanding, aiding or assisting in the commission of a trespass, are principals in the transaction, and persons assenting to a trespass after it has been done may also become trespassers.

(c) *Wilson v. Barker*, 4 B. & Ad. 616; 906; 6 M. & Gr. 242. *Woolen v. Wright*, 1 N. & M. 409. *Nicoll v. Glennie*, 1 M. & S. 592. *ante.*

(e) *Roe v. Birkenhead &c., Rail. Co.* 7 Exch. 36.

(d) *Wilson v. Tummon*, 6 Sc. N. R.

BOTH the master who commands the doing, and the servant who does, an act of trespass, may be made responsible as principals, and sued jointly for damages. (*f*) A servant keeping the key of a room, knowing that a man is imprisoned therein, is a trespasser. (*g*) Where an arrest has been made under process, which is afterwards set aside for irregularity, both the attorney who sued out the process and the client who set the attorney in motion may be sued for the assault and false imprisonment. The servant is, as we have seen, equally liable with the master in respect of his own personal participation in a wrongful act, and can not discharge himself from liability on the ground that he acted under unavoidable ignorance and in obedience to his master's orders, nor can he justify under any authority from his master when his master had no authority in the matter. (*h*) A servant may, as we have seen, be liable for a conversion to which he is a party, though he is acting in obedience to the commands of his master, and under authority from him. (*i*)

1313. Husband and wife.—The husband is by law answerable for all actions for which his wife stood attached at the time of the marriage, and also for all her torts and trespasses during coverture; but the action must be against them both jointly, for if she alone were sued, it might be a means of making the husband liable without giving him an opportunity of defending himself. (*k*) The husband takes his wife with all her obligations and liabilities. If, therefore, at the time of her marriage she is tenant of certain premises, and has received notice to quit, the husband after the marriage incurs the obligation of giving up possession of the premises, and may render himself liable to an action for double value for holding over; for if the wife incurs the penalty the husband will have to pay it, and he can not get rid of the obligation by pleading ignorance, for it is his duty to make inquiry, nor by showing that his wife deceived him, or concealed the notice to quit. (*l*)

The husband must be sued jointly with the wife for an

(*f*) Bates v. Pilling, 6 B. & C. 38.

(*g*) Bro. Abr. TRESPASS, pl. 133, 256, 265.

(*h*) Stephens v. Elwall, 4 M. & S. 261.
Bennett v. Bayes, 5 H. & N. 391; 29 Law J., Exch. 224.

(*i*) Perkins v. Smith, 1 Wils. 328. Davies v. Vernon, 6 Q. B. 443.

(*k*) Bac. Abr. BARON AND FEME, L.

(*l*) Lake v. Smith, 1 B. & P., N. R. 179.

assault or libel committed by the wife, or for the destruction or conversion of property by the wife, or for any act of trespass committed by her during the coverture. (*m*) He continues answerable in damages to all persons who have been injured by the wrongful act of the wife so long as the relation of husband and wife continues, though they are living apart, (*n*) unless they are separated under a decree of judicial separation, 20 & 21 Vict. c. 85, s. 26, or the wife has obtained a protecting order under s. 21, in which case the husband is not liable for the wife's tortious acts. If the marriage be dissolved, the husband can not be sued jointly with the wife for a tort committed during the coverture. (*o*)

Where a married woman signed and delivered a distress-warrant to a bailiff, and directed him to distrain the goods of a tenant, under the impression that she had a right to distrain when she had no such right, and the bailiff having been sued and compelled to pay damages for the illegal distress, brought an action of tort for deceit against the wife and her husband, it was held that the action was not maintainable, as it was not founded upon an alleged assertion of the wife that she had a right to distrain, and there could be no retainer of the plaintiff to distrain given by the wife, nor any contract by her to indemnify him. (*p*)

The husband of an executrix or administratrix is liable in respect of all assets received and wasted, and devastavits committed by himself or by his wife during the coverture, and his estate remains liable after his death. (*q*)

After the death of the wife, or dissolution of the marriage, the husband is discharged from all responsibility for her tortious acts, unless he himself participated therein, or authorized or instigated them, in which case he will be responsible, like any other master who has committed a tortious act through the medium of his servant. After the death of the husband the wife may be sued alone for all tortious acts in which she has participated, whether she was a sole actor in them or whether they were committed by her at the instigation or

(*m*) *Catterall v. Kenyon*, 3 Q. B. 315. 168.

Keyworth v. Hill, 3 B. & Ald. 686.

Draper v. Fulkes, Yelv. 165.

(*n*) *Head v. Briscoe*, 5 C. P. 484.

(*o*) *Capel v. Powell*, 34 Law J., C. P.

(*p*) *Rawlings v. Bell*, 1 C. B. 959. See *Liverpool Adelphi Loan, &c., v. Fairhurst*, *Wright v. Leonard*, *ante*.

(*q*) *Smith v. Smith*, 21 Beav. 385.

under the influence and direction of her husband. (r) And the same rule of law prevails where the husband has abjured the realm, or has been transported, and is thereby civiliter mortuus. (s)

In every case of a judicial separation, or divorce a vinculo matrimonii, or a protecting order, the wife so separated, or divorced, is considered a feme sole, for the purpose of being sued for wrongs and injuries done by her, and her husband is not liable for any wrongful act or omission by her. (t)

1314. *Infants*.—An infant in the actual occupation of land is responsible for nuisances and injuries to his neighbor, arising from the negligent use and management of the property. A man who has made a contract with an infant can not convert anything that arises out of that contract into a tort, and seek to enforce the contract through the medium of an action of tort. Therefore, where a lad hired a mare, and injured it by immoderate riding, it was held that a plea of infancy was an answer to the action, the action being founded on contract.

(u) But where a horse is hired for one purpose and is used for another, or is let out to be used by one person, and he allows it to be used by another, there is a tort independent of contract. And, therefore, where an infant hired a horse on the terms that it was to be ridden on the road and not over fences in the fields, and the infant, having got possession of the horse, lent it to a friend, who took it off the high road, and in endeavoring to jump the animal over a hedge, transfixed it on a stake and killed it, it was held that the infant was responsible in damages for the value of the horse. (w)

An infant is not liable for the conversion of goods if the cause of action is grounded on matter of contract with the infant, and constitutes a breach of contract as well as a tort.

(y) Neither is he liable, as previously mentioned, to an action for a fraudulent representation or a breach of warranty, (z) where a contract made by means of the misrepresentation or a sale effected through the false warranty is substantially the

(r) *Vine v. Saunders*, 4 B. N. C. 102.
As to damages in the latter case, *quære*,
see per Bosanquet, J., S. C.

(s) Bac. Abr. *BARON AND FEME*, M.

(t) 20 & 21 Vict. c. 85, ss. 21, 26. *Cappel v. Powell*, *supra*.

(u) *Jennings v. Rundall*, 8 T. R. 335.

(w) *Burnard v. Haggis*, 32 Law J., C. P. 189.

(y) *Manby v. Scott*, 1 Sid. 129.

(z) *Howlett v. Haswell*, 4 Campb. 118. *Green v. Greenbank*, 2 Marsh. 485.

cause of action; nor is he chargeable on the custom of the realm as a common innkeeper. But if an infant gets goods into his hands by fraud and false pretenses, or under color of a pretended contract, and then refuses to deliver up the goods on the demand of the party who has been defrauded of the possession of them, he can not, if the goods were in his hands or under his control at the time they were demanded back, set up his minority as a defense to an action grounded on such demand and refusal. (a)

Where an action for money had and received was brought against an infant to recover money which the infant had embezzled, Lord KENYON said that infancy was no defense to the action; that infants were liable to actions *ex delicto*, though not *ex contractu*; and though the action was in form an action of the latter description, yet it was *ex delicto* in point of substance; that if an action of trover had been brought for any part of the property embezzled, or an action grounded on the fraud, infancy would have been no defense; and that as the object of the action was precisely the same, his opinion was that the same rule of law should apply. (b)

1315. *Executors and administrators*.—An action does not in general lie at common law against executors to recover damages for waste committed by their testator, it being a tort which dies with the person. (c) They are not responsible in damages for injuries done by their testator in cutting down another man's trees, or for trespasses committed by him in entering in his lifetime upon another man's land, and, prostrating fences, or digging therein, where the wrong-doer acquires no gain to himself from the commission of the wrong; but wherever by the wrong done property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. So far as the tort itself goes, an executor shall not be liable; but so far as the act of the offender is beneficial to his personal estate, his assets ought to be answerable, and his executor therefore shall be charged. Where, therefore, trees, coals, or minerals wrongfully severed by one man from the soil and freehold of another, have been sold by the wrong-doer, and the latter

(a) *Mills v. Graham*, 1 B. & P., N. R. 145.

(b) *Bristow v. Eastman*, 1 Esp. 172.

(c) 2 Inst. 301.

dies, his estate, in the hands of his executor, is answerable for the price, and an action for money had and received may be maintained against the executor for the recovery thereof. (*d*)

Personal representatives are not responsible for a conversion or unlawful detention by their testator or intestate in his lifetime of another man's chattels, the private wrong being, as we have seen, buried with the offender. But where there has been a conversion of property by the deceased, which has benefitted his personal estate, the personal representative may, in general, be sued in form *ex contractu*, founded on the tort. "Thus an action on the custom of the realm against a common carrier for not receiving and carrying goods, being for a tort, will not lie against an executor; but an action *ex contractu* for the same cause will lie. If a man take a horse from another, and bring him back again, an action for the trespass will not lie against his executor, but an action for the use and hire of the horse by the deceased may be maintained." (*e*) Where the plaintiff declared that he was possessed of a cow which he delivered to the testator to keep for him, and that the testator sold the cow; and converted and disposed of the money to his own use, it was held that the executor was not responsible in trover for the conversion of the beast by the testator, but that he might be made liable for the value of it in an action for money had and received. (*f*)

No action lies against an executor of a deceased sheriff, jailor, or officer, for an escape suffered or permitted by his testator, or by reason of his testator's having neglected to attend and give evidence in a cause in obedience to a subpoena served upon him in his lifetime, (*g*) nor are executors liable in equity for the negligence of their testator. (*h*)

1316. *Wrongs committed by a deceased person within six months before death.*—By 3 & 4 Wm. 4, c. 42, s. 2, reciting that there was no remedy provided by law for certain wrongs done by a person deceased in his lifetime to another in respect to his property, real or personal, it is enacted, that an action for trespass or case may be maintained against the

(*d*) *Powell v. Rees*, 7 Ad. & E. 428.

(*e*) *Hambly v. Trott*, Cowp. 375.

(*f*) *Bailey v. Birtles*, Sir T. Raym. 71.
Perkinson v. Gilford, Cro. Car. 539.

(*g*) *Williams on Executors*, 6th ed., pt. 4, bk. 2.

(*h*) *Overend & Co. v. Gurney*, L. R. 4 Ch. App. 701.

executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death; and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damage to be recovered in such actions shall be payable in like order of administration as the simple contract debts of such person. Where a watch was shown to have been in the possession of a testatrix more than six months before her decease, and she was asked within the six months to give it up, and wrongfully refused, this was held to be evidence of a conversion within six months of her death. (*i*)

1317. *Actions against the executor of a prebendary, vicar, or incumbent of a benefice* for dilapidations are maintainable where the prebendal-house, chancel of the church (where that is repairable by the incumbent), or the buildings, hedges, and fences belonging to the prebendary, vicarage, or benefice are left in a state of decay, or where there has been a felling of timber otherwise than for repairs or fuel; (*k*) but the incumbent of a vicarage can not maintain an action against the executor of his predecessor for not cultivating the glebe-land in a husband-like manner. (*l*) And in the case of dilapidations to buildings, no claim for dilapidations can now be made, except under the provisions of the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), except in the case of willful waste.

1318. *Liabilities of executors and administrators for their own wrongful acts.*—If a testator or intestate at the time of his death was in the possession of the goods and chattels of third persons, and had no lien upon them, and these goods come into the possession of his personal representatives after his decease, or under their dominion and control, and they refuse to give them up to the owners on demand made by the latter, they are responsible in damages for a conversion or unlawful detention of the property. But those only who

(*i*) *Richmond v. Nicholson*, 8 Sc. 137.

(*k*) *Radcliff v. D'Oyly*, 2 T. R. 630.

Wise v. Metcalfe, 10 B. & C. 312;

Saund. 216 a, note a.

(*l*) *Bird v. Relph*, 4 B. & Ad. 830.

have been guilty of the tort should be made defendants. Thus, if there are three executors, and one only of the three has got possession of, or meddled with, the goods of the plaintiff, that one alone should be sued.

Formerly, if an executor committed a devastavit and died, the wrong died with him, so that his executor was not liable for it; but by 30 Car. 2, c. 7, and 4 & 5 W. & M. c. 34, s. 12, the executors or administrators of any executor or administrator, who shall waste or convert to his own use the estate of his testator or intestate, shall be liable in the same manner as their testator or intestate would have been if they had been living. (*m*) A feme covert executrix who survives her husband is liable for any devastavit committed by him during their joint lives. (*n*)

An executor is as liable for what he omits to do, if it is his duty to do it, as for a misfeasance. (*o*)

1319. Trustees in bankruptcy.—Trustees of the estate and effects of bankrupts may defend any action or suit which the bankrupt might have defended. They are not liable as assignees of a lease unless they have done some act which unequivocally indicates that they have elected to take the lease; (*p*) nor even then, unless they have refused for twenty-eight days after notice, or such further time as the court may allow, to disclaim the lease.

1320. Of the continued liability of a bankrupt to actions ex delicto, and to arrest.—The Bankrupt Act does not exempt a bankrupt from actions for damages in respect of wrongs done by him prior to, or during the bankruptcy, for the damages do not constitute a debt until they have been assessed by a jury, and judgment for them has been obtained. (*q*) If the action has been tried, and damages recovered, before the granting the order of discharge, so that the amount has become a judgment debt provable against the estate, then the order of discharge will be a bar to further proceedings thereon. (*r*) The 31st section of the 32 & 33 Vict. c. 71,

(*m*) See *Coward v. Gregory*, L. R., 2 C. P. 153.

(*n*) *Soady v. Turnbull*, L. R., 1 Ch. App. 494.

(*o*) *Grayburn v. Clarkson*, L. R., 3 Ch. App. 605.

(*p*) See *Goodwin v. Noble*, 8 Ell. & Bl. 587; 27 Law J., Q. B. 204.

(*q*) *Lloyd v. Peell*, 3 B. & Ald. 408. *Parker v. Crole*, 5 Bing. 63. *Parker v. Norton*, 6 T. R. 699.

(*r*) *Longford v. Ellis*, 1 H. Bl. 29, n. *Greenway v. Fisher*, 7 B. & C. 436.

enacts that "demands in the nature of unliquidated damages, otherwise than by reason of a contract or promise, shall not be provable in bankruptcy."

Arrest and imprisonment for debt have been abolished, with a few exceptions, by 32 & 33 Vict. c. 62. (s) The second part of that act, however, sect. 11 to 23, provides for the punishment of certain misdemeanors committed by bankrupts, and the 9th section provides that nothing in the first part of the Act, sect. 1 to 10, shall affect any right or power under the 32 & 33 Vict. c. 71 (the Bankruptcy Act, 1869), to arrest or imprison any person. The last-mentioned Act, sect. 86, provides that a debtor may be arrested, and his goods, papers, &c., seized, if, after a petition of bankruptcy has been presented, there is reason to believe he is going abroad, or quitting his residence, to avoid service of the petition, examination in bankruptcy, &c., or if he is about to remove or conceal his property, &c., or if he removes any property without leave of the trustee in bankruptcy, or fails to attend any examination; (t) and the 33 & 34 Vict. c. 76, extends the power of arrest to cases where a debtor summons has issued, but before any petition for adjudication has been presented.

1321. *Of the number of the defendants in actions ex delicto—Parties jointly and severally liable.*—Whoever willfully assists in the doing of an unlawful act becomes answerable for all the consequences of such act; and when several persons have been jointly concerned in the commission of a wrongful act, they may in general, as we have seen, all be charged jointly as principals, or the plaintiff may sue any of the parties upon whom individually a separate trespass attaches. (u)

Torts are in their nature several, and in all actions of tort, therefore, one defendant may be acquitted and others found guilty.

In the case of actions for the wrongful conversion of property, several parties may be joined as defendants, and one or more of them be found guilty and the rest acquitted; and unless all are implicated in a joint conversion, all can not be

(s) See *R. v. Master*, L. R., 4 Q. B.

285.

(t) And see s. 77.

(u) *Ld. Kenyon, C. J., Mitchell v. Tarbutt*, 5 T. R., 651. *Sutton v. Clarke*, 6 Taunt 29.

found guilty: (*v*) But where the action, though for a tort, is founded on a contract, and several defendants are sued jointly, it has been doubted whether one can be acquitted and another found guilty. (*y*) Where an action was brought against two defendants for deceit, alleged to have been committed in a joint sale by them of some sheep, and the declaration set forth that the defendants sold to the plaintiff some sheep, their joint property, and warranted them to be sound, and they proved to be unsound, and there was no evidence to affect one of the defendants, it was held that the action was founded on the joint contract of both, and that one defendant could not be acquitted and the other found guilty. (*z*) See *post*, s. 3.

Where an action has been brought against several joint-trespassers, the evidence must be confined to the joint offense in which all are implicated. The plaintiff can not recover for what was done by one or more before or after the joint act; (*a*) and when an action is brought for one joint-trespass, and the plaintiff elects to go for a trespass committed at any particular time, he must confine himself to that period; and if all the defendants were not concerned in the trespass then committed, the plaintiff can not have recourse to a trespass committed at a subsequent time, when some of the defendants were concerned who were not implicated in the first transaction, (*b*) for some of the defendants might be thereby subjected to damages for a trespass wherein they had no part or concern; (*c*) but if he fails in proving a joint-trespass by all on the day he first selects, he is at liberty to abandon that trespass and to prove a joint-trespass at another period. (*d*)

When the plaintiff's evidence discloses no joint-trespass committed by all the defendants, but only separate trespasses by each, the plaintiff may be put to his election against which of the several defendants he will proceed. (*e*)

One of several partners can not, as we have seen, drag

(*v*) *Nicoll v. Glennie*, 1 M. & S. 588.

(*y*) *Pozzi v. Shipton*, 8 Ad. & E. 975.

(*z*) *Weall v. King*, 12 East, 452.

(*a*) *Aaron v. Alexander*, 3 Campb.

35.

(*b*) *Sedley v. Sutherland*, 3 Esp. 204.

(*c*) *Ibid.* *Tait v. Harris*, 6 C. & P. 73.

(*d*) *Roper v. Harper*, 5 Sc. 250; 4 B. N. C. 20.

(*e*) *Howard v. Newton*, 2 M. & Rob. 510.

the firm or his co-partners into a trespass by signing a warrant or authority for the doing a wrongful act in the name of the firm of which he is a member; for one partner has no authority to bind the partnership to the commission of a wrongful act without the previous consent or subsequent concurrence of all the partners. (*f*) If the act is done by the one partner for the benefit of the firm, and the firm afterwards take advantage of the act, and adopt the transaction, they may then, as we have seen, become responsible for it.

SECTION III.

OF NON-JOINDER AND MIS-JOINDER OF PARTIES—AMENDMENT BEFORE AND AT THE TRIAL.

By the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, s. 19, it is provided, that the joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist, and judgment may be given in favor of such one or more of the plaintiffs as shall be adjudged by the court to be entitled to recover; (*g*) but the defendant, though unsuccessful, is entitled to the costs occasioned by joining any person in whose favor judgment is not given, unless otherwise ordered by the court or judge. This section applies only to cases where there was fair ground to believe that there was a joint cause of action vested in all who were joined as plaintiffs. It does not enable two or more persons to join in a speculative sort of action, saying, one or other of us is entitled to recover, but not both. (*h*) Nor does it enable the court to give judgment for one plaintiff, who might have been prevented from maintaining the action, if he had been the sole plaintiff at first. (*i*)

1322. *Amendment of non-joinder and mis-joinder before trial.*—By the Common Law Procedure Act, 1852, 15 & 16

(*f*) *Petre v. Lamont*, Car. & M. 96.

(*g*) *Bremner v. Hull*, L. R., 1 C. P. 748.

(*h*) *Bellingham v. Clark*, 1 B. & S.

332.

(*i*) *Stubs v. Stubs*, 31 Law J., Exch. 511.

Vict. c. 76, s. 34, it is enacted, that "it shall be lawful for the court or a judge, at any time before the trial of any cause, to order that any person not joined as plaintiff shall be so joined, or that any person originally joined as plaintiff shall be struck out, if it shall appear that injustice will not be done by such amendment, and that the person to be added consents, either in person or by writing under his hand, to be so joined, or that the person to be struck out was originally introduced without his consent, or that such person consents in manner aforesaid to be struck out; and such amendment shall be made upon such terms as to the amendment of the pleadings (if any), postponement of the trial, and otherwise, as the court or judge by whom such amendment is made shall think proper; and when any such amendment shall have been made, the liability of any person who shall have been added as co-plaintiff shall, subject to any terms imposed as aforesaid, be the same as if such person had been originally joined in such cause."

1323. *Amendment at the trial.*—It is further enacted, by s. 35, that in case it shall appear at the trial of any action that there has been a mis-joinder of plaintiffs, or that some person, not joined as plaintiff, ought to have been so joined, and the defendant shall not, at or before the time of pleading, have given notice in writing that he objects to such non-joinder, specifying therein the name or names of such person, such mis-joinder or non-joinder may be amended as a variance at the trial by any court of record holding plea in civil actions, and by any judge sitting at nisi prius, or other presiding officer, in like manner as in the case of amendments of variances under the 3 & 4 Wm. 4, c. 42, if it shall appear to such court, or judge, or other presiding officer, that such mis-joinder or non-joinder was not for the purpose of obtaining an undue advantage, and that the person to be added consents, either in person or by writing under his hand, to be so joined, or that the person to be struck out was originally introduced without his consent, or that such person consents in manner aforesaid to be so struck out; and such amendment shall be made upon such terms as the court, or judge, or other presiding officer by whom such amendment is made shall think proper; and when any such amendment shall

have been made, the liability of any person who shall have been added as co-plaintiff shall, subject to any terms imposed as aforesaid, be the same as if such person had been originally joined in such action. And by s. 222, further powers of amendment (*post*, ch. 21, s. 2) are given, enabling fresh plaintiffs to be added in certain cases, in order to bring the real question in dispute before the court, (*k*) but not a fresh defendant. (*l*) The court will not add a party to the record as plaintiff if he is trustee for a person who objects to his being added. (*m*) Nor can the court, under s. 222, substitute the personal representative as plaintiff, if the plaintiff was dead at the time the writ was issued. (*n*)

1324. *Amendment after notice or plea in abatement of non-joinder of parties.*—It is also enacted, by s. 36, that in case notice of non-joinder be given, or any plea in abatement of non-joinder of a person as co-plaintiff, in cases where such plea in abatement may be pleaded, be pleaded by the defendant, the plaintiff shall be at liberty, without any order, to amend the writ and other proceedings before plea, by adding the name of the person named in such notice or plea in abatement, and proceed in the action without any further appearance, on payment of the costs occasioned by such amendment; and, in such case, the defendant shall be at liberty to plead *de novo*.

1325. *Misjoinder of defendants.*—The 15 & 16 Vict. c. 76, s. 37, provides for the amendment of a mis-joinder of defendants at the trial by the judge "or other presiding officer." A county court judge therefore may, in an action sent down for trial under 19 & 20 Vict. c. 108, s. 26, amend a mis-joinder of defendants under this section. (*o*) The acquittal of one defendant in an action founded on neglect of duty and not upon breach of contract, does not affect the right of the plaintiff to have his judgment against the defendant against whom the verdict has been obtained. (*p*)

1326. *The effect of marriage, death, and bankruptcy upon the proceedings in an action* is provided for and regulated by the

(*k*) Blake v. Done, 31 Law J., Exch. S. 586.

102.

(*l*) Garrard v. Guibelei, 34 Law J., C.

P. 131; *ib.* 270.

(*m*) Sturgis v. Smith, 5 L. T. R., N.

(*n*) Clay v. Oxford, L. R., 2 Exch. 54.

(*o*) Rennison v. Walker, L. R., 7 Exch.

143.

(*p*) Govett v. Radnidge, 3 East, 62.

Common Law Procedure Act, 1852, 15 and 16 Vict. c. 76, ss 135-142. The right of a personal representative of a deceased plaintiff to continue the action by entering a suggestion of the death upon the record (s. 137), applies only to such causes of action as would have survived to the personal representative, and not where the cause of action died with the plaintiff at common law, and a perfectly new right has by statute been given to the personal representative, as under **LORD CAMPBELLS'S** Act, 9 & 10 Vict. c. 93 (*q*)

(*q*) *Flinn v. Perkins*, 32 Law J., Q. B. 10.

CHAPTER XXI.

OF ACTIONS EX DELICTO, PLEADINGS, DEFENSES, AND EVIDENCE.

SECTION I.—*Of pleadings, defenses, and evidence in actions ex delicto.*

- 1327. Of actions in the county court.
- 1328. The general jurisdiction of the county court.
- 1329. Copyright of design.
- 1330. Friendly societies.
- 1331. Ouster of jurisdiction of county court in cases where the title to land, &c., is in question.
- 1332. Recovery of possession of small tenements in the county court.
- 1333. Equitable jurisdiction.
- 1334. Admiralty jurisdiction.
- 1335. Jurisdiction by consent.
- 1336. Waiver of objection to jurisdiction.
- 1337. Of actions in the superior courts—Joinder of different causes of action in the same suit.
- 1338. Requisites of the declaration.
- 1339. Statement of special damage.
- 1340. Several counts in declaration in respect of the same cause of action.
- 1341. Pleas.
- 1342. Pleas to the jurisdiction—Privileges of ambassadors.
- 1343. Plea of not guilty.
- 1344. Not guilty by statute.
- 1345. Of pleading several matters of defense.
- 1346. Traverses by the defendant.
- 1347. Traverses by the plaintiff.
- 1348. Requisites of special pleas.
- 1349. Fictitious and needless averments in pleading.
- 1350. Defenses arising after the commencement of the action.

- 1351. Payment of money into court by way of compensation or amends.
 - 1352. Plea of infancy in actions ex delicto.
 - 1353. Plea of accord and satisfaction.
 - 1354. Plea of the pendency of another action for the same wrong.
 - 1355. Plea of judgment recovered.
 - 1356. Continuing injuries—Judgment recovered.
 - 1357. Effect of the recovery of judgment in actions for the conversion of property.
 - 1358. Recovery of judgment in rem.
 - 1359. Plea of the bankruptcy of the plaintiff.
 - 1360. Pleas of the statute of limitations.
 - 1361. Commencement of the period of limitation.
 - 1362. Extension of the period of limitation in certain cases.
 - 1363. Equitable pleas and defenses.
 - 1364. Joinder of issue.
 - 1365. Pleadings construed distributively.
 - 1366. New assignments.
- SECTION II**—*Proceedings and evidence at the trial.*
- 1367. Right to begin.
 - 1368. Proof on the part of the plaintiff.
 - 1369. Effect of payment of money into court.
 - 1370. Primary and secondary evidence.
 - 1371. Notice to produce a written document to let in secondary evidence of its contents.
 - 1372. Proof of facts resting on hearsay and reputation.

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| 1373. Entries of deceased persons against their interest. | statements and representations to the plaintiff. |
| 1374. Entries made by deceased persons in the exercise of their duties. | 1377. Evidence of manorial customs. |
| 1375. Statements and declarations accompanying an act. | 1378. Evidence of title and seizin. |
| 1376. When the adverse party in a suit is estopped from giving evidence to contradict his own | 1379. Amendment of variances between the declaration of the cause of action and the proof adduced in support of it. |
| | 1380. Admissions of liability. |
| | 1381. Illness of witness. |

SECTION I.

OF PLEADINGS, DEFENSES, AND EVIDENCE IN ACTIONS EX DELICTO.

1327. *Of actions in the county court.* (a)—The 30 & 31 Vict. c. 142, enacts (s. 1), that a plaint may be entered in the county court within the district of which the defendant or one of the defendants dwells or carries on his business at the time of bringing the action or suit, or, by leave of the judge or registrar, within which he dwelt or carried on business within six months of the time of commencing the action, or, by the like leave, within which the cause of action wholly or in part arose. (b) It has been held (c) that a railway company neither “carries on its business,” nor “dwells,” within the district of every county court where it may happen to have a station, but that it must be considered to “carry on its business,” and to “dwell,” at its headquarters, i. e., at the place where its principal office is situate, where the directors meet, and where all the affairs of the company are managed and directed. (d) But in the case of a manufacturing company, they carry on business where the goods are manufactured and sold, although the registered office of the company, where the board of directors meet, may be elsewhere. (e) If the company merely receives tolls elsewhere than at its registered office, as in the case of a bridge company,

(a) See Pollock's County Court Practice, 6th ed. (1868).

(b) As to county court actions in London, see s. 3.

(c) Under the repealed sections of the 9 & 10 Vict. c. 95.

(d) Shiels v. Gt. North. Rail. Co., 30

Law J., Q. B. 331. Adams v. Gt. West. Rail. Co., 30 Law J., Exch. 124. Brown v. Lond. and North-West. Rail. Co., 32 Law J., Q. B. 318.

(e) Keynsham Blue Lias Co. v. Baker 33 Law J., Exch. 41.

its registered office would probably be its place of business within the above section. (*f*) A commercial company established in the metropolis, and carrying on business there, does not also carry on business in a country town merely by employing an agent there and transacting business there in the name of such agent and not in their own names. (*g*) A man who has no permanent residence "dwells" wherever he is temporarily resident. (*h*)

A party injured by the wrongful act of the company may also sue them in the district where the cause of action wholly or in part arose, by making application to the registrar, or by obtaining the leave of the judge of the county court of that district, 30 & 31 Vict. c. 142, s. 1. Under the repealed 16th section of the 9 & 10 Vict. c. 95, the action could only be brought in the district where the cause of action, i. e., the whole cause of action, arose, that is to say everything which it was necessary for the plaintiff to prove as a condition precedent to his right to recover. (*i*)

1328. *The general jurisdiction of the county court extends to all actions ex delicto for the recovery of demands not exceeding £50; 13 & 14 Vict. c. 61, s. 1, except actions for malicious prosecution, libel, slander, or seduction; 9 & 10 Vict. c. 95, s. 58. But by the 30 & 31 Vict. c. 142, s. 10, any action "for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort," brought in a superior court, may be remitted for trial to a county court, (*j*) unless the plaintiff gives security for costs to the satisfaction of a master, or satisfies the judge that he has a cause of action fit to be prosecuted in the superior court. (*k*) The substance, and not the form, of the cause of action, must be regarded in order to determine whether it is one of the excepted actions. If, therefore, a plaint in the county court is in form founded on negligence, but is in substance a plaint for a*

(*f*) *Aberystwith Pier Co. v. Cooper*, 35 Law J., Q. B. 44.

(*g*) *Corbett v. Gen. Steam Nav. Co.*, 4 H. & N. 482. *Minor v. Lond. and North-West. R. Co.*, 1 C. B., N. S. 331. *Oldham Bridge Co. v. Heald*, 33 Law J., Exch. 236.

(*h*) *Alexander v. Jones*, L. R., 1 Exch. 133.

(*i*) *Fuller v. Mackay*, 22 Law J., Q. B.

415. *Aris v. Orchard*, 6 H. & N. 160; 30 Law J., Exch. 21. See *Bonsey v. Wordsworth*, 18 C. B. 325.

(*j*) See *Thornwell v. Wigner*, L. R., 6 Exch. 87.

(*k*) See *Owens v. Woosman*, *Owens v. Jones*, L. R., 3 Q. B. 469; 37 Law J., Q. B. 159. *Kimbray v. Draper*, L. R., 3 Q. B. 160; 37 Law J., Q. B. 80.

malicious prosecution, the county court has no jurisdiction to hear and determine it; (*l*) unless it be remitted for trial under the above provision. The signing of the charge-sheet at a police station is not necessarily the commencement of a malicious prosecution, at all events if the plaintiff is discharged when taken before the magistrates, and there is nothing to prevent him from suing in the county court for false imprisonment only, although he may have appeared before the magistrates to support the charge. (*m*)

1329. Copyright of design.—The proprietor of copyright in any design may institute proceedings in the county court of the district in which the piracy is alleged to have been committed, for the recovery of the damages he has sustained by reason of such piracy; but in any such proceedings the plaintiff must deliver with his plaint a statement of particulars as to the date and title, or other description of the registration of the copyright, and of the alleged piracy; and the defendant must give notice of any objections to the copyright, or to the title of the proprietor, in manner therein provided. (*n*)¹

1330. Friendly Societies.—Applications for the settlement of disputes arising in friendly societies, the rules of which do not prescribe any other mode of settling such disputes, may be made to the county court of the district within which the usual (*o*) or principal place of business of the society is situate, and the court is to give such relief and make such orders as might be made by the Court of Chancery. (*p*) And it has been held that the county court has jurisdiction to reinstate a member of an enrolled friendly society improperly expelled, although the rules of the society prescribe a mode of determining disputes under them. (*q*)

1331. Ouster of jurisdiction of county court in cases where the title to land, &c., is in question.—The 58th section of the

(*l*) Hunt v. North Staff., &c., Rail. Co.,
2 H. & N. 451. Rogers v. Macnamara,
14 C. B. 27; *post*, ch. 22.

(*m*) Austin v. Dowling, L. R., 5 C. P.
574.

(*n*) 21 & 22 Vict. c. 70, s. 8. As to
proceedings in appeal or prohibition, see

s. 9.

(*o*) See Shea v. United Assurance Soc.
L. R., 3 C. P. 21.

(*p*) 18 & 19 Vict. c. 63, ss. 41, 42, 44.

(*q*) Wooldridge, *Ex parte*, 31 Law J.
Q. B. 122. See Skipton Industrial Co-
operative Soc. v. Prince, 33 Id. 323.

¹ In this country no such rule prevails. The declaration or complaint must show a legal cause of action, and this involves the setting forth of such facts as show a legal and valid copyright interest in the plaintiff, and a clear infringement by the defendant.

9 & 10 Vict. c. 95, further excepted from the cognizance of the county court actions "of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise shall be in question." (r) But the 30 & 31 Vict. c. 142, ss. 11, 12, now provides, that actions of ejectment where neither the value of the land, &c., nor the rent payable for it, shall exceed £20, may be brought in the county court of the district in which the lands are situate. The value of the land under the above section means the value of the land to let by the owner, not the value of the plaintiff's interest in the land, as where he is himself a lessee under the ground landlord, and sub-lets. (s) But the rent payable means the rent payable between the litigant parties. (t) If the title to be tried affects other lands of greater value than £20, the action may, by order of a judge, be tried in the superior court (s. 12).

The exception of actions in which the title to any corporeal or incorporeal hereditament, toll, fair, market, or franchise comes in question, it will be observed, still remains. The mere assertion however, of a *bonâ fide* claim of title by a party to the action is not sufficient to oust the jurisdiction of the county court. It must be shown that the title to land really "is in question;" (u) and if it really comes in question, it is immaterial whether it is brought forward *malâ fide* or *bonâ fide*. (v) If a plaintiff shapes his case so as to show by his plaint, or the particulars of demand thereunto annexed, that the title to land, &c., comes into question, he then ousts the court of its jurisdiction; but if the plaintiff proceeds for a matter which is *prima facie* within the jurisdiction of the county court, a mere allegation or notice by the defendant that the title is in question, or a plea setting up title, &c., is not sufficient to oust the jurisdiction of the court. (w) Proof of the facts stated or pleaded must in the first instance be given, that the judge may inquire into them, and determine whether the title really is in question. But he can not by his own decision give himself jurisdiction, and if he comes to a

(r) *Lawford v. Partridge*, 1 H. & N. 621.

(s) *Elston v. Rose*, L. R., 4 Q. B. 4.

(t) *Brown v. Cocking*, L. R., 3 Q. B. 672.

(u) *Emery, In re*, 2 C. B., N. S. 423; 27 Law J., C. P. 216.

(v) *Marsh v. Dewes*, 17 Jur. 558.

(w) *Lilley v. Harvey*, 5 D. & L. 648.

wrong judgment, and improperly assumes jurisdiction, a prohibition will lie, (*v*) and he and his officers will be responsible for their proceedings. The judge must of necessity determine the question of his jurisdiction for himself in the first instance, because on that determination it depends whether he hears the case on the merits. (*y*)

It was held that title to a corporeal hereditament came into question in the following cases; where the plaint was for breaking and entering certain apartments of the plaintiff, removing the furniture and expelling the plaintiff, and the plaintiff's case was that he had let the defendant a portion of the cottage, retaining the rest with the furniture for himself; that the defendant broke and entered this (the plaintiff's) part of the cottage, and removed the furniture into a neighboring shed, affirming that he had taken the whole cottage and would keep it; (*z*) where the plaint was for a year's rent of a house let by the plaintiff to the defendant, and the defense was that the plaintiff's title expired subsequently to the letting, and was then vested in another party, who claimed the rent, and it appeared that it was a *bonâ fide* defense with some evidence to support it, and not a mere illusory matter set up for the mere purpose of ousting the jurisdiction of the court; (*a*) where, on a claim for rent, the defendant set up a *bonâ fide* claim of ownership subject to a quit rent. (*b*)

Where an action for false imprisonment was brought against the defendant for giving the plaintiff into custody for trespassing on his close and taking sand therefrom, and a question was raised as to the right to take sand from the close, it was held that this right was not involved in the inquiry into the question of the false imprisonment, as it might have been if the action had been brought for a trespass upon the land, or for a trespass in removing the plaintiff from the land, and the defendant had justified under a plea of *molliter manus imposuit*. (*c*)

It is to be observed, also, that the 58th section of the 9 & 10 Vict. c. 95, does not extend to oust the jurisdiction of the

(*v*) *Elston v. Rose*, *supra*.

(*y*) *Thompson v. Ingham*, 14 Q. B. 718; 19 Law J., Q. B. 189. *Brown v. Cocking*, *supra*.

(*z*) *Chew v. Holroyd*, 8 Exch. 249; 22 Law J., Exch. 95.

(*a*) *Mountnoy v. Collier*, 1 Ell. & Bl. 630; 22 Law J., Q. B. 124.

(*b*) *Pearson v. Glazebrook*, L. R., 3 Exch. 27.

(*c*) *Eversfield v. Newman*, 4 C. B., N. S. 418.

county court in cases where a new remedy has been expressly given in the county court by a subsequent statute. Thus, where an Act (*d*) provided that the amount paid for carrying into force an order of two justices to abate a nuisance might be recovered in the county court from the owner of the premises where the nuisance existed, and a plaint was brought in the county court charging the defendant with certain expenses as being the owner of a ditch, and the defense was that the defendant was not the owner of the ditch, it was held that the title certainly did come in question on this issue, but that the particular statute on which the action was founded gave a special jurisdiction to the county court over the particular question, and gave it express power to try the question of ownership which necessarily involved the question of title. (*e*)

1332. Recovery of possession of small tenements in the county court.—When the term and interest of any tenant of premises, the rent of which does not exceed £50 a-year, and upon which no fine or premium has been paid, has expired or been determined by notice to quit, and the tenant, or any person claiming under him, neglects or refuses to deliver up possession, the landlord may, by plaint in the county court of the district in which the premises lie, proceed for the recovery of such premises, adding a claim for rent or mesne profit, &c. (*f*) He may proceed, also, in such cases, to recover possession by plaint in the county court where he has a right to re-enter for non-payment of rent. (*g*) No question of title arises in the case of a landlord proceeding to recover possession of premises demised by him to a tenant, as both the tenant and all persons claiming under the tenant, are estopped from disputing the landlord's title. If, therefore, the tenant voluntarily lets another person into possession, the person so let in is in the same position as the tenant himself, and is bound by the estoppel. (*h*) But the tenant, and those claiming under him, may show that the title which the landlord had at the time of the demise subsequently

(*d*) 11 & 12 Vict. c. 123, which is repealed by 29 & 30 Vict. c. 90. The latter Act, however, s. 34, and the 18 & 19 Vict. c. 121, s. 19, substantially make similar provisions.

(*e*) *Reg v. Harden*. 2 Ell & Bl. 191; 22 Law J., Q. B. 299.

(*f*) 19 & 20 Vict. c. 108, ss. 50, 51.

See *Harrington (Earl) v. Ramsay*, 22 Law J., Exch. 326. An order for delivery of possession, however, made under these sections does not affect the rights of a person not a party to the proceedings; *Hodson v. Walker*, L. R., 7 Exch. 55.

(*g*) 19 & 20 Vict. c. 108, s. 53.

(*h*) *Emery, In re*, 4 C B., N. S. 423.

expired, or was determined; and if such a point comes in question before the county court judge, there is then, as we have seen, a question of title ousting the jurisdiction of the court. (*i*) And to give the county court jurisdiction, it must be established that the relationship of landlord and tenant exists between the parties. (*j*)

1333. Equitable jurisdiction.—The 58th section of the 9 & 10 Vict. c. 95, further excepted from the jurisdiction of the county court any action “in which the validity of any devise, bequest, or limitation, under any will or settlement may be disputed.” But by the 28 & 29 Vict. c. 99, s. 1, the county court may, in cases where the subject-matter of the suit does not exceed £500, exercise the jurisdiction of the Court of Chancery in administration suits, in suits for the execution of trusts, (*k*) of foreclosure or redemption, for enforcing any charge or lien, for specific performance, or reforming or setting aside agreements, (*l*) in proceedings under the Trustee Relief Acts, in all proceedings relating to the maintenance or advancement of infants, or for the dissolution of partnerships, “in all proceedings for orders in the nature of injunctions where the same are requisite for granting relief, in any matter in which jurisdiction is given by this Act to the county court,” and for stay of proceedings at law for debts provable under an administration suit then pending in such court; also by 31 & 32 Vict. c. 40, s. 12, in partition suits. Provision is also made by ss. 3 and 9 of 28 & 29 Vict. c. 99, and 30 & 31 Vict. c. 142, s. 9, for the transfer of suits from the county court to the Court of Chancery, and vice versa, either at the discretion of a vice-chancellor, or by order of the judge of the county court or vice-chancellor, whenever it appears during the progress of the suit that the subject-matter exceeds or does not exceed £500, as the case may be; (*m*) by s. 18 of the 28 & 29 Vict. c. 99, for an appeal from the decision of the county court to a vice-chancellor, (*n*) and by ss. 10 and 11 for the determination of the particular court in

(*i*) *Mountnoy v. Collier*, *ante*.

(*j*) *Banks v. Rebdeck*, 20 Law J., Q. B. 476.

(*k*) *Clayton v. Renton*, L. R., 4 Eq. Ca. 158.

(*l*) 30 & 31 Vict. c. 142, s. 9, and sched.

C. Wilcox v. Marshall, L. R., 3 Eq. Ca. 270.

(*m*) See *Baker v. Wait*, L. R., 9 Eq. Ca. 103. *Birks v. Silverwood*, L. R., 14 Eq. Ca. 101.

(*n*) See *Harper v. Pole*, L. R., 3 Eq. Ca. 752; 30 & 31 Vict. c. 142, s. 35.

which proceedings in equity must be taken or prosecuted under the Act.

1334. *Admiralty jurisdiction.*—By the 31 & 32 Vict. c. 71, jurisdiction in admiralty cases is given to certain county courts (designated by order in council) over claims for salvage, (*o*) towage necessities, (*p*) or wages, subject in each case to the limitation of amount specified in the Act, and also “as to any claim for damage to cargo or damage by collision—in which the amount claimed does not exceed three hundred pounds,” s. 3. And by the 32 & 33 Vict. c. 51, s. 2, “as to any claim in tort in respect of goods carried in any ship” (*q*) subject to a similar limitation as to amount, which jurisdiction may be exercised by proceedings either in rem or in personam, s. 3. By the 4th section of that Act it is enacted that the above 3rd section of the 31 & 32 Vict. c. 71, shall extend to all claims to damage to ships, whether by collision or otherwise, when the amount claimed does not exceed £300. It had been previously held (under 3 & 4 Vict. c. 65), that the jurisdiction of the Court of Admiralty does not extend to barges propelled by oars only, (*r*) and the same construction has now been put upon the above Acts conferring admiralty jurisdiction upon the county courts. (*s*) By ss. 6, 7, and 8, of the first-mentioned Act, provision is made for the transfer of causes from the county court to the High Court of Admiralty, (*t*) or to another county court, according to circumstances, by s. 10 and s. 5 of 32 & 33 Vict. c. 51, for the summoning of nautical assessors, in any admiralty or maritime cause, to assist the judge; by s. 21 of the former Act for the determination of the particular county court in which proceedings should be commenced, and by s. 26 of that Act for an appeal to the High Court of Admiralty from the decree or order of the county court. (*u*) If less than the sum to which the jurisdiction of the county is

(*o*) The county court had previously exercised a limited jurisdiction in salvage cases. See 25 & 26 Vict. c. 63, s. 49. 17 & 18 Vict. c. 104, ss. 458, 460.

(*p*) See *The Riga*, L. R., 3 Adm. & Eccl. 516.

(*q*) See *The Nuova Raffaellina*, L. R., 3 Adm. & Eccl. 483.

(*r*) *The Bilbao*, 2 Lush. 149.

(*s*) *Everard v. Kendall*, L. R., 5 C. P. 428. See *The Dowse*, L. R., 3 Adm. & Eccl. 135. *Simpson v. Blues*, L. R., 7 C. P. 290.

(*t*) See *The Bengal*, L. R., 3 Adm. & Eccl. 14. *The Swan*, *ibid.* 314.

(*u*) See *The Forest Queen*, L. R., 3 Adm. & Eccl. 299.

limited, *i.e.* £300, in actions of tort, is "recovered" in a superior court, (*v*) the plaintiff is not entitled to costs. (*w*)

1335. Jurisdiction by consent.—By 19 & 20 Vict. c. 108, s. 23, it is further enacted, that with respect to all actions other than for crim. con. (now abolished), which may be brought in any superior court of common law, if both parties shall agree by memorandum signed by them or their respective attorneys, that any county court named in such memorandum shall have power to try such action, such county court shall have jurisdiction to try the same. And (s. 25) that in any action in the county court in which the title to any corporeal or incorporeal hereditament, or to any toll, fair, market, or franchise, shall incidentally come in question, the judge shall have power to decide the claim, which it is the immediate object of the action to enforce, if both parties at the hearing consent in writing, signed by them or their attorneys; but the judgment of the court in such cases is not to be evidence of title between the parties or their privies in any other proceeding; and the consent is not to affect any right of appeal.

A similar consensual jurisdiction is by the 31 & 32 Vict. c. 71, s. 3, and 32 & 33 Vict. c. 51, s. 2, given to the county court in Admiralty causes, where the sum claimed exceeds the amount to which their ordinary jurisdiction is limited. But no such consensual jurisdiction is given to them in equity.

1336. Waiver of objection to jurisdiction.—When parties appear before a judge and submit their case to his determination, and make no objection to his jurisdiction until after he has adjudicated, they are often bound by his determination because they have assented to it. (*x*) Where a judge made an order under the Interpleader Act which the Act gave him no power or authority to make without the consent of the parties, and there was no express formal consent, but both the plaintiff and defendant attended the hearing of the summons before the judge, and took no objection to the making of the order, it was held that they must by their conduct be taken to have submitted the matter to his decision, and that the order was binding and conclusive upon them as an award between them. It was held, also, that as the order was the order of a superior

(*v*) See *Hewitt v. Cory*, L. R., 5 Q. B. 418.

(*w*) 31 & 32 Vict. c. 71, s. 9.

(*x*) *Murish v. Murray*, 13 M. & W. 56.

court, the consent which was necessary to give jurisdiction need not be stated on the face of the order, as it would be intended that the court had jurisdiction; (y) for nothing shall be intended to be out of the jurisdiction of the superior court but what expressly appears to be so. (z)

So, where the 17 & 18 Vict. c. 125, s. 1, gave jurisdiction to a judge to try issues of fact without a jury, in case the parties consented in writing, and the court or a judge allowed such trial, and the parties to an action verbally consented to try issues of fact before a judge without a jury, and both parties appeared, and the case was heard and decided, it was held that they could not object to his jurisdiction on the ground that there had been no consent in writing, nor any order of the court, or a judge, allowing such trial as required by the Act, but that both parties were estopped by their conduct from taking the objection. (a)

Where a party against whom costs have been given by a Court of Quarter Sessions consents that the taxation shall take place after the sessions are over, and the justices give judgment for costs *nunc pro tunc*, the party so consenting is precluded from afterwards objecting to the want of jurisdiction. (b)

But where the objection is that the person adjudicating has no power or jurisdiction over the matter in controversy, (c) *e.g.*, that an arbitrator has not duly enlarged the time for making his award, by which his authority is determined, (d) the attendance of the complainant and his taking part in the proceedings will not preclude him from subsequently raising the objection; although if the objection be that some bare formality has not been observed, that will be waived if the parties are substantially before the right tribunal, and the person who raises the objection takes part in the proceedings, although under protest, intending to avail himself of the decision if in his favor, and to object to it if against him. (e)

1337. Of actions in the superior courts—Joinder of different

(y) *Harrison v. Wright*, 13 M. & W. 816.

(z) *Peacock v. Bell*, 1 Wms. Saund.

743. (a) *Andrews v. Elliott*, 25 Law J., Q.

B. 1. (b) *Freeman v. Read*, 30 Law J., M.

C. 123.

(c) *Davies v. Price*, 34 Law J., Q. B. 8.

(d) *Ringland v. Lowndes*, 33 Law J., C. P. 337.

(e) *Ringland v. Lowndes*, 33 Law J. C. P. 25.

causes of action in the same suit.—By the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, it is enacted (s. 3), that it shall not be necessary to mention any form or cause of action in any writ of summons; and (s. 41) that causes of action, of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit, except replevin or ejectment; and where two or more of the causes of action so joined are local, and arise in different counties, the venue may be laid in either of such counties; but the court, or a judge, has power to prevent the trial of different causes of action together, if such trial would be inexpedient, and may order separate records to be made up, and separate trials to be had; also (s. 40), that in any action brought by a man and his wife for an injury done to the wife, in respect to which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right.

1338. *Requisites of the declaration.*—Every declaration of the cause of action must be entitled of the court in which the action is brought, and of the day of the month and year when it is pleaded, and must bear no other time or date. (*g*) It must have a certain formal commencement and conclusion, and the name of the county from which the jury are to come to try the action is in all cases to be stated in the margin of the declaration, and taken to be the venue intended by the plaintiff, and no venue is to be stated in the body of the declaration, or in any subsequent pleading; but wherever local description is required, such local description is to be given, (*h*) and the cause of action must be proved to have arisen at the particular place named; but where local description is not necessary, and the declaration does not allege that the injury was done in any particular locality, it is not necessary to prove the exact place where it was done. (*i*)

The plaintiff is at liberty in all personal actions to lay his venue where he pleases, except in certain actions against justices, constables, officers and their assistants, (*k*) and the court will not make an order for changing the venue, unless there is

(*g*) 15 & 16 Vict. c. 76, s. 54.

(*h*) 15 & 16 Vict. c. 76, ss. 59, 60.
Reg. Gen. 16 Vict., 1 Ell. & Bl. App.
LXXIX.

(*i*) *Simmons v. Lillystone*, 8 Exch. 441; 22 Law J., Exch. 218.

(*k*) See *Chitty's Arch. Pr.*, 12th ed. title, VENUE.

manifest inconvenience or impropriety in trying the cause in the county selected by the plaintiff. (*l*)

When the declaration is for a breach of duty, the facts creating the duty should be set forth on the face of the declaration. It is not enough to state that it was the duty of the defendant to do the act which he is stated to have neglected to do. (*m*) "The decisions," observes Lord CAMPBELL, "show that the allegation of duty in a declaration is in all cases immaterial, and ought never to be introduced, for if the particular facts set forth raise the duty, the allegation is unnecessary; and if they do not, it will be unavailing. If the particular facts stated in the declaration do not raise the duty, it can not be established by other facts not stated. The declaration, therefore, must stand or fall by the facts stated. (*n*) Negligence creates no cause of action unless it expresses or establishes some breach of duty. (*o*)

The novelty of the particular complaint set forth in a declaration is no objection to it, provided it shows an injury cognizable by law. (*p*)

1339. Statement of special damage.—If any peculiar or special damage has been sustained by the plaintiff, it should be stated in the declaration, with such reasonable particularity as to give notice to the defendant of the peculiar nature of the injury. Where the action is not maintainable at all without proof of special damage, then the fact of special damage having been sustained can not be given in evidence without a statement of it in the declaration; and in other actions, such as actions for words which are actionable in themselves, particular instances of special damage can not be given in evidence, unless they are particularized in the declaration. (*q*)¹

(*l*) *Helliwell v. Hobson*, 3 C. B., N. S. 761. See *Levy v. Rice*, L. R., 5 C. P. 119. *Church v. Barnett*, L. R., 6 C. P. 116.

(*m*) *Brown v. Mallett*, 5 C. B. 615.

(*n*) *Seymour v. Maddox*, 16 Q. B. 331.

(*o*) *Dutton v. Powles*, 30 Law J., Q. B. 169; 31 ib. Q. B. 191.

(*p*) *Ashby v. White*, 1 Smith's, L. C. 6th ed. 227.

(*q*) *Browning v. Newman*, 1 Str. 666; *ante*.

¹ An injury that is the natural and necessary result of an act, may be recovered for under a general allegation of damage, but, where the injury is the *natural*, but not the *necessary* result of an act, the damage is *special*, and can only be recovered for when *specially* alleged; *Vanderslice v. Newton*, 4 N. Y. 130; *Bristol, &c., Co. v. Gridley*, 28 Conn. 201; *Smith v. Sherman*, 4 Cush. (Mass.) 408; *Crain v. Petrie*, 6 Hill (N. Y.), 523; *Alston v. Huggins*, 3 Brev. (S. C.) 185; *Olmstead v. Barker*, 25 Ill. 86; *Burnell v. R. R. Co.*, 14 Mich. 34; *Hart v. Evans*, 8 Penn. St. 13; *Hunter*

It is not necessary in a declaration by a plaintiff, who sues as the administrator of his deceased wife for an injury causing her death, under 9 & 10 Vict. c. 93, for his own benefit as husband, to disclose or allege any pecuniary damage suffered by the plaintiff beyond the ordinary claim for damages. (r)

1340. *Several counts in declaration in respect of the same cause of action.*—By the rules and orders made by the judges pursuant to the Common Law Procedure Act, 1852, it is provided that, except as thereafter mentioned, several counts on the same cause of action shall not be allowed, and any count or counts used in violation of the rule may, on the application of the party objecting, within a reasonable time, or before an order made for time to plead, be struck out or amended by the court or a judge, on such terms as to costs or otherwise as such court or judge may think fit; but the court or judge may allow such counts on the same cause of action as may appear to be proper for the purpose of determining the real question in controversy between the parties on its merits, subject to such terms as to costs and otherwise as the court or judge may think fit. And when no rule or order has been made as to costs, and on the trial there is more than one count founded on the same cause of action, and the judge or presiding officer before whom the cause is tried shall, at the trial, certify to that effect on the record, the plaintiff will be liable for all costs occasioned by such count, in respect of which he has failed to establish a distinct cause of action, including those of the evidence as well as those of the pleading. (s)¹

1341. *Pleas.*—All pleadings must be entitled of the court in which the action is brought and must bear date the day of the month and year when they are pleaded. (t)

1342. *Pleas to the jurisdiction.—Privileges of ambassadors.*—The accredited ambassadors of foreign potentates resident in

(r) *Chapman v. Rothwell*, 27 Law J., Q. B. 315; *ante*.

(s) *Mercer v. Stanbury*, 25 Law J., Exch. 316; 2 H. & N. 155, n.

(t) 15 & 16 Vict. c. 76.

v. Stewart, 47 Me. 419; *Teayanden v. Hetfield*, 11 Ind. 522; but all damages that necessarily result from an act may be recovered under a general allegation; *Hutchinson v. Granger*, 13 Vt. 386; *Laraway v. Perkins*, 10 N. Y. 371; *Stevens v. Syford*, 7 N. H. 360.

¹ In New York, under the Code, the cause of action can only be set forth in *one* count, but any number of *causes of action* may be embraced in the same complaint.

this country are not amenable to the jurisdiction of our civil tribunals. They can not be lawfully imprisoned in any civil proceeding, nor can their goods be taken in execution; and if a writ is sued out against them, the defendant may defeat the action by pleading to the jurisdiction of the court. (*u*) In other cases, to repel the jurisdiction of the king's court, you must show a more proper and more sufficient jurisdiction, for if there is no other mode of trial that alone will give the king's courts a jurisdiction. (*v*)

1343. *Plea of Not Guilty.*—In actions for a wrong or a breach of duty, the plea of not guilty operates, as we have seen, as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defense than such denial is admissible under that plea. All other pleas in denial must take issue on some particular matter of fact alleged in the declaration. (*y*) But where an action is brought against a master or employer for injuries sustained through the negligence of his servant or workman in doing his master's work, or executing his orders, the plea of not guilty puts in issue the fact whether the party doing the injury was the servant of the defendant, and whether he was doing his work or executing his orders. (*z*) If several wrongful acts are alleged in the same declaration, the plea of not guilty puts them all in issue. (*a*) Where special damage is substantially the thing complained of, as in actions for verbal slander, where the words spoken are not actionable per se, the plea of not guilty puts in issue the existence of the special damage. (*b*)

1344. *Not guilty by statute.*—The 5 & 6 Vict. c. 97, s. 3, which repeals so much of any clause in any act of a local and personal nature whereby parties are entitled to plead the general issue, and give the special matters in evidence, is, by its preamble, confined to actions "for any matter done in pursuance of, or under the authority of, the said acts." (*c*)

1345. *Of pleading several matters of defense.*—By the new rules of pleading it is provided, that in all actions for torts, all

(*u*) *Magdalena St. Nav. Co. v. Martin*, 28 Law J., Q. B. 310.

(*v*) *Ld. Mansfield, Mostyn v. Fabrigas*, Cowp. 172.

(*y*) *Reg. Gen. Hil. Term*, 16 Vict., 1 Ell. & Bl. App. lxxxi.

(*z*) *Mitchell v. Crassweller*, 13 C. B. 245.

(*a*) *Card v. Card*, 5 C. B. 632.

(*b*) *Wilby v. Elston*, *ante*.

(*c*) *Carr v. Royal Ex. Ass. Co.*, 1 B. & S. 956; 31 Law J., Q. B. 93.

matters in confession and avoidance of the cause of action shall be pleaded specially, as in actions on contract. (*d*) The defendant may, by leave of the court or a judge, plead, in answer to the declaration or other subsequent pleading of the plaintiff, as many several matters as he shall think necessary for his defense, upon an affidavit being made by him or his attorney, if required by the court or judge, to the effect that he is advised or believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded are respectively true in substance and in fact. But the pleas of not guilty, release, statute of limitations, bankruptcy of the defendant, coverture, denial that the property, an injury to which is complained of, is the plaintiff's, leave and license, and son assault demesne, may be pleaded together as of course, without leave. (*e*)

Except in cases specifically provided for, if either party plead several pleas, replications, avowries, cognizances, or other pleadings, without leave of the court or a judge, the opposite party is at liberty to sign judgment; which may, however, be set aside upon an affidavit of merits. (*f*)

Several pleas, replications, or subsequent pleadings, or several avowries or cognizances, founded on the same ground of answer or defense, are not to be allowed, unless they appear to the court or judge to be proper for determining the real question in controversy between the parties on its merits, and subject to such terms as to costs and otherwise as the court or judge may think fit. When no rule or order has been made, and on the trial there is more than one plea, replication, or subsequent pleading on the record, founded on the same ground of answer or defense, and the judge or presiding officer, before whom the cause is tried, certifies to that effect on the record, the defendant will be liable for all costs occasioned by such plea or other pleading, in respect of which he has failed to establish a distinct ground of answer or defense, including those of the evidence as well as those of the pleading. (*g*)

1346. *Traverses by the defendant.*—The defendant may either traverse generally such of the facts contained in the

(*d*) Reg. Gen. Hil. Term, 16 Vict., 1 Ell. & Bl. App. lxxxi.

(*e*) 15 & 16 Vict. c. 76, ss. 81, 84.

(*f*) 15 & 16 Vict. c. 76, s. 86. *Messiter v. Roe*, 13 C. B. 162.

(*g*) Reg. Gen. 16 Vict. 1 Ell. & Bl. App. lxxix.

declaration as might have been denied by one plea, or may select and traverse separately any material allegation in the declaration, although it might have been included in a general traverse. He is at liberty also to traverse the whole or part of a replication or subsequent pleading of the plaintiff by a general denial, or, admitting some part or parts thereof, to deny all the rest, or to deny any one or more allegations. (*h*)

1347. *Traverses by the plaintiff*.—The plaintiff, on the other hand, is at liberty to traverse the whole of any plea or subsequent pleading of the defendant, by a general denial; or admitting some part or parts thereof, to deny all the rest, or to deny any one or more allegations. (*i*)

1348. *Requisites of special pleas*.—A plea pleaded generally to the whole declaration must offer a good answer in point of law to all the causes of action comprised therein. If it does not do this it is bad, and the plaintiff is entitled to judgment for so much as is not covered by the plea. (*k*) A plea, which is a good plea to some only of the counts of a declaration, should in the introductory part thereof be confined to those counts, and not be pleaded generally to the whole declaration, notwithstanding s. 75 of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, which enacts, that pleas capable of being construed distributively shall be taken distributively, for that has reference only to the finding of the jury upon the issues joined. (*l*) If a plea, which professes to answer the whole of the declaration, is in truth an answer only to part, the plaintiff may be entitled to judgment non obstante veredicto. (*m*)

In an action of libel, where the declaration sets out several distinct libels in different counts, the defendant can not plead one plea in justification of the whole, but must plead the truth of the libel to each count separately. (*n*)

Any plea, good in substance, is not objectionable on the ground of its treating the declaration either as framed for a breach of contract or for a wrong (s. 74).

Where proof of the precise locality is material to the defense,

(*h*) 15 & 16 Vict., c. 76, ss. 76, 78.

(*i*) 15 & 16 Vict. c. 76, s. 77.

(*k*) Rogers v. Spence, 12 Cl. & Fin.

718.

(*l*) Jervis, C. J., Gabriel v. Dresser, 15 C. B. 627. Wilkinson v. Kirby, 23 Law

J., C. P. 224. Chappell v. Davidson, 18 C. B. 194. But see Blgrave v. Bristol. Wat. Co. 1 H. & N. 387.

(*m*) Lyne v. Siesfeld, 1 H. & N. 281.

(*n*) Honess v. Stulbs, 7 C. B., N. S. 555; *ante*.

and the place is not described in the declaration, the defendant is bound to show it by his pleading. (o)

1349. *Fictitious and needless averments in pleading.*—All statements which need not be proved, such as the statement of time, quantity, quality, and value, where these are immaterial; the statement of losing and finding, and bailment, in actions for goods, or their value; the statement of acts of trespass having been committed with force and arms, and against the peace, &c., and all statements of a like kind, are to be omitted in pleading. (p)

“It is an elementary rule in pleading, that when a state of facts is relied on it is enough to allege it simply, without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation. Thus, in a case very familiar, if a trespass be justified by a plea of highway, the pleader never states how the locus in quo became a highway; and if the plaintiff's case is that the locus in quo, by an order of justices, award of inclosure commissioners, local act of parliament, or any other lawful means, had ceased to be a highway at the time alleged in the declaration, he simply puts in issue the fact of its being a highway at the time, without alleging the particular mode by which he intends to show, in proof, that it had before then ceased to be such. The certainty or particularity of pleading is directed, not to the disclosure of the case of a party, but to the informing the court, the jury, and the opponent, of the specific proposition for which he contends; and a scarcely less important object is the bringing the parties to issue on a simple and certain point, avoiding that prolixity and uncertainty which would very probably arise from stating all the steps which lead up to that point.” (q)

1350. *Defenses arising after the commencement of the action* may be pleaded, together with pleas of defenses arising before the commencement of the action, but the plaintiff may confess such plea, and become entitled to the costs of the cause up to the time of pleading such plea. The rule does not apply to the case of a plea pleaded by one or more only out of several defendants. (r) Any defense arising after the commencement

(o) Webber v. Sparkes, 10 M. & W.
487. Ellison v. Isles, 11 Ad. & E. 676.

(p) 15 & 16 Vict. c. 76, s. 49.

(q) Williams v. Wilcox, 8 Ad. & E.
333.

(r) Reg. Gen. 16 Vict. 1 Ell. & B.
App. lxxxii.

of the action must be pleaded according to the fact, without any formal commencement or conclusion, and any plea which does not state whether the defense therein set up arose before or after action, will be deemed to be a plea of matter arising before action. (s)

1351. *Payment of money into court by way of compensation or amends.*—By 15 & 16 Vict. c. 76, it is enacted (s. 70), that it shall be lawful for the defendant in all actions except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation (which is now abolished), or debauching the plaintiff's daughter or servant, and, by leave of the court or a judge, upon such terms as they or he may think fit, for one or more of several defendants, to pay into court a sum of money by way of compensation or amends, and such payment is to be pleaded, as near as may be, in the form given by s. 71 of the statute. However, in trespass for breaking and entering the plaintiff's house, and assaulting his son, whereby the plaintiff lost his son's services, it was held that the defendant might pay money into court, (t) and in cases of libel and slander, payment into court, together with a plea of apology, may be made as mentioned. The plaintiff may reply to the plea by accepting the sum paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and is at liberty in that case, to tax his costs, and, in case of nonpayment thereof within forty-eight hours, to sign judgment for such costs; or the plaintiff may reply that the sum paid into court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded; and, in the event of an issue thereon being found for the defendant, the defendant is entitled to judgment and his costs of suit. (u)

1352. *Plea of infancy in actions ex delicto.*—A plea of infancy constitutes no defense, as we have seen, to an action for an assault or false imprisonment, or to an action of libel and slander, or for seduction; but it is an answer to an action for deceit, and to actions of tort founded on contract, such as an action for a false and fraudulent representation by an infant that he was of full age, whereby the plaintiff was induced to

(s) 15 & 16 Vict. c. 76, s. 68.

(t) *Newton v. Holford*, 6 Q. B. 921.
Aston v. Perkes, 15 M. & W. 385.

(u) As to the effect of a payment of money into court in actions of tort, see *post*, s. 2.

contract with him ; for if such an action was maintainable, all the pleas of infancy would be taken away, as such affirmations are in every contract. (v) ¹

1353. *Plea of accord and satisfaction.*—Whenever the plaintiff has consented to receive, and has actually received, satisfaction and recompense for the injury he has sustained, the cause of action is discharged, although the satisfaction and recompense were not one hundredth part of the value of his loss ; for, by his own accord and agreement, the injury is dispensed with, and in all actions in which nothing but amends are to be recovered in damages, there a concord carried into execution is a good plea. (y) The ordinary form of a plea of accord and satisfaction is to the effect that, after the accrual of the cause of action, and before the commencement of the suit, the defendant delivered to the plaintiff, and the plaintiff accepted from the defendant, certain goods and chattels, or moneys, or securities for money, &c., specifying the nature and character of the things delivered in full satisfaction and discharge of the cause of action, and of all damages sustained therefrom by the defendant. To support this plea it must be proved that the satisfaction was given and accepted in respect of the identical cause of action included in the declaration ; for where a plaintiff who had received some internal injury in a railway collision, but was not aware of it,

(v) *Johnson v. Pye*, 1 Sid. 258. Liv. 430.

Adel. Loan Ass. v. Fairhurst, 9 Exch. (y) *Andrew v. Boughey*, Dyer. 75b.

¹ Infancy is a bar to all actions arising out of a contract, except for actual necessities, and this includes all actions for *torts* growing out of contracts, as actions for fraud, false representations, &c ; *Bent v. Manning*, 10 Vt. 225 ; *Hyman v. Cain*, 3 Jones (N. C.) 111 ; *Hall v. Woods*, 4 La. Ann. 85 ; but even upon such contracts the recovery is not confined to the contract, but only the *value* of the articles can be recovered if their actual value is *less* than the contract price, otherwise the contract price controls ; *Passenger R. R. Co. v. Stutter*, 54 Penn. St. 375 ; *Hyer v. Hyatt*, 3 Cr. C. C. (U. S.) 276. The rule is, that a contract to an infant's prejudice is void, while one that is for his benefit is merely voidable. He may affirm it or disaffirm it upon attaining his majority ; *Oliver v. Hoodlett*, 13 Mass. 237 ; *Wheaton v. East*, 5 Yerg. (Tenn.) 41 ; but for torts founded on positive wrongs, as trespass, trover, bastardy, assault, and that species of wrongs that do not arise out of a contract, he is held liable the same as an adult ; *Humphrey v. Douglass*, 10 Vt. 71 ; *Baxter v. Bush*, 29 Vt. 465 ; *Filts v. Hall*, 9 N. H. 441 ; *Scott v. Watson*, 46 Me. 362 ; *Dist. v. Bragdon*, 23 N. H. 407 ; *Conklin v. Thompson*, 29 Barb. (N. Y.) 218 ; *Chandler v. Com*, 4 Met. (Ky.) 60 ; *Towne v. Wiley*, 23 Vt. 355.

accepted a small sum of money as compensation for damage done to his clothes and hat, and then brought an action for the injury to the person, it was held that such cause of action was untouched by the accord and satisfaction in respect of the injury to the clothes. (z) And in cases where the person injured has been induced by the false representations of the medical officers of the railway company to accept a small and almost nominal sum in full of all demands, and to give a receipt for the same, the company will be restrained from setting up the plea of accord and satisfaction, or relying upon the receipt given at all. (a)¹

Either money or chattels, railway bonds or negotiable securities, or an estate or interest in land, or a mere agreement only, may be given, granted, or surrendered, and accepted by way of compensation and amends for the damages that may have been sustained. If goods of the defendant are in the hands of the plaintiff, and it is agreed between the plaintiff and defendant that the plaintiff shall retain these goods as his own property, in satisfaction and discharge of the cause of action, and the goods are accordingly retained and accepted by the plaintiff in satisfaction, &c., this is a valid accord executed, and is pleadable in bar of an action. (b) But the delivery and acceptance of a man's own goods and chattels constitute no satisfaction. Thus, in an action of trespass against a defendant in respect of an entry by him upon the plaintiff's land, the defendant said that after the entry there was an accord between them that the plaintiff should re-enter into the same land, and should enjoy it without interruption by the defendant, and that the defendant should deliver to the plaintiff all the title deeds concerning the said land, that the plaintiff had re-entered, and that the defendant had delivered the title deeds; and it was held that this was no

(z) *Roberts v. E. C. Rail. Co.*, 1 F. & F. 450. See *Lee v. Lancashire and Yorkshire Rwy.*, L. R., 6 Ch. App. 527. As to accord and satisfaction for the injury and all its consequences, *Rideal v. Gt. West. Rail. Co.*, Id. 706. As to inspection of the reports of railway officials and medical men to the company, see *Baker v. Lond. and South-West. Rail. Co.*, L. R., 3 Q. B. 91. *Cossey v. London and*

Brighton Rwy., L. R., 5 C. P. 146. And as to inspection generally, *Woolley v. North Lond. Rwy.*, L. R., 4 C. P., 602; 38 Law J., C. P., 317. *Pape v. Listet*, L. R., 6 Q. B. 242. *Mahoney v. Widows' Life Assurance Fund*, L. R., 6 C. P. 252. *Richards v. Gellatly*, L. R., 7 C. P. 127. (a) *Stewart v. Gt. West. Rwy.*, 2 De G. J. & S. 319.

(b) *Jones v. Sawkins*, 5 C. B. 142.

¹ *Stafford v. Bacon*, 1 Hill (N. Y.) 132.

answer, for it must be intended that the title deeds were the plaintiff's own title deeds, and then to deliver him his own deeds; and put him in possession of his own land, was no satisfaction of the wrong done before in keeping him out; but it was admitted, that if the defendant had shown any title in himself to the possession of the deeds, then his delivering them up would have been a good bar to the action. (c)

The meaning of an accord and satisfaction is, that there has been an agreement for something to be done in satisfaction and discharge of the cause of action, and that the agreement has been completely performed, so that there is a total extinguishment of the original cause of action. The plea, therefore, must set forth an accord executed, showing a complete performance by the defendant of the substituted contract. (d)¹ Where the defendant had slandered the plaintiff, and after the utterance of the slander the plaintiff and defendant met, and it was agreed that certain letters and doc

(c) Bro. Abr. ACCORD, I.

(d) Gabriel v. Dresser, 15 C. B. 622

¹ An accord without *satisfaction* is no bar to an action; Russell v. Lyttle, 6 Wend. (N. Y.) 390; Ballard v. Nooks, 2 Ark. 45; Brooklyn Bank v. De Graun, 23 Wend. (N. Y.) 342; but where there is an *accord with satisfaction*, predicated upon a full and adequate consideration, it is a full bar. But in most of the states it is held that, where a debt is liquidated, and there is no dispute between the parties as to the amount due, an agreement to take a less sum, although it is actually paid by the debtor and received by the creditor in full discharge of the debt, is not a bar to recovery of the balance. It does not operate as a *satisfaction* of the debt, because the agreement to take a less sum than was actually due is not predicated upon a consideration, and the amount paid only operates *pro tanto* as a discharge; Warren v. Skinner, 20 Conn. 559; Daniels v. Hatch, 21 N. J. 391; Makepeace v. Harvard College, 10 Pick. (Mass.) 298; White v. Jordan, 27 Me. 370; Seymour v. Minturn, 17 Johns. (N. Y.) 169; Eve v. Mosley, 2 Strob. (S. C.) 203; Girser v. Cushner, 4 G. & J. (Md.) 305; Morse v. Hylton, 1 Div. (N. C.) 429; Sullivan v. Finn, 4 Greene (Iowa) 544; Higgins v. Halligan, 46 Ill. 173; University v. Walden, 15 Ala. 655; Mordecai v. Stewart, 36 Ga. 126; Harriman v. Harriman, 12 Gray (Mass.) 341; Beardsly v. Davis, 52 Barb. (N. Y.) 159; Miller v. Holden, 18 Vt. 337; but where there is a *new* consideration, as a new benefit received or burden imposed, an agreement, executed, to take less than the sum due, may be a bar, as where the agreement is predicated upon a payment *before* the money under the original contract is due; Rose v. Hall, 26 Conn. 392; Jones v. Bullett, 2 Litt. (Ky.) 49; Smith v. Brown, 3 Hawks (N. C.) 580; but in Kentucky the payment of a less sum, *under an agreement that it shall discharge the whole debt*, is held an accord and satisfaction; Pepper v. Aiken, 2 Bush (Ky.) 254; so in Delaware; Silver v. Reynolds, 2 Harr. (Del.) 275; so in Massachusetts it is held that an agreement to take less than the amount due on a note, if executed, *and the note is delivered up to the payor*, operates as a discharge of the entire debt; Bawker v. Childs, 3 Allen (Mass.) 34; so that such

uments in the handwriting of the plaintiff, in the possession of the defendant, containing certain proofs against the plaintiff of the truth of the charges made by the defendant, should be burnt, and that no action should be brought, and the letters were burnt, but the plaintiff, nevertheless, brought an action, it was held that the accord executed was a bar to the action. (c)

1354. *Plea of the pendency of another action for the same wrong.*—"The law abhors multiplicity of actions, and therefore, whenever it appears upon record that the plaintiff has sued out two writs against the same defendant for the same thing, the second writ shall abate." (f) Therefore, in an action of trespass for a horse, it is a good plea in abatement that another action is pending for the same trespass, whether the action be in the same court or in another and different court of co-ordinate jurisdiction. (g) But the pendency of a suit in an inferior court, (h) or in a foreign court, (i) can not be pleaded to an action in one of the courts of Westminster for the recovery of the same demand; and if an action be brought in the county court, the pendency of an action in the

(c) *Lane v. Applegate*, 1 Stark. 97. As to an agreement for the making and acceptance of a public apology, *Boosey v. Wood*, 34 Law J., C. P. 65.

(f) *Bac. Abr.*, ABATEMENT, M.

(g) *Lev. Ent.* 54, *Sparry's case*, 5 Co. 62a; *Com. Dig.* ABATEMENT, H. 24.

(h) *Loughton v. Taylor*, 6 M. & W. 695.

(i) *Cox v. Mitchell*, 29 Law J., C. P. 33. *Ostell v. Lepage*, 5 De G. & Sm. 95. *Scott v. Ld. Seymour*, 31 Law J., Exch. 457. *Scott v. Pilkington*, 31 Law J., Q. B. 81. As to two actions for the same cause in the Admiralty Court in this country and abroad, see *The Mali Ivo*, L. R., 2 Adm. & Eccl. 356.

payment will operate as a discharge if made *before the money is due*, or if made *in the notes of a third person*; *Brooks v. White*, 2 Met. (Mass.) 283; so where it is agreed to take *property* in full payment, even though not worth more than *one cent*; *Jones v. Bullitt*, 2 Litt. (Ky.) 49. But it is not with the question as applicable to contracts that we are dealing, but as applicable to torts. In all such cases the damages are unliquidated, and, in the absence of fraud, the payment of *any* sum, however small, under an agreement that it shall operate as a full discharge, will, when executed, amount to an accord and satisfaction, and be a complete bar to an action for the same injury, however inadequate it may be; so, too, where there are several joint wrong doers, a settlement with one operates as a discharge of all, and will be a bar to a recovery against the others; *Bank v. Curtis*, 37 Barb. (N. Y.) 317; *Ruth v. Turner*, 2 H. & M. 38; *Ellis v. Bitzer*, 2 Ohio, 89; *Stockton v. Frey*, 4 Gill (Md.) 406; *Phillip v. Kelly*, 29 Ala. 628; *R. R. Co. v. Reed*, 37 Ill. 484; but an accord and satisfaction must be specially plead, and can not be relied on under the general issue; *Phillip v. Kelly*, *ante*; *Kenyon v. Sutherland*, 9 Ill. 99; and the plea must set forth a discharge of the claim by an executed agreement predicated upon a legal consideration.

superior court does not oust the jurisdiction of the county court; (*k*) also, if the two suits are in their nature different, if the proceeding in one is in rem, and the other in personam, the pendency of the one can not be pleaded in suspension of the other. (*l*) If a plaintiff sues both at law and in equity for the same cause of action, he may be compelled to elect in which suit he will proceed. (*m*)

The court in many cases will relieve on motion where different actions are brought for the same cause, instead of putting the party to plead. Thus, where compensation in damages has been claimed for a trespass committed by several persons, and full compensation in damages has been received from one of the co-trespassers, the court will interfere summarily to prevent the plaintiff from seeking the same compensation a second time from another co-trespasser; but where the injury done is an injury to character from the publication of a libel, the court will not interfere in a summary way to prevent the continuance of proceedings against the publisher of the libel, on the ground that damages have been recovered by the plaintiff from another publisher of the same libel, as the nature and extent of the injury in each particular case depend upon the extent of the circulation of the libel. (*n*)

1355. *Plea of judgment recovered.* (*o*)—Whenever judgment has been recovered in an action of tort, the judgment, if pleaded, is a bar to any subsequent action for the same wrong, “for you shall not bring the same cause of action twice to a final determination; nemo debet bis vexari pro eadem causâ; and what is the same cause of action is, where the same evidence will support both actions.” (*p*) But by allowing judgment to go by default in an action to which there is a good defense, the defendant is not precluded from setting up such defense in any subsequent action in which the matter may arise between the same parties. (*q*) In an action for slander you can not have an action twice over against the same person for the utterance of the same words on the same occasion, but

(*k*) *M'Murray v. Wright*, 11 W. R. 35.
Bissil v. Williamson, 7 Exch. 391.

(*l*) *Harmer v. Bell*, 7 Moore, P. C. 281.

(*m*) *Simpson v. Sadd*, 24 Law J., C. P.

156.
 (*n*) *Martin v. Kennedy*, 2 B. & P. 69.

(*o*) As to the effect of a foreign judgment *in rem*, see *Castrique v. Imrie*, L. R., 4. Eng. & Ir. App. 414.

(*p*) *Kitchen v. Campbell*, 3 Wils. 304; 2 W. Bl. 827.

(*q*) *Howlett v. Tarte*, 31 L. J., C. P. 150.

every fresh utterance and publication of the slander create a fresh cause of action, so that you may have two actions for words spoken at different times, conveying distinct imputations upon the plaintiff; and judgment recovered in the first action would be no bar to the second action. Every plea alleging that the plaintiff brought a prior action against the defendant for the same wrong, and recovered judgment therein, (*r*) must contain in the margin thereof a statement of the date of such judgment; and, if such judgment be in a court of record, of the number of the roll, if any, on which the proceedings are entered. In default of such statement, the plaintiff will be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, is at liberty to sign judgment as for want of a plea. (*s*)¹

(*r*) See *Basham v. Lumley*, 3 C. & P. 489 n.

(*s*) Reg. Gen. Hil. T., 16 Vict., R. 10; 1 Ell. & Bl. App. iii.

¹ A plea or answer setting up a former adjudication must set forth facts that show either that *the matter in controversy was actually determined* in a former suit, or that it *might have been litigated* under the issues joined therein; *Columbus, &c., R. R. Co. v. Watson*, 26 Ind. 50; and so, where an award of arbitrators is plead in bar, it must show that the very matters embraced in the action are covered by the award; *Davison v. Johnson*, 13 N. J. 112.

The pendency of another suit for the *same cause of action* is matter of abatement, whether the other action is pending in another state or not, but, in order to be effectual, the plea must show that the court has jurisdiction over the action; *Ex parte Balch*, 3 McLean (U. S.) 221; *Boswell v. Tunnell*, 10 Barr. (Penn.) 958; *James v. Dowell*, 7 S. & M. (Miss.) 333; but the pendency of a former suit in the courts of a *foreign country* is not matter of abatement; *Williams v. Ayrault*, 31 Barb. (N. Y.) 364; but a *prior* suit can not be abated by the bringing of a second action for the same cause; the plea is only available when it sets forth the pendency of another action for the same cause *before* the bringing of the second action; *Hailman v. Buckmaster*, 8 Ill. 498; and the action must be between the *same parties*, and one in which a valid judgment can be obtained; *Cornelius v. Vanansdallen*, 3 Barr. (Penn.) 434; and the parties must stand in the same *relation* in the former action. That is, the fact that the defendant had previously brought an action against the plaintiff, in which the same questions and issues are involved, is not a matter of abatement. *New England Screw Co. v. Blevens*, 3 Blatch. C. C. (U. S.) 240. Being matter of abatement, it must be plead *before issue joined*, or is treated as waived. *Estep v. Larsh*, 21 Ind. 190. The plea need not state that the former action *is still pending*. It is enough if *it was pending when the suit was brought*, and its subsequent discontinuance does not avail to cure the cause of abatement. *Lee v. Hefly*, 21 Ind. 98.

If the record, when produced, shows on the face of it that the cause of action in the second suit is not the same as that for which judgment was recovered in the former action, the record at once disproves the plea, and the plaintiff will be entitled to a verdict. (t) But the varying of the form of the claim, where the claim is substantially the same, will not be allowed to defeat the operation of the rule. Therefore, where a servant in husbandry, being hired for a quarter of a year, and having entered the service, was discharged therefrom before the end of the quarter, and then sued her master in the county court for discharging her without reasonable cause, and her master obtained a verdict on the ground that he had good cause for dismissing her, and the servant then, after the quarter had elapsed, took out a summons before justices against her master to recover the quarter's wages, it was held that the question before the justices under this summons was substantially the same as that which had been adjudicated upon by the county court, viz., whether the dismissal was wrongful; that the decision in the county court was conclusive between the parties, and could not be reviewed by the justices. "It was open to the justices," observes COCKBURN, C. J., "to inquire whether the county court had jurisdiction, and whether the judge had determined that the discharge of the respondent was rightful; but as soon as they had ascertained both those facts in the affirmative, they were bound by law to treat the decision of the county court as conclusive between the parties, and not to allow the dispute as to the discharge being wrongful to be reopened." (u)

The recovering from a servant of damages for leaving the service of his master, has been held to be a bar to a second action against another person for seducing the servant away from his master's service, because the damage for the loss of service was compensated for in the first action. (v)

If two commit a joint tort, the judgment against one is of itself, without execution, a sufficient bar to an action against the other for the same cause; (y) and whenever the cause of action in the two suits is identical, the recovery of judgment

(t) *Wadsworth v. Bentley*, 23 Law J. Q. B. 3.

(u) *Routledge v. Hislop*, 29 Law J. M. C. 90.

(v) *Bird v. Randall*, 3 Burr. 1345.

(y) *King v. Hoare*, 13 M. & W. 504-506; *Brinsmead v. Harrison*, L. R., 6 C. P. 584.

in the one is a bar to the other. (*z*) A judgment, therefore, in a county court is a bar to an action on the same subject-matter in any other court. (*a*) If, therefore, two persons jointly convert goods, and one of them receives the proceeds, you can not, after a judgment against one in trover, which is unsatisfied, have an action against the other for the same conversion; or, having once elected to treat the matter as a wrong, bring an action against the other for money had and received, to recover the value of the goods. (*b*) But a judgment obtained upon some technical collateral point, not touching the substantial cause of action between the parties, is no bar to a subsequent action. If the plaintiff makes a mistake in his declaration, and the defendant demurs, and judgment is given for him, the plaintiff may rectify the mistake in a second action. (*c*) "Where the declaration in the second action is framed in such a manner that the causes of action may be the same as those in the first suit, it is incumbent on the party bringing the second action to show that they are not the same." (*d*) "The plaintiff who brings a second action, ought not to leave it to nice investigation to see whether the two causes of action be the same; he ought to show, beyond all controversy, that the second is a different cause of action from the first." Where there are two distinct demands not in the least blended together, and the plaintiff has failed through inadvertence in proving one of them, he may maintain a second action for the other. (*e*) Whenever the same point was not in issue in the prior action, the judgment in such prior action can have no effect upon the second action; (*f*) but when the pleading and the state of the record are such that the plaintiff might, if he had thought fit, have recovered his whole demand in the first action, he can not afterwards be allowed to recover it in a second action.

Recovery of judgment upon a contract with insurers against loss is, as we have seen, no bar to an action against

(*z*) *Slade's case*, 4 Co. 94b. *Phillips v. Berryman*, 3 Doug. 288.

(*a*) *Austin v. Mills*, 9 Exch. 288; 23 Law J., Exch. 42.

(*b*) *Buckland v. Johnson*, 15 C. B. 161; 23 Law J., C. P. 204. *Brown v. Wooton*, Cro. Jac. 73. *Brinsmead v. Harrison*, 1848.

(*c*) *Lampen v. Kedgewin*, 1 Mod. 207.

(*d*) *Bagot (Lord) v. Williams*, 3 B. & C. 239.

(*e*) *Seddon v. Tutop*, 6 T. R. 609.

(*f*) *Carter v. James*, 13 M. & W. 137. *Howlett v. Tarte*, 31 Law J., C. P. 146.

the wrongdoer who occasioned the loss, although the insurer has received a full indemnity. (*g*)

A plea of the recovery of judgment and damages in an action for a false imprisonment upon a charge of felony, is no answer to an action for a malicious prosecution for the same felony. "It is altogether," observes PARKE, B., "a different cause of action. The taking a man upon a charge of felony, is distinct from the act of going before a grand jury, and falsely and maliciously taking an oath to get a bill found against him for the same felony, and then going before a petit jury and trying to induce them to find him guilty. (*h*)

Where the second action is founded upon some special damage flowing from the original wrong, a plea of judgment recovered in an action for such original wrong, will be a bar to such second action, unless the special damage alleged in the declaration be shown to constitute a new cause of action. Thus, where the plaintiff in his declaration alleged that the defendant beat the plaintiff's head against the ground, and that the plaintiff brought an action of assault and battery for that and recovered damages, and that since the recovery of such damages, by reason of the same battery, a piece of the plaintiff's skull had come out, and the defendant pleaded in bar the recovery mentioned in the declaration, and averred it to be for the same assault and battery, and the plaintiff demurred, and it was urged that this subsequent damage was a new matter which could not be given in evidence in the first action, when it was not known, it was held that the recovery of damages in the first action was an absolute bar to any subsequent action for the same battery. (*i*)

1356. *Continuing injuries—Judgment recovered.*—But where the injury is of a continuing nature, the bringing of an action and the recovery of damages for the perpetration of the original wrong does not prevent the injured party from bringing a fresh action for the continuance of the injury. Thus, if a building has been wrongfully erected upon the plaintiff's land, and the plaintiff has brought an action and recovered damages for the trespass, he is not thereby precluded from bringing a

(*g*) *Yates v. Whyte*, 4 B. N. C. 282 ;
ante.

(*h*) *Guest v. Warren*, 9 Exch. 379 ; 23
Law J., Exch. 121.

(*i*) *Fetter v. Beale*, 1 Salk. 11.

fresh action and recovering fresh damages for the continuance of the erection. If the defendant, for example, has thrown a heap of stones on the land of the plaintiff, and leaves them there, the defendant is responsible in trespass from day to day until they are removed. Thus, where the trustees of a turnpike road built buttresses on the land of the plaintiff to support the road, and the plaintiff thereupon sued them and their workmen in trespass for such erection, and accepted money paid into court in full satisfaction of the trespass, it was held that after notice to the defendants to remove the buttresses, and a refusal to do so, the plaintiff might bring another action of trespass against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar. (*k*)¹

So where an action was brought against the defendant for obstructing an ancient window of the plaintiff's house, by keeping and continuing a certain roof before then wrongfully erected adjoining the said house, to the injury of the plaintiff's reversion, and a former judgment recovered by the plaintiff against the defendant for the same grievance was pleaded in bar, and the plaintiff replied that the grievances were not the same, and issue was joined thereupon, and it appeared that on a former trial between the same parties of an action for an injury to the plaintiff's reversion in the same premises by erecting and keeping up the roof, the plaintiff recovered damages, it was held that such recovery was no bar to the second action; for if the erection of the roof in the first instance was an injury to the reversion, the continuance of it subsequently to the first action was a fresh injury to the reversioner, in respect of which a fresh action was maintainable. (*l*)

(*k*) *Holmes v. Wilson*, 10 Ad. & E. 503.

(*l*) *Shadwell v. Hutchinson*, 2 B. & Ad. 97.

¹ In all cases where the injury is of a *continuous* nature, every new injury is a ground of action, and the person whose property is injured thereby may maintain separate and distinct suits therefor, each embracing all causes of action therefrom up to the time of action brought, and the pendency of a former suit is not a matter of abatement, for, although the damage is only enhanced by the act complained of in the former actions, yet the *cause* of action is entirely distinct, and the damage therefrom *can not* be recovered in the former suit. *Cohocton Stove Co. v. R. R. Co.*, 52 Barb. (N. Y.) 396; *Clowes v. N. Staffordshire Potteries Co.*, L. R., 8 Ch. App. 102; *Beckwith v. Griswold*, 29 Barb. (N. Y.) 291.

But where the injury is not of a continuing nature, and the damages which flow therefrom, when they accrue, have accrued once for all, then the recovery of judgment in a previous action is, as we have seen, a good bar. Thus, if a man has dug a pit, or made a trench in another's land, and an action has been brought and damages have been recovered for the injury, such recovery of damages is a complete satisfaction for the wrong done in cutting into the plaintiff's land, and no other action is maintainable; (*m*) but where a man digs a trench or deepens a ditch in his own land, which has the effect of injuriously diverting water from his neighbor's stream, or of diminishing the supply of water to a neighbor's mill, then there is a continuing injury so long as the trench remains open, and the ditch deepened, and the diverted water is allowed to run through it to the injury of the neighboring proprietor.

When both landlord and tenant are responsible for the injury, the plaintiff may proceed against either at his election; but he can have but one satisfaction for the same wrong, and having sued and recovered judgment against one, he can not recover against the other. (*n*)

1357. *Effect of the recovery of judgment in actions for the conversion of property.*—We have already seen, that by a recovery of judgment in an action for the conversion of property, the plaintiff's right of property in the things converted is barred, and the property vests in the defendant in the action. (*o*) The property in the goods is changed by relation from the time of the conversion. It is not, however, the recovery only, but the recovery coupled with the payment of the damages, that changes the property. (*p*)

1358. *Recovery of judgment in rem* is no bar to proceedings in personam, and, therefore, a judgment in rem in the admiralty court is not pleadable in bar of an action for damages. (*q*) So, conversely, a judgment in personam, *e. g.*, in an action at law for damages, is no bar to a suit in the court of admiralty in rem. Where there is a remedy both in personam and in rem a

(*m*) Clegg v. Dearden, 12 Q. B. 591.

(*n*) Rosewell v. Prior, 2 Salk. 460; 12 Mod. 636. Brent v. Haddon, Cro. Jac. 555.

(*o*) Cooper v. Shepherd, 3 C. B. 272;

Holroyd, J., in Morris v. Robinson, 3 B. & C. 206.

(*p*) Brinsmead v. Harrison, L. R., 6 C. P. 584.

(*q*) Nelson v. Couch, 33 L. J., C. P. 46.

person who has resorted to one of the remedies may, if he does not thereby get fully satisfied, resort to the other. (r)

1359. *Plea of the bankruptcy of the plaintiff.*—By s. 142 of the Common Law Procedure Act, 1852, 15 & 16 Vict, c. 76, it is enacted, that the bankruptcy of the plaintiff in an action shall not be pleaded in bar to such action, unless the assignees shall decline to continue and give security for the costs thereof, upon a judge's order to be obtained for that purpose, within such reasonable time as the judge may order, but the proceedings may be stayed until such election is made; and in case the assignees neglect or refuse to continue the action and give such security within the time limited by the order, the defendant may, within eight days after such neglect or refusal, plead the bankruptcy.

1360. *Pleas of the Statute of Limitations.*—By 21 Jac. 1, c. 16, s. 3, it is enacted, that all actions of trespass quare clausum fregit, all actions of trespass, detinue, trover, and replevin for taking away of goods and cattle, all actions upon the case, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, shall be commenced within the time and limitation thereafter expressed, and not after; that is to say, the said actions upon the case other than for slander, and the said actions for trespass, detinue, and replevin for goods or cattle, and the said actions of trespass quare clausum fregit, within six years next after the cause of such actions or suit, and not after; and the said action of trespass, of assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after; and the said actions upon the case for words within two years next after the words spoken, and not after. But (s. 4) if in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint or writ, the plaintiff, his heirs, executors, &c., may commence a new action within a year after such judgment reversed, or given against the plaintiff, and not after. And by 19 & 20 Vict. c. 97, s. 10, absence beyond seas, or imprisonment at the time of the accrual of the cause of action, is no

(r) *Yeo v. Tatem*, L. R., 3 P. C. C. 696.

longer to have the effect of extending the period of limitation. This section is retrospective. (s) ¹

1361. Commencement of the period of limitation.—The time of limitation begins to run from the accrual of the cause of action; and when an act has been done which is lawful in itself, but becomes unlawful only in case it causes damage and injury to another, the time of limitation will run, not from the period of the doing of the lawful act, but from the time of the accrual of the damage, and the consequent conversion of the act which was lawful in its inception into a tort. Thus, where one person is possessed of the surface of land, and another is owner of the subsoil, and the owner of the subsoil excavates therein for minerals, without causing any immediate apparent injury to the surface, but damage ultimately ensues, and the surface subsides, the time of limitation will begin to run from the time when the damage manifested itself, and not from the period of the making of the excavation. (t) ² Whenever one

(s) *Cornill v. Hudson*, 8 E. & B. 429; Q. B. 378; 34 ib. Q. B. 181. *Ld. Wensleydale*, *Rowbotham v. Wilson*, 8 H. L. L. R., 4 Ch. App. 735. C. 359; 30 Law J., Q. B. 965. See

(t) *Bononi v. Backhouse*, 28 Law J., *Smith v. Thackerah*, L. R., 1 C. P. 564.

¹ If the Statute of Limitations is relied upon as a matter of defense, it must be specially plead in bar, and can not be insisted on under the general issue. It is a personal privilege of the party pleading it, and unless plead is treated as waived; *Bank v. Waterman*, 26 Conn. 324; *In re Young's Estate*, 3 Md. Ch. 461; *Spear v. Griffin*, 23 Md. 418; *Partridge v. Mitchell*, 3 Edw. Ch. (N. Y.) 180; and the statute of the *forum* is alone available. The fact that the parties reside in New York, and the cause of action is barred under the Statute of Limitations there, will be of no avail if an action is brought in another state, and the court *has jurisdiction of the defendant*; unless the statute of the forum has run upon the claim, it is no bar; *Medbury v. Hopkins*, 3 Conn. 472; *Blackburn v. Morton*, 18 Ark. 384; *Upton v. Hunter*, 2 W. Va. 83; *Thompson v. R. R. Co.*, 36 Barb. (N. Y.) 79; but in Ohio, by special statute passed in 1830, no action can be maintained in the courts of that state upon which the statute has run in another state; *Worth v. Wilson*, *Wright* (Ohio), 152; *Horton v. Horner*, 14 Ohio, 437; and so in Texas; *Bryton v. Bouton*, 10 Tex. 62; *Thompson v. Berry*, 26 Id. 263; Kentucky; *Cargile v. Harrison*, 9 B. Mon. (Ky.) 518; Massachusetts; *Halsey v. McLean*, 12 Allen (Mass.), 439; but the statute bar must be perfected in such other state. The statute does not run against the state; *State v. Joiner*, 23 Miss. 500; *Lenasser v. Washburn*, 11 Gratt. (Va.) 572; *Alton v. Transn. Co.*, 12 Ill. 38; *U. S. v. White*, 2 Hill (N. Y.) 59; but it does run against a municipal corporation the same as against an individual; *County v. Powell*, 22 Mo. 525; nothing less than sovereignty exempts a party from its operation; *Lane v. Kennedy*, 13 Ohio St. 42.

² Whenever an injury is *complete* as a legal injury, however slight, the statute begins to run. But, although the *promoting cause* of the injury may have preceded the injury itself for a long time, the statute does not commence to run until an *actual*

person does anything or permits anything to be done on his own land which causes injury to his neighbor, and the injury is of a continuing nature, the cause of action, as we have seen, continues, and is renewed, *de die in diem*, as long as the cause of the continuing damage is allowed to continue. If a man, by digging and constructing basins and canals on his own land,

legal injury ensues; *Bank v. Waterman*, 26 Conn. 324; by *legal injury* is meant such injury as entitles a party to maintain an action, even though the damage is merely nominal; therefore, where the injury is such that a *right of action accrues*, the statute begins to run from that time, however slight the damage; *Richman v. Richman*, 10 N. J., 114; *Jones v. Conway*, 4 Yeates (Penn.) 109; *Hardee v. Dunn*, 13 La. Ann. 161. In an action of trover, where the conversion is dependent upon a demand and refusal, the statute does not begin to run until after demand, but where no demand is necessary, the statute begins to run from the time of conversion; *Cadman v. Rogers*, 10 Pick. (Mass.) 112; *Read v. Markle*, 3 Johns. (N. Y.) 523.

The fact that the injurious consequence *is not known*, does not prevent the operation of the statute *from the time when the injury was done and a cause of action accrued*; *Gastin v. Jefferson*, 15 Iowa, 185; *but the injury must be complete as a legal injury*. Thus in *Polly v. McCall*, 37 Ala. 20, the defendant diverted the water of a brook by means of a ditch and hole, which, when first constructed, produced no injury to the plaintiff's estate, except at times of extraordinary floods. In time, however, the ditch became partly filled with sand, and set the water back upon the plaintiff's land, and flooded it. The court held that the statute only began to run from the time when legal injury was inflicted upon the plaintiff, and hence the defendant could not claim by prescription except from the time when such injury accrued. See also *Mitchell v. Mayor of Rome*, 49 Ga. 19; *Napier v. Bulwinkle*, 5 Rich. (S. C.) 311.

In cases of fraud, in equity, the statute only begins to run *from the time when the fraud was discovered* by the person defrauded. *Bricker v. Lightner*, 40 Penn. St. 199; *Mayne v. Griswold*, 3 Sandf. (N. Y.) 463; *Donnelly v. Donnell*, 8 B. Mon. (Ky.) 113; *Curry v. Allen*, 34 Cal. 254; *Shields v. Anderson*, 3 Leigh. (Va.) 729; *Longworth v. Hunt*, 11 Ohio St. 194; *Haywood v. Marsh*, 6 Yerg. (Tenn.) 69; *Raymond v. Simonson*, 4 Blackf. (Ind.) 77; *Craft v. Arthur*, 3 Dessan (S. C.) 223; *Stocks v. Leonard*, 8 Ga. 511; *Wilson v. Ivy*, 32 Miss. 233; but at law, the limitation begins to run, except where saved by statute, from the commission of the fraud; *Ellis v. Kelso*, 18 B. Mon. (Ky.) 296; except in cases where a relation of trust and confidence exists; *Wilson v. Ivy*, 32 Miss. 233; *Nudd v. Hamblin*, 8 Allen (Mass.), 230; *Coolidge v. Allcock*, 30 N. H. 329. A fraudulent concealment of the origin, or of the cause of action itself, is a good reply to a plea setting up the statute of limitations; *Allen v. Mille*, 17 Wend. (N. Y.) 202; *McKown v. Whittemore*, 31 Me. 448; *Turnpike v. Field*, 3 Mass. 201; *Smith v. Bishop*, 9 Vt. 110; *Douglass v. Elkins*, 28 N. H. 25; *Hoyle v. Jones*, 35 Ga. 40; *Kane v. Cook*, 8 Cal. 449; but mere ignorance of one's rights does not affect the operation of the statute; it must, in order to repel its force, *be an ignorance induced by the fraud of the defendant*, and such as would not have been discovered by the exercise of due diligence on his part; *Martin v. Bank*, 31 Ala. 115; *Bossard v. White*, 9 Rich. (S. C.) 483; *R. R. Co. v. Bridges*, 7 B. Mon. (Ky.) 556.

causes a stream of water to flow against his neighbor's wall, and gradually to undermine it, so that at last the wall falls, the period of limitation runs from the time of the falling of the wall, and not from the time of the construction of the basins and canals. (u)¹ And if a man, by digging on his own land, wrongfully lays open the foundations of his neighbor's wall, and causes them to be gradually weakened by the effect of flowing water, rain, and frost, so that at last the wall falls, the time of limitation runs from the time of the falling of the wall, and not from the time of the excavation of the soil. (v) And in all cases of continuing nuisances and injuries arising from a continuing wrongful act, there is a continuing cause of action. (x) Where slanderous words are uttered which create no cause of action unless they are followed by special damage, the period of limitation runs from the time that special damage accrues, and not from the time of the utterance of the words. (y)

Where an action is brought against a justice of the peace for a false and malicious imprisonment, every continuance of the imprisonment *de die in diem* is, in point of law, a new imprisonment; and, therefore, the time of limitation runs from the last day of such imprisonment, and not from the time of the issuing of the warrant. (z)

As a general rule, the period of limitation runs from the time of the commission of the wrongful act, and not from the time of the knowledge of that act by the plaintiff, there being no proof of any fraud practiced by the defendant in order to conceal that knowledge from the plaintiff. (a) Thus, in actions for negligence or for a breach of duty, the cause of action accrues at the time of the occurrence of the act of negligence or the breach of duty, and not from the period of its discovery by the plaintiff. If, therefore, an attorney or agent has been guilty of a neglect of duty, and the injurious consequences thereof do not come to the knowledge of the principal until

(u) Gillon v. Boddington, Ry. & M.
161.

(v) Roberts v. Read, 16 East, 217.

(x) Whitehouse v. Fell, 30 Law J., C.
P. 305.

(y) Saunders v. Edwards, 1 Sid. 95;
see *ante*.

(z) Hardy v. Ryle, 9 B. & C. 608.
Massey v. Johnson, 12 East, 68.

(a) Granger v. George, 7 D. & R. 730;
5 B. & C. 149.

¹ Ludlow v. H. R. R. Co., 6 Lans. (N. Y.) 128; Webb v. Bird, 13 C. B. (N. S.) 843; Elliott v. N. E. R. R. Co., 10 Ho. Lord's Cas. 383; but, *contra*, see Kerns v. Schoonmaker, 4 Ohio, 331.

after the lapse of six years from the occurrence of the wrongful act, the right of action of the principal is barred. (b) But in actions of detinue, where the defendant has goods under his charge under an implied contract to re-deliver them on request, and has wrongfully dealt with them without the knowledge of the owner, the period of limitation runs either from the date of such conversion, or, at the option of the owner, from the date of the defendant's breach of duty by refusing to redeliver on request. (c)

1362. *Extension of the period of limitation in certain cases.*—When the action abates by the death of the plaintiff, or is abated without default of the plaintiff by the act of God, and the period of limitation has run out before the commencement of a fresh action, the courts have indulged the plaintiff with the liberty of suing out a new writ, so that he did it within a reasonable time. One mode of measuring the time was with reference to the time it would occupy in getting to the place where a new writ was to be obtained. Hence the writ got the name of a writ of journey's accounts. But there was no exact limit of time to govern the court in saying what was a reasonable time in getting the writ, and the question is, whether the action is, under the particular circumstances of the case, brought within a reasonable period after the expiration of the time of limitation. (d)¹

1363. *Equitable pleas and defenses.*—By 17 & 18 Vict. c. 125, s. 83, it is enacted, that it shall be lawful for every defendant, or for a plaintiff in replevin, in any case in any of the superior courts, in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defense, and these courts are thereby empowered to receive such defense by way of plea, provided that such plea shall begin with the words "for defense on equitable grounds," or words to the like effect. Any such matter (s. 84) which, if it arose before or during the time for pleading, would be an answer to the action by way of plea, may, if it arise after the lapse of the

(b) *Howell v. Young*, 5 B. & C. 265.

(d) *Curlewis v. Mornington*, 27 Law

(c) *Wilkinson v. Verity*, L. R., 6 C. P. J., Q. B. 439.

206,

¹ For instances where the statute is suspended, see the statutes and decisions in each state.

period during which it could be pleaded, be set up by way of *auditâ querelâ*. The plaintiff may reply (s. 85), in answer to any plea of the defendant, facts which avoid such plea upon equitable grounds; provided that such replication shall begin with the words, "for replication on equitable grounds," or words to the like effect. But it is provided (s. 86), that in case it shall appear to the court, or any judge thereof, that any such equitable plea, or equitable replication, can not be dealt with by a court of law so as to do justice between the parties, it shall be lawful for such court or judge to order the same to be struck out.

Matters which would entitle the defendant to an unconditional and perpetual injunction in equity to restrain an action in respect thereof, may, under this statute, be pleaded by way of equitable defense; but if the matters of defense are not such as to entitle the defendant to unconditional relief, they can not be made the foundation of a good, equitable plea. (*e*) Where the plaintiff complained of three grievances, one relating to the obstruction of his lights, another relating to the taking away of the support of his building, and a third to the obstruction of his chimneys, and causing them to smoke, and the defendant pleaded by way of equitable defense that the whole of the grievances complained of arose from the pulling down of an ancient house, and the building of another messuage on the site of it, and that the acts causing the grievances complained of were done with the knowledge, consent, and acquiescence of the plaintiff, and upon the faith of his approval of the mode in which they were done, it was held that the plea disclosed a good equitable defense; but that it was well answered by a replication setting up that the acquiescence and consent upon the faith of which those acts were done were obtained from the plaintiff by the representations of the defendant, that none of the grievances complained of would take place if the plaintiff would give his consent as alleged. (*f*)

1364. *Joinder of issue*.—Either party may plead in answer to the plea or subsequent pleading of his adversary, that he joins issue thereon, and such joinder of issue operates as a denial of the substance of the plea or other subsequent plead-

(*e*) *Hyde v. Graham, Wakley v. Froggatt ante.*

(*f*) *Davies v. Marshall, ante. Rawlins v. Wickham, 3 De G. & J. 304.*

ing and an issue thereon; and in all cases where the plaintiff's pleading is in denial of the pleading of the defendant, or some part of it, the plaintiff may add a joinder of issue for the defendant (15 & 16 Vict. c. 76, ss. 76-79). The object of this new form of replication, "the plaintiff joins issue on each of the pleas," merely enables a party in a compendious manner to traverse all those allegations in a plea which he could have traversed before; but such matters as, before the above Act, must have been replied specially, must still be so replied; and all matters which must have been pleaded by way of new assignment, must still be so pleaded. (*g*)

1365. *Pleadings construed distributively.*—Pleas of payment and set-off, and all other pleadings capable of being construed distributively, are to be taken distributively; and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by a jury, a verdict is to pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be answered. (*h*)

1366. *New assignments.*—"Where the defendant answers what may reasonably be considered the gist of the trespass described in the declaration, it will be presumed that the action is carried on only for that which the defendant has thus attempted to justify, unless the plaintiff intimates by a new assignment that the defendant has overlooked a part of the grievances he complains of, or has altogether misapprehended his meaning." (*i*) Where the defendant has committed several trespasses, either upon the person, goods, or lands of another, some of which are justifiable, and others not, and the action is brought for those trespasses which are not justifiable, but the defendant by his plea answers those only which are justifiable, the plaintiff should by his replication make a new assignment, showing the trespasses for which the plaintiff proceeds. (*k*)

(*g*) *Glover v. Dixon*, 9 Exch. 159, *Huddart v. Rigby*, *infra*.

(*h*) 15 & 16 Vict. c. 76, s. 75. Reg. Gen. Hil. Term, 16 Vict., No. 62; 1 Ell. & Bl. App. xiii. *Patterson v. Harris*, 31 Law J., Q. B. 277.

(*i*) *Monprivat v. Smith*, 2 Campb.

76. As to new assignment, see the

note to *Taylor v. Cole*, 1 Smith's L. C. 115, 6th. ed. *Lambert v. Hodgson*, 1 Bing. 319.

(*k*) See the notes to *Greene v. Jones*, 1 Saund. 299. *Robertson v. Gauntlett*, 16 M. & W. 297. *Huddart v. Rigby*, 1 R., 5 Q. B. 139.

And where the declaration is general, and the subject-matter thereof divisible, and the plea apparently answers the whole cause of action, but in reality answers only a part, the plaintiff must new assign as to the part not really answered. Thus, where the plaintiff complained that the defendant entered upon the plaintiff's close and cut down one hundred yards of railing, and the defendant pleaded a right of way over the close, and justified the cutting down of the rails, because they obstructed him in the exercise of his right of way, and the plaintiff merely traversed the allegation that the rails were in the highway, and it appeared that some of the rails cut were there, it was held that, upon this issue, both parties must be taken to have agreed that those were the rails in question, and that if the plaintiff meant to go for rails cut down on other parts of his close, he should have so stated by a new assignment. (*l*)

The object of a new assignment, therefore, is to correct a mistake occasioned by the generality of the declaration, and is in the nature of a replication to the defendant's plea; or it may be more properly considered as an explanation of the declaration, setting forth the true ground of complaint, as being different from that which is covered by the plea. (*m*) The 15 & 16 Vict. c. 76, ss. 87, 88, now regulate the pleading of new assignments, and forms of new assignment are given by schedule B. Nos. 55, 56, and 57, to that act.

There can be no new assignment for a cause of action not included in the declaration. A new assignment, therefore, of an entirely new cause of action is bad. The object of it is to inform the defendant that there is another cause of action included in the declaration beyond that which the defendant has answered by his plea, and that the plaintiff means to rely upon the last-named cause of action, and not the cause of action to which the plea is pleaded. (*n*) A new assignment admits that the declaration is well answered by the plea. If, therefore, the plaintiff fails to take issue on the plea, but new assigns a distinct substantive trespass, and fails to prove it the defendant will be entitled to a verdict. Where, in tres

(*l*) *Bracegirdle v. Peacock*, 8 Q. B. 186.

(*m*) *Stephens on Pleading*, pp. 205, 206, 1st ed. *Ellison v. Isles*, 11 Ad. &

E. 671. *Lancashire Waggon Co. v. Fitzhugh*, 6 H. & N. 502.

(*n*) *Rogers v. Spence*, 12 Cl. & Fin 719.

pass, the defendant pleaded that the locus in quo was part of a common which had been allotted to him, to which the plaintiff now assigned that the trespass complained of was in another place, and upon its being admitted in the opening of the plaintiff's counsel to the jury that the trespass was in the same place, but that the defendant had no title to it, the chief justice said that was decisive against the plaintiff, and that the defendant was entitled to a verdict. (o)

SECTION II.

PROCEEDINGS AND EVIDENCE AT THE TRIAL.

1367. *Right to begin.*—The sixteen judges have made a resolution that the plaintiff shall begin at the trial in all actions for personal injuries, libel, and slander, although the general issue may not be pleaded, and the affirmative be on the defendant. (p) And it is now held that the plaintiff should bring his own cause of complaint before the court and jury in every case where he has anything to prove, either as to the facts necessary for his obtaining a verdict, or as to the amount of damages to which he conceives the proof of such facts may entitle him. (q)

Under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 18, if counsel announces his intention not to adduce evidence, he can not afterwards do so. (r)

1368. *Proof on the part of the plaintiff.*—If a declaration discloses a state of facts upon which an action may be maintained, although there be neither malice nor fraud, the plaintiff is not bound to prove either, though both be alleged, and may recover upon the liability which the facts disclose, though fraud and malice be disproved, just as where a defendant who is charged with doing an act willfully may be made responsible for the act and its consequences, whether done willfully or not. (s)

(o) Anon. cited 16 East, 86. Oakley v. Davis, ib. 82. Atkinson v. Matteson, 2 T. R. 172.

(p) Carter v. Jones, 6 C. & P. 64; 1 M. & Rob. 281.

(q) Mercer v. Whall, 5 Q. B. 458. Taylor on Evidence, §§ 353, 354, 4th ed.

(r) Darby v. Ouseley, 1 H. & N. 8.

(s) Swinfen v. Ld. Chelmsford, 5 H. & N. 920.

When affirmative pleas of justification are put upon the record with the general issue, the plaintiff's counsel may, if he pleases, not only prove the facts of the declaration, but also may, in the first instance, and before the defendant's case is gone into at all, go into any evidence which tends to destroy the effect of the justification, by way of anticipating the defense; or he may, if he pleases, content himself with proving the fact on the general issue, and then close his case, leaving the defendant to make out his justifications as he can, and afterwards go into evidence, in reply, as to the justifications. But if the plaintiff's counsel, knowing by the pleas what the defense is to be, close their case, and trust to evidence in reply, they are restricted to such evidence as goes exactly to answer the case proved, or attempted to be proved, by the defendant in support of the justifications, and they can not be allowed to go beyond it. (*t*)

Where an act of parliament prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. The plaintiff must, therefore, prove some special damage, some peculiar injury, beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law. (*u*)

1369. *Effect of payment of money into court.*—"Formerly it was supposed by the profession that by payment of money into court in an action of tort the defendant admitted the cause of action sued for, and that as the plaintiff was at liberty to prove any cause of action he pleased, consistent with the declaration, it was the duty of the defendant to take care by the form of his pleading or by obtaining particulars on summons, that his admission by payment into court was not used to his prejudice; but of late years this rule has been greatly modified, and it has been held that where in an action of tort the declaration is general and unspecific, the payment of money into court, though it admits a cause of action, does not admit the cause of action sued for, and that the plaintiff must give evidence of the cause of action sued for before he can have larger damages than the amount paid into court. On

(*t*) *Pierpoint v. Shapland*, 1 C. & P. 447.

(*u*) *Chamberlaine v. Chester and Birkenhead Rail. Co.*, 1 Exch. 877.

SEC. II. *PLEADING IN EX DELICTO.*

the other hand, if the declaration is specific, so that nothing would be due to the plaintiff from the defendant, unless the defendant admitted the particular claim made by the declaration, the payment of money into court admits the case of action sued for, and so stated in the declaration. If the breach is single, and the damages entire, then of course, it becomes under such circumstances a mere question of damages; but if the damages be compounded of several things, although the payment of money into court may, from the form of declaration, admit the particular cause of action sued for, still it may be necessary to prove the cause of action, with a view to the damages." (v)

1370. *Primary and secondary evidence.*—"Our ancestors," observes BEST, C. J., "were wise in making it a rule of law that in all cases the best evidence that could be had should be produced; for if the best evidence be kept back, it raises a suspicion that, if produced, it would falsify the secondary evidence on which the party has rested his case." Where in an action against a wrong-doer for an injury to the reversion, the plaintiff proved that the premises were devised to him, and that the occupier held as tenant to him, the latter fact being established by oral evidence only, though it appeared on cross-examination that he held under a written agreement, the Court of Common Pleas were divided in opinion whether the reversion of the plaintiff had been sufficiently proved. (y)

Where a witness, not a party to the cause, and whose answer will affect the rights of others, is asked a question respecting the contents of a written document, the document itself must, in general, be produced, as being the primary and best evidence of what it is, whether the inquiry arise on examination-in-chief, cross-examination, or re-examination, or goes to the credit of the witness. (z) In an action for the infringement of copyright in a musical composition, therefore, a witness was not allowed to be asked, in support of the defendant's plea that the composition in question was not first published in England, whether he had seen printed copies of it for sale in a certain shop in a foreign town, at a date previous to the registration

(v) *Jervis, C. J., Perren v. Monm. Rail. Co.*, 11 C. B. 865.

(y) *Strother v. Barr*, 5 Bing. 151. See *Fenn v. Griffiths*, 6 Bing. 533. *Augustin*

v. Challis, 1 Exch. 279.

(z) *The Queen's case*, 2 B. & B. 286
Macdonnell v. Evans, 11 C. B. 130.
Darby v. Ouseley, 1 H. & N. 6.

of the copyright in England, no such copies being produced in court, and no proof being given that they could not have been produced. (a) But this rule did not of course apply to oral statements. (b) And a witness may now be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown him; but if it is intended to contradict him by the writing, his attention must be called to it before it can be used for that purpose. (c) To exclude oral evidence respecting the contents of a written document, it should appear either that the document itself would be evidence upon the issue if produced, or to contradict the witness if he answered in a particular way, or that the precise terms and language of the writing itself were necessary to be referred to, in order to answer the question. (d)

A party to the cause is also allowed to affect his own rights by parol admissions respecting the contents of written documents, if he chooses to answer the questions that may be put to him respecting them. (e) Thus, where in an action for fraudulent misrepresentation as to the price which certain seed would command in London, whereby the plaintiff had been induced to sell seed to the defendant at a lower price than he otherwise would have done, the plaintiff's counsel proposed to ask the defendant, in cross-examination, whether a similar action had not been brought against him in the county court, what was the subject of that action, and what its result, and the defendant's counsel objected to the question on the ground that it related to the contents of a judicial proceeding, the record of which would be the primary and best evidence, it was held that as the defendant was a party to the proceeding, what he said as to the result of it, and the verdict of the jury, would be evidence against him, whether it related to a record or writing or not, and that the question, therefore, might be put, but that he had the option of answering or not as he pleased. (f)

"Although," observes HOLROYD, J., "it be a general rule of law that the best evidence is to be produced, yet that rule is not to be taken literally, for, with respect to evidence of a per-

(a) *Boosey v. Davidson*, 13 Q. B. 267.

(b) *Crowley v. Page*, 7 C. & P. 789.

(c) 17 & 18 Vict. c. 125, ss. 24, 103.

Sladden v. Serjeant, 1 F. & F. 323.

(d) *Henman v. Lester*, *infra*.

(e) *Ante*.

(f) *Henman v. Lester*, 12 C. B., N. S. 789; 31 Law J., C. P. 370.

son holding an office, such as constable, or holding any official character or appointment, it is not necessary to produce the actual appointment, though it be made under seal. It is sufficient to show," (as against a wrong-doer), "that the party is actually in the exercise of his office or public employment, and constantly discharging the official or public duties thereof."

(*g*) Evidence, also, of persons being trustees or commissioners of turnpikes and excise officers, may be given by proof of their having acted as such, without proof of their appointment. (*h*)

Further, the adverse party to a suit may have so treated and dealt with a copy of an original document, as to have admitted the truth of the contents of the copy, and rendered it receivable as primary evidence against him by way of an admission. Thus, a document in the possession of a lord of a manor which he represents to contain a true account of the customs of the manor, would be admissible as primary evidence against him, although it purport to be a copy of the decree of the Court of Chancery. (*i*) So in an action of replevin, where the question was as to the boundary of a certain estate, depositions made by the defendant in a prior suit against him in chancery by a stranger to the present action were held admissible against him, at all events to the extent and for the purpose for which they were so used by him in the former suit. (*k*)

1371. *Notice to produce a written document to let in secondary evidence of its contents.*—Whenever a written instrument which requires to be proved is in the hands of the opposite party, notice to produce it is, generally speaking, necessary, before secondary evidence of its contents can be given. If the document is seen in court at the trial, in the hands of the adverse party or his attorney, notice to produce it at once is all that is required. (*l*) But it is open to the opposite party to show that it was not in his possession or under his control at the time the notice was served. Where, therefore, the plaintiff, in an action for an excessive distress, proposed to give secondary

(*g*) *Brewster v. Sewall*, 3 B. & Ald. 302. *Dexter v. Hayes*, 11 Ir. C. L. R. 106.

(*h*) 3 Geo. 4. c. 126, s. 134; 7 & 8 Geo. 4. c. 53, s. 17.

(*i*) *Price v. Woodhouse*, 3 Exch. 616.

(*k*) *Richards v. Morgan*, 33 Law J. Q. B. 115.

(*l*) *Snelgrove v. Stevens*, Car. & M. 508; *Dwyer v. Collins*, 7 Exch. 639.

evidence of the warrant of distress, and the defendant proved that it had been handed over to the Commissioners of Excise pursuant to the statute, it was held that secondary evidence of its contents was not admissible. (*m*)

However, various instances may be mentioned where notice to produce a writing is unnecessary in order to let in secondary evidence of its contents. This is the case where the instrument produced and that to be proved are duplicate originals; where the instrument to be proved is a notice, such as a notice to quit; (*n*) also where, from the nature of the action, the opposite party must know that he is charged with the possession of the document, as where the action is brought for recovering possession of the instrument itself. (*o*) So the contents of a notice affixed to the freehold may be proved by oral testimony, without producing or giving notice to produce the board, &c., itself; as where in an action for shooting the plaintiff's dog, a witness was allowed to give oral evidence (to connect the defendant with the trespass) of a notice affixed to a pole driven into the ground, that "all dogs found trespassing would be shot." (*p*) But portable notices, not affixed to the freehold, must be produced, where they are relied upon as forming the basis of some contract or arrangement between the parties. Thus, in trover against a carrier, where the question was whether the goods were rightfully detained by the defendant in satisfaction of a general lien, it was held that parol evidence could not be given of the contents of a portable notice hung up in the defendant's office, to the effect that all goods carried, &c., would be subject to such general lien, but that the notice itself must be produced. (*q*)

If at the trial, *e.g.*, in an action of libel, the plaintiff produces what he alleges to be a copy of the libelous document, and the defendant then produces a document which he alleges to be the original, the judge must determine whether it is the original, for if it is, the copy is inadmissible. (*r*)

1372. Proof of facts resting on hearsay and reputation.—Hearsay evidence or evidence not founded upon the personal

(*m*) *Harvey v. Mitchell*, 2 M. & Rob. 366.

(*n*) *Doe v. Somerton*, 7 Q. B. 58. See *Doe v. Turford*, 3 B. & Ad. 890.

(*o*) *How. v. Hall*, 14 East, 274. *Scott*

v. Jones, 4 Taunt. 864. *Whitehead v. Scott*, 1 M. & Rob. 2.

(*p*) *Bartholomew v. Stevens*, 8 C. & P. 728.

(*q*) *Jones v. Tarleton*, 9 M. & W. 67.

(*r*) *Boyle v. Wiseman*, 11 Exch. 36.

knowledge of the witness, but upon what he has heard another person say respecting some particular fact, is generally speaking inadmissible. But the declarations or statements of deceased persons respecting facts and circumstances, which may be presumed to have been within their own knowledge, are receivable in evidence in certain cases in proof of matters of common reputation or notoriety, and of local and personal or family interest. In cases of general rights depending upon immemorial usage, also, living witnesses can only speak of their own knowledge to what has passed in their own time, and therefore, to supply the necessary evidence, the law receives the declarations or statements of persons who are dead. But such evidence is admissible only to prove a public right in which all the Queen's subjects are interested. If the right is a mere private prescriptive right, it is inadmissible. When all the inhabitants or tenants of a manor, or all the inhabitants of a particular district are interested, the right is of a public nature and may be supported by hearsay evidence of reputation. Thus, the declarations of deceased copy-holders are admissible to prove a right of free warren claimed over the whole manor. (s) So evidence of reputation is admissible to show by whom a certain bridge is repairable *ratione tenuræ*, for that concerns every one who passes along the highway, and all the ratepayers of the county. (t) But where a certain number only of the tenants of a manor claim separate prescriptive rights of common over the lord's waste, depending on each separate prescription, these rights are not of a public character, although there be many of them, and they can not consequently be supported by hearsay evidence of reputation. (u) Traditionary reputation is, for the same reasons, evidence of boundary between two parishes or manors, (v) but not of the boundary between two estates. (y)¹ When the statements and

(s) *Carnarvon (Earl) v. Villebois*, 13 M. & W. 332; 14 Law J., Exch. 233.

(t) *Reg. v. Bedfordshire*, 4 Ell. & Bl.

535.

(u) *Dunraven (Lord) v. Llewellyn*, 15

Q. B. 809. See *Warrick v. Queen's College, L. R.*, 10 Eq. Ca. 105; 6 Ch. App. 716.

(v) *Nicholls v. Parker*, 14 East, 331, n.

(y) *Clothier v. Chapman*, Id.

¹ In many of the states in this country, traditionary evidence is admissible to prove a boundary between estates; *Cline's Heirs v. Catron*, 22 Gratt (Va.) 378; and the declarations of deceased persons, having no interest in the matter, to prove a boundary, but not to establish a title. *Porter v. Warner*, 2 Root. (Conn.) 22; *Bland v. Talbot, Cooke* (Tenn.) 142; *Howell v. Lelden, Harr. & McH.* (Md.) 84;

declarations of deceased persons are sought to be given in evidence respecting matters of local interest, it should be shown that such deceased persons were conversant with the

Miller v. Wood, 40 Vt. 438; *Wood v. Willard*, 37 Id. 377; *Wendell v. Abbott*, 45 N. H. 349. In reference to the admissibility and effect of traditionary evidence generally, the rules are laid down in *Best on The Law of Evidence* (Wood's Edition), p. 899, in a note by Mr. Wood, thus:

"It is now regarded as well settled that, where no better evidence exists, and the facts sought to be established are so ancient that the positive evidence of living witnesses can not be procured, hearsay evidence will be received to establish pedigree and relationship. But, in such case, the evidence should come from some one connected with the family whose pedigree or relationship to a deceased person is sought to be established, by blood, or from some one who has some personal knowledge of the family, or the facts of which they speak, or those who have derived knowledge relative thereto from persons connected with the family, or those particularly acquainted therewith, or the evidence will not be received; *Carter v. Buchanan*, 9 Ga. 539; *Jackson v. Browner*, 18 Johns. (N. Y.) 37; *Moers v. Bunker*, 29 N. H. 420; *Strickland v. Poole*, 1 Dallas (U. S.), 14; *Kelly v. McGuire*, 15 Ark. 555; *Greenwood v. Spiller*, 3 Ill. 502; *Armstrong v. McDonald*, 10 Barb. (N. Y.) 300; *Binney v. Ham*, 3 A. K. Marsh. (Ky.) 322; *Crawford v. Blackburn*, 17 Md. 49; *Kaywood v. Barnett*, 3 Dev. & B. (N. C.) 91; *Chapman v. Chapman*, 2 Conn. 347; *Everingham v. Messroom*, 2 Brev. (S. C.) 461; *Gilchrist v. Martin*, 1 Bailey (S. C.) 492; *Webb v. Richardson*, 42 Vt. 465; *Jackson v. Cooley*, 8 Johns. (N. Y.) 128; *Elliott v. Piersoll*, 1 Pet. (U. S.) 328; *Waldron v. Tuttle*, 4 N. H. 371; *Stein v. Bowman*, 13 Pet. (U. S.) 209; as to prove who are heirs of a deceased person; *Greenwood v. Spiller*, 3 Ill. 502; so to prove who was the mother of a child, the declarations of a father in reference thereto may be received; *United States v. Saunders*, 1 Hempst. (Tenn.) 483; so, too, the declarations of a mother in reference to the paternity of her son may be given in evidence; *Caujolle v. Ferrie*, 26 Barb. (N. Y.) 177; so the declarations of any deceased person, as to who were his or her heirs; *Moffitt v. Witherspoon*, 10 Ired. (N. C.) 185; so to prove the death of a person after the lapse of a long time in which he has not been heard from; *Miner v. Boneham*, 15 Johns. (N. Y.) 226; *Stouvenel v. Stevens*, 2 Daly (N. Y. C. P.) 319.

"But this species of evidence, coming from living persons connected with the persons deceased, and the declarations of such deceased persons, are entitled to more weight than those coming from persons who had no connection with the family. *Saunders v. Fuller*, 4 Humph. (Tenn.) 516. And all such evidence is to be weighed in view of the circumstances under which the declarations were made, whether any litigation had been commenced involving the relationship, and all the circumstances calculated to throw any light upon the motives or interest of the person in making them. *United States v. Saunders*, 1 Hempst. (Tenn.) 483; *Caujolle v. Ferrie*, 2 Barb. (N. Y.) 177.

"The rule in reference to this class of evidence was given by the court in *Stein v. Bowman*, 13 Pet. (U. S.) 209, thus: 'The hearsay evidence admissible in cases of pedigree is limited to those connected with the family who are supposed to have known the relationship existing, and must have been made before the suit was commenced.'

"In *Jackson v. Browner*, 18 Johns. (N. Y.) 37, it was held that 'where the wit-

locality. (z) When the right claimed is of a more general nature, such as a right of highway, or of ferry, in which all persons are interested, evidence of what any deceased person has been

(z) *Weeks v. Sparke*, 1 M. & S. 689.

nesses are not connected with the family, have no personal knowledge of the facts of which they speak, and have not derived their information from persons connected or particularly acquainted with the family, but speak generally of what they have heard or understood, such evidence is insufficient to establish pedigree.'

"In *Elliott v. Piersoll*, 1 Pet. (U. S.) 328, where a letter from a deceased member of a family, stating the pedigree of the family, sworn to by the wife as having been written by her husband, and as containing facts of which he had often spoken to her in his life-time, was offered, it was held that both the letter and the testimony of the wife were competent evidence.

"So, too, in questions of pedigree, the declarations of deceased members of a family in reference to marriages, are admissible; but, when the marriage is essential to be established, as a substantive fact, it can not be established by such declarations. *Westfield v. Warren*, 8 N. J. 249.

"The date of the birth of a child may be proved by the declarations of deceased members of the family, even though there is a family register in which the birth of the child is registered. The reason for this rule is, that both species of evidence are of equal weight and character; the one not being entitled to any more consideration than the other; *Clements v. Hunt*, 1 Jones (N. C.), 400; but its age can not be established in this way; *Albertson v. Robertson*, 1 Dallas (U. S.), 9; nor the place of its birth; *Wilmington v. Burlington*, 4 Pick. (Mass.) 174; *Shearer v. Clay*, 1 Litt. (Ky.) 260; *Independence v. Pompton*, 4 Halst. (N. J.) 209; *Brooks v. Clay*, 3 A. K. Marsh. (Ky.) 545; or any fact that is susceptible of proof by witnesses who speak from their own knowledge; *Mima Queen v. Hepburn*, 7 Cranch (U. S.) 290; so hearsay evidence is admissible in some states to prove the marriage of parties by proving cohabitation; *O'Gara v. Eisenlohr*, 38 N. Y. 296.

"So it is competent to prove, by the declaration of the parents of a child, whether they were married when the child was born; but such evidence is not admissible to prove that children born in wedlock are illegitimate by reason of non-access; *Stevens v. Moss*, Cowper, 491; *Bowles v. Bingham*, 2 Munf. (Va.) 442; so such evidence is admissible to prove whom a man married, or whom a woman married, what children they had, whether legitimate or illegitimate, that either died abroad; and these facts may be established by the declarations of deceased members of the family, but the declarations of those not connected with the family (as neighbors or acquaintances) are not receivable; *Vowles v. Young*, 13 Ves. Jr. 140; *Whitlock v. Baker*, Id. 511; so in such cases recitals in old deeds are evidence; *Little v. Palister*, 4 Greenl. (Me.) 209; *Buller's Nisi Prius*, 233, 294; *Morris v. Vandever* 1 Dallas (U. S.), 67; *Paxton v. Price*, 1 Yeates (Penn.) 500; inscriptions on old gravestones, the finding of a special verdict between other members of the family stating a pedigree, the statement of a pedigree in an old bill in chancery, as well as herald books and entries in family bibles; *Curtis v. Patton*, 6 S. & R. (Penn.) 135; *Kidney v. Cockburn*, 2 R. & M. 163; *Taylor v. Cole*, 7 T. R. 3; *Lovell v. Arnold*, 2 Munf. (Va.) 167; *Pegram v. Jabell*, 2 Harr. & Munf. (Va.) 281; *Whitlock v. Waters*, 4 C. & P. 376; *Goodright v. Moss*, 2 Cowp. 594; but, so far as the allegations in a bill in chancery are concerned, it is proper to say that generally, under

heard to say respecting the right is receivable, but it would be almost worthless unless it comes from some one having good means of knowledge. (a) And the declaration or statement of a deceased person with regard to a particular fact which would support or negative the right is inadmissible. Thus, the ancient answers of conventional tenants of a manor stating the right of the lord, are admissible even against the freeholders of the manor; but if they state a fact only, *e.g.*, that the commons of the manor belong to the tenants without stint on payment of £— per annum, they are not admissible. (b)

Maps, &c., used by deceased stewards of a manor, stand on the same footing as declarations, but they are only admissible for the purposes for which they have been used. A map, therefore, used only for the purpose of defining the copyholds

(a) Parke, B., *Crease v. Barrett*, 1 Cr. W. 234.
M. & R. 929. *Pim v. Currell*, 6 M. & (b) *Crease v. Barrett*, *supra*.

the modern rules of evidence, such evidence is not regarded as admissible; but if the circumstances, the relations of the parties, and the nature of the issue are such as to afford no ground for supposing that the orator's mind had any bias, and that so far as these facts are concerned, he had no interest to serve, there can be no question but that the evidence would be received for what it is worth in the establishment of a pedigree; *Berkley's Peerage Case*, 2 Bing. 86; 2 Selwyn's *Nisi Prius*, 684; so statements in old wills bearing upon questions of pedigree or relationship, although the will is canceled, and never was operative, but which was found among the papers of the testator, a deceased member of the family, whose pedigree are in question, is admissible; *Johnson v. Earl Pembroke*, 11 East, 503; so a register of, births and marriages kept in the records of a town is admissible on questions of pedigree; *Miner v. Boneham*, 15 Johns. (N. Y.) 226; so *ex parte* affidavits taken abroad have been held admissible to prove pedigree, and to establish boundaries; also to establish the identity of a person; *Taylor v. Simpson*, 2 Dall. (U. S.) 117; *Sturgeon v. Waugh*, 2 Yeates (Penn.) 467; *Lilly v. Kintzmiller*, 1 Id. 28; so depositions of deceased witnesses, used in a cause between other parties, are admissible upon a question of pedigree, whether taken before or after the litigation commenced in which the question of pedigree is involved; *Peake's Ev.* 24, note, citing MS. case of *Bordereau v. Montgomery*; *Jenkins v. Tom et al.*, Wash. (U. S.) 123; *Lovell v. Arnold*, 2 Munf. (Va.) 167. Inscriptions upon rings worn by a former member of the family are held admissible to prove pedigree. *Vowles v. Young*, 13 Ves. 144.

"Lord Erskine, in commenting upon the class of evidence competent to prove a pedigree, said: 'Upon questions of pedigree, inscriptions upon tombstones are admitted, as it must be supposed that the relations of a family would not permit an inscription without foundation to remain. So engravings upon rings are admitted, upon the presumption that a person would not wear a ring with an error upon it.'"

of a manor, would not be evidence as a declaration as to the existence of a highway marked on it. (c) ¹

1373. Entries of deceased persons against their interest, made

(c) *Pipe v. Fulcher*, 1 Ell. & Ell. 111.

Charts of pedigree hung up in a family mansion, or in a situation to indicate that it was recognized and accepted by the family as correct; *Goodwright v. Moss*, 2 Cowp. 594; coat armor; *Coke's Littleton*, 27 a; and *mural inscriptions*, giving an historical account of a family, placed in a chancel which was formerly used as a burial place for the family, located in a parish where the family were long resident proprietors, have been also held admissible; and where the articles themselves can not be produced, copies thereof may be used; *Slaney v. Ward*, 1 My. & Cr. 354. In this case, which involved a question of pedigree, the existence of the mural inscriptions and their obliteration, about twenty-four years before the trial, was established; and the court held that a copy thereof was competent evidence, provided the genuineness of the original inscriptions was established. This class of evidence, however, may always be impeached; and Mr. Phillips, in vol. 1, p. 222, of his work on Evidence, gives several instances in which that species of evidence has been completely overthrown. None of this species of evidence is conclusive, but its genuineness, and the weight to be given it, depend largely upon the circumstances of each case, the condition in which it was found, and a multitude of circumstances that tend to convince the mind that a thing is real or spurious, in reference to which no rules can be given. So it may be said, generally, that any species of evidence tending to show the declarations of deceased relatives upon the question of relationship, which is established as genuine, and which leaves no doubt as to their understanding of the matter, is always admissible to establish pedigree. The register of births, deaths or marriages, in a family bible; *Leggett v. Boyd*, 3 Wend. (N. Y.) 376; *Goodwright v. Moss*, Cowp. 594; *Whitlock v. Baker*, 13 Vesey, 511; *Higham v. Ridgway*, 10 East, 120. In the *Berkley Peerage Case*, 4 Camp. 421, Lord REDESDALE, in commenting upon this class of evidence, said: "The circumstance of an entry being in a family bible, to which all the family has access, gives it that validity which it would not have if the book remained in the exclusive possession of the father." Entries in family bibles have, therefore, become common evidence of pedigree in this country; and in America, where there is no register of births or baptism, *hardly any other is known*; or in the diary of a physician who was present at the birth of a child; *Ames v. Middleton*, 23 Barb. (N. Y.) 571; so memoranda in other books, as an almanac; *Herbert v. Tucknall*, L. Raym. 84; a prayer book; *Leigh's Peerage*, printed in 1829, p. 310; as well as entries in other documents, books, or papers, kept in and accessible to the family, are admissible.

¹ Old maps are admissible to establish boundaries, when they have been kept in such a manner as to indicate that they have been generally recognized and acted upon; *Dunn v. Hayes*, 21 Me. 76; *Jackson v. Frost*, 5 Cow. (N. Y.) 346; *Landing v. Philadelphia*, 16 Penn. St. 69; *Crawford v. Loper*, 25 Barb. (N. Y.) 449; but private maps or plots annexed to deeds, but not recorded with them, are not admissible; *Shirras v. Craig*, 7 Cr. (U. S.) 34; *Griffith v. Tuckerhouser*, Peters (U. S. C. C.) 418; unless they have been made by public authority, or some person having personal knowledge of the matters therein shown, or are shown to be correct by positive evidence or facts fairly warranting such a presumption; *Wood v. Willard*, 2'

in books, accounts, &c., are also admissible. Thus, where the right to the soil is in question, entries made by the deceased steward of a former owner through whom the plaintiff claims title, charging himself with the receipt of money for trespasses committed on the locus in quo are admissible. (*d*) And when the book in which the entry is found is an ancient book, and comes from the proper custody, it is not necessary to prove the handwriting of the party who made the entry. (*e*) But entries in a deceased steward's book made in his favor, and not connected with other entries made against him, are not evidence of the facts mentioned in such entries. (*f*) Where there are entries in an account-book charging and discharging the person making them, both sides of the account may be looked at; and it is no objection to the reception of an account containing items of charge and discharge, that the balance appears to be in favor of the deceased person making the entries. (*g*)

1374. *Entries made by deceased persons in the exercise of their duties* are also admissible. Thus, to disprove a lien in an action of trover, the entry of a tender and refusal of the amount claimed as lien, made by a deceased clerk of the plaintiff's attorney in a day-book kept by him for the purpose of minuting his daily transactions, is admissible. (*h*) But where, in an action of deceit, the defendant offered in evidence a book purporting to be made up from slips of paper on which the daily transactions of his business as a pawnbroker were entered, but it appeared that it was kept privately by him at his own house, and that none of his clerks had access to it, the evidence was rejected. (*i*)

Where the entry is admitted in evidence as being against the interest of the party making it, it carries with it the whole statement; but if the entry is merely an act done in the course

(*d*) *Barry v. Beddington*, 4 T. R. 514.
Doe v. Stacey, *post*.

(*e*) *Wynne v. Tyrwhit*, 4 B. & Ald.
 376.

(*f*) *Knight v. Waterford*, (Marquis), 4

Y. & C. 284.

(*g*) *Buller v. Michel*, 2 Pr. 399. *Rowe v. Brenton*, 3 M. & Ry. 268.

(*h*) *Marks v. Lahee*, 3 B. N. C. 419.

(*i*) *Ellis v. Cowne*, 2 C. & K. 719.

Vt. 82; *Johnson v. Jones*, 1 Black. (U. S.) 209; *Jackson v. Van Dyke*, 1 N. J. 28; *Mitchell v. Churchman*, 4 Humph. (Tenn.) 218; *Smith v. Strong*, 14 Pick. (Mass.) 18.

of a man's duty, then it is confined to matters within that duty. (*k*) Thus where, according to the practice of a sheriff's office, the officer making an arrest was required to make, and did make, a return signed by him of the arrest, and of the time and place where it was made, and after his death this return was offered in evidence, it was held that it was evidence of the fact of the arrest, and perhaps also of the time when, but certainly not of the place where, it was made, and, per DENMAN, C.J., "whatever effect may be due to an entry made in the course of any office reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances." (*l*)

1375. *Statements and declarations accompanying an act* are admissible in evidence as part of the *res gesta* to show the real nature and character of the transaction. Thus, the cries of a mob during a riot are admissible in evidence to show the object and intentions of the rioters, and so are the cries and exclamations of a person injured uttered at the time of an alleged assault. (*m*) So the exclamations of bystanders when an accident occurs, and the conduct of a particular person is in question, are admissible in evidence, as part of the *res gesta*. They may be the result of prejudice or passion, but they are admissible, and the jury must judge what reliance may be placed upon them. A letter written by the plaintiff himself on the day a certain transaction took place, making certain inquiries and directing certain things to be done, which were done in obedience to the letter, has been held admissible in evidence on the part of the plaintiff himself in support of his own case, to show the nature and character of the transaction in which he was engaged. (*n*) So where a dressing-case, the property of the defendant's sister-in-law, had been stolen from the defendant's house, and suspicion fell on the plaintiff, and a policeman was sent for, who, on hearing the facts stated by the sister-in-law, in the presence of the plaintiff, said, "Do you give her (the plaintiff) into custody?" and the sister-in-law

(*k*) Pollock, C. B., in *Percival v. Nan-*
son, 7 Exch. 3.

(*l*) *Chambers v. Bernasconi*. 1 C. M.
R. 347.

(*m*) *Thompson v. Trevanion*, Skin.
402.

(*n*) *Milne v. Leisler*, 7 H. & N. 796;
31 Law J., Exch. 257.

replied, "I will go and ask my brother-in-law" (the defendant), and went out and then returned, it was held that what she said when she came back was admissible in evidence against the defendant as part of the *res gesta*. (o) ¹

Whenever a wrongful act forming the subject-matter of an action has been done by an agent, bailiff, or servant acting in the ordinary course of his employment, or in obedience to the express directions of his employer or principal, what he says in the course of the transaction is evidence against those he represents. In an action for false imprisonment, therefore, what the person into whose custody the defendant commits the plaintiff, says, is admissible in evidence against the defendant. (p) But in an action of detinue against a pawnbroker, where the only evidence of the goods having come to the defendant's hand was a declaration by the pawnbroker's servant that it was a hard case, for his master had advanced £200 upon them at five per cent., it was held that such a declaration was

(o) *Harris v. Dignum*, 29 L. J., Exch. 23.

(p) *Powell v. Hodgetts*, 2 C. & P. 432.

¹ The rules applicable to the admission of this class of evidence are thus laid down by Mr. Wood (the author of the notes to this work), in a note to "Best on the Law of Evidence" (Wood's Edition), p. 876:

"It is a well-settled rule of evidence that the declarations and acts of the principal parties to an act, as well as the circumstances surrounding them, at the time of the principal fact, may be given in evidence in a controversy between the parties relative thereto as a part of the *res gesta*, which are calculated to show the nature of the act, and are in harmony with it. But in order to be admissible they must be immediately connected with the material inquiry involved in the issue, and must have occurred at the *time* of the transaction, or if not precisely concurrent, so closely connected therewith that they may be said to spring from it, and thus tend to explain it. They must be so closely connected with the principal act in point of time as to be spontaneous and voluntary, and to preclude all possible idea of deliberate design. Indeed, it has been said that the declarations or acts must be the natural or inseparable concomitants of the principal fact in controversy, so that they may be presumed to have been induced by the same motive that led to the act itself, and so closely allied thereto in point of time as obviously to form a part of the transaction, and must be calculated to unfold its nature and quality. If there is any thing which raises a suspicion that they were intended to deceive, and were made or done in bad faith, the court not only *may*, but should, exclude them; *Riggs v. State*, 6 Cold. (Tenn.) 517; *Elkins v. Hamilton*, 20 Vt. 627; *Carter v. Buchanan*, 3 Ga. 513; *Fifield v. Richardson*, 34 Vt. 410; *Atherton v. Tilton*, 44 N. H. 452; *Meek v. Perry*, 36 Miss. 190; *Springer v. Droach*, 32 Ind. 486; 2 Am. Rep. 356; *Crowther v. Gibson*, 19 Md. 365; *Lund v. Tyngsborough*, 9 Cush. (Mass.) 36; *Koch Howell*, 6 W. & S. (Penn.) 350; *Clayton v. Tucker*, 20 Ga. 452; *Curtis v. Avon*,

inadmissible, for it was not an ordinary pawnbroking transaction, but a loan by the defendant as by any other person. (g)

Declarations by one of several tort feasons, in such actions as for negligence, where no common motive or object can exist, are evidence against himself alone, unless they are made in the presence and hearing of the others; (r) but if several co-defendants be shown by other evidence to have combined together for a common object, what each says as to the motives and circumstances of the trespass, becomes admissible against the other. (s)

1376. *When the adverse party in a suit is estopped from giving evidence to contradict his own statements and representations to the plaintiff.*—Where one person by his words or conduct willfully induces another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as

(g) *Garth v. Howard*, 8 Bingham, 453.

(r) *Daniels v. Potter*, M. & M. 503.

(s) *Lord Ellenborough, C. J.*, in *R. v. Hardwicke*, 11 East, 584.

&c., *R. R. Co.*, 49 Barb. (N. Y.) 148; *Stewart v. Hanson*, 35 Me. 506; *Franklin v. Woodford*, 14 La. Ann. 188; *Clark v. Rush*, 19 Cal. 393; *Russell v. Frisbee*, 19 Conn. 205; and this is applicable to actions civil or criminal; *Hamilton v. State*, 36 Ind. 280; 10 Am. Rep. 28; *Campbell v. U. S. Ct. of Cl.* 240; *Bank v. Kennedy*, 17 Wall. (U. S.) 19; *People v. Brotherton*, 47 Cal. 388; *Sill v. Reese*, Id. 294; *Landell v. Hotchkiss*, 4 N. Y. Sup. Ct. 685; *Burlew v. Hubbell*, 1 Id. 235; *Parker v. R. R. Co.*, 109 Mass. 449; *Jordan v. Osgood*, Id. 457.

"But such evidence is *never* admissible to prove the *cause* or *manner* of an injury. In *Brownell v. Pacific R. R. Co.*, 49 Mo. 239, the plaintiff's husband was injured upon the defendant's road, and died almost instantly from the effects of the injury; and the court held that his declarations as to the cause and manner of the accident, made under such circumstances, were admissible as a part of the *res gestæ*; but they put their decision upon the express ground that the declarations were so intimately blended with the accident itself that it could not be said in any sense to be detached from it. The fact that the declarations were made the same day that the accident happened has no bearing upon the question. The simple test is, whether the accident and declarations could be fairly said to have been detached from each other; and without intending any disrespect to the court, I can not but think that the doctrine announced by it is not only a dangerous one, but one which has no foundation upon any well-recognized authority.

"The entire value of this class of evidence depends upon its spontaneity, and is predicated upon the idea that being spontaneous, springing from the act itself, and forming a part of it in point of time, before any idea of deliberate design or purpose to make evidence for each other has entered the minds of the parties, it tends to explain and throw light upon the transaction itself. Therefore it is that the declara-

existing at the same time. (t) "By the term 'willfully,'" observes PARKE, B., "we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and he did act upon it as true, the party making the representation would be equally precluded from contesting its truth." (u)

Where an action was brought for the conversion of a policy of insurance, and the plaintiff proved that he had given instructions to the defendant to effect a policy for him, and gave in evidence a letter from the defendant to the plaintiff, stating

(t) *Pickard v. Sears*, 6 Ad. & E. 474.
Piggott v. Stratton, 29 Law J., Ch. 9.
McCance v. Lond. and North-West. Rail.
 Co., 34 Law J., Exch. 39.

(u) *Freeman v. Cooke*, 2 Exch. 633.
Haines v. E. Ind. Co., 11 Moore, P. C.
 C. 57.

tions of a party who has been injured and is suffering from the effects of the injury, made during the time while he or she is suffering from the effects of it, are admissible upon the question as to the nature and extent of such suffering, but *never* upon the question as to its *cause*. *Illinois, &c., R. R. Co. v. Sutton*, 42 Ill. 438; *Gray v. McLaughlin*, 26 Iowa, 279; *Hall v. State*, 48 Ga. 607; *Bassham v. State*, 38 Tex. 622; *Jex v. Board of Education*, 1 Hun. (N. Y.) 157.

"That declarations made by a party after the transaction is ended, or an injury is received, so far detached therefrom in point of time as to admit of deliberate design, or as to be fairly detached from the transaction to which they relate, are not regarded as a part of the *res gesta*, see *Lane v. Bryant*, 9 Gray (Mass.) 245; *Smith v. Webb*, 1 Barb. (N. Y.) 230; *McAdams v. Brand*, 35 Ala. 478; *Osborn v. Robbins*, 37 Barb. (N. Y.) 481; *Simms v. Macon, &c., R. R. Co.*, 28 Ga. 94; *Nelson v. State* 2 Swan (Tenn.) 237; *Detroit, &c., R. R. Co. v. Van Steinberg*, 17 Mich. 99; *Com. v. Harwood*, 4 Gray (Mass.) 41; *State v. Jackson*, 17 Mo. 544; *Wilson v. Shefflock*, 36 Me. 295; *Stewart v. Reddett*, 3 Md. 67; *Cherry v. McCall*, 23 Ga. 193; *Carter v. Buchanan*, 3 Id. 513; *People v. Graham*, 21 Cal. 261; *Luby v. Hudson River R. R. Co.*, 17 N. Y. 131; *Monday v. State*, 32 Ga. 672; *Matteson v. N. Y., &c., R. R. Co.*, 35 N. Y., 487; *Kinnard v. Burton*, 25 Me. 39; *Com. v. McPike*, 3 Cush. (Mass.) 181; *State v. Dominique*, 30 Mo. 585.

"Indeed, in *Friedman v. R. R. Co.*, 7 Phil. (Penn.) 203, it was held expressly that even the dying declarations of the deceased, as to the *cause* of his injuries, could not be given in evidence in an action for negligence. See, also, *Marshall v. Chicago, &c., R. R. Co.*, 48 Ill. 475.

"In *Lambert v. The People*, 29 Mich. 71, the court admitted statements made by a person who had been robbed, made to persons coming up to him within three minutes after the commission of the crime, as a part of the *res gesta*.

that he had effected the policy, Lord MANSFIELD refused to allow the defendant to contradict his own representation, and show that no policy had been effected, and held him liable as an insurer for the amount that would have been recoverable by the plaintiff on the policy if it had been duly effected. (*v*)

Wherever, indeed, a man has made a false assertion calculated to lead others to act upon it, and they have done so to their prejudice, he is forbidden, as against them, to deny that assertion. Wherever, also, he has led others into the belief of a certain state of facts by conduct of culpable neglect, calculated to have that result, and they have acted on that belief to their prejudice, he will not be heard afterwards, as against such persons, to show that that state of facts did not exist. In short, a man is not permitted, or at liberty, to charge the consequences of his own fault on others, and complain of that which he has himself brought about. (*y*) But the neglect must be in the transaction itself, and be the proximate cause of the

(*v*) *Harding v. Carter*, Park on Insurance, 5.

(*y*) *Swan v. North Brit. Austr. Co.*, 31 Law J. Exch. 436.

"But if such a time had elapsed as to detach the statements, in point of time, from the transaction itself, the evidence would not have been admissible. Thus in *Hamilton v. People*, 29 Mich. 171, for burning a barn, it was held that statements made by the respondent after the fire were not admissible.

"In *Mitchum v. The State*, 11 Ga. 615, the rule as to what facts may be given as a part of the *res gestæ* was thus stated: 'To make declarations a part of the *res gestæ*, they must be contemporaneous with the main fact; but in order to be contemporaneous they are not required to be *precisely* concurrent in point of time. If the declarations spring out of the transaction—if they elucidate it—if they are voluntary and spontaneous—and if they are made at a time so near to it, as reasonably to preclude the idea of deliberate design, they are then to be regarded as cotemporaneous.' The reason for this rule is apparent. That which properly is admissible as a part of the *res gestæ* is admissible for as well as against the party making the declaration or doing the acts claimed to form a part of the transaction, and nothing can properly be permitted which is not so intimately blended with the transaction itself as to wholly preclude the idea that the party was seeking to make evidence for himself. Now in this case (*Stern v. Railway Co.*), if the son had survived and had brought an action for personal injuries against the defendant, would the court have permitted him to show that within two hours after the injury he had stated to the policeman that the injury resulted from the overcrowded condition of the car? I apprehend not; yet the one declaration, as a part of the *res gestæ*, is as admissible as the other. The fact that the son died, and that the declaration was made by him when *in extremis*, gives it no additional weight or consideration as a part of the *res gestæ*. A period of time had elapsed between the declaration and the transaction itself, which detached the one from the other.

injury sustained, and must not be the neglect of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy. (z)

Thus the principal whose negligence has enabled his agent to cheat a third person acting with ordinary caution, is universally estopped from denying the authority of the agent. A retired partner, who has given no notice of dissolution to a customer, is estopped from denying the authority of the continuing partner to bind him with that customer. A master who has accredited a servant to a tradesman to order goods in his name, and has recalled the authority from the servant without giving notice to the tradesman, is estopped from denying the authority of the servant to bind him with such tradesman. The same principle applies to instruments under seal. But the party who claims the benefit of this doctrine of estoppel, must show that he has acted in the transaction in which he was deceived, with ordinary caution. (a) So a company, by entering the name of

(z) Blackburn, J., ib. 32; ib. 277.

(a) Erle, C. J., Swan, *Ex parte*, 30 Law J., C. P. 118.

"In reference to acts or declarations forming a part of the *res gesta*, it must be remembered that they are admissible *for* as well as *against* a party; hence it is that courts have exercised extreme caution not to admit such acts or declarations as arise so long after the transaction to which they relate, that an opportunity is given for deliberate design in manufacturing evidence; and the fact that the declaration is against the interest of the person making it has no bearing in determining the question. If they are fairly detached from the original transaction so as not to be the spontaneous product of it, they are no part of the *res gesta*.

"It is not possible to give a general rule applicable to all cases. The question of the admissibility of such evidence must necessarily depend upon the peculiar facts and circumstances of each case, and rests largely in the discretion of the court. Indeed, there is no one branch of the law of evidence that calls for the exercise of a keener discretion or more sound judgment than this. To group the declarations, acts, and circumstances attendant upon the principal transaction, and determine whether they are natural or artificial, *mala fide* or *bona fide*, is a matter calling into exercise the best faculties of a judicial mind. Instances can be given showing when such evidence has been received, and when it has been rejected; but they furnish no test for another case. Yet the *real* test generally applicable is simply whether the evidence sought to be admitted is of acts, declarations, or circumstances so immediately connected with the fact in issue as to be a part of it, and whether they are so far the natural, voluntary, and spontaneous result of it, and are so intimately connected with it in point of time, that they may be said to spring from it, and explain the real nature, character, or extent of the transaction itself. It is not essential that they should have occurred at the *precise time* of the transaction itself, but they must have occurred at such a time, and in such a manner, and must be so close'

a shareholder on their register under a forged or invalid transfer, represents that the person so entered is entitled to transfer the shares to a third person, and is estopped from denying it; and if the real holder's name is restored to the register, such third person is entitled to sue the company, and to recover the value of the shares at the time they first refused to recognize him as shareholder, with interest. (b)

1377. *Evidence of manorial customs.*—Proof of entries on the rolls of a manor court are admissible in evidence to prove manorial customs. (c) A presentment in a manor court, setting forth the bounds of a manor, is likewise evidence of such bounds, although some portion of the document be cut off, if there is no reason to suppose that that part contains any evidence to the contrary of the part produced. When an ancient

(b) <i>Re Bahia and San Francisco Rail. Co.</i> , L. R., 3 Q. B. 584; 37 Law J., Q. B. 176. <i>Hart v. Frontino & Bolivia Gold Mining Co.</i> , L. R., 5 Exch. 111. See <i>Re</i>	<i>London & Provincial Telegraph Co.</i> , L. R., 9 Eq. Ca. 653. (c) <i>Damerell v. Protheroe</i> , 10 Q. B. 20.
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allied thereto as really to form a part of it. *Meek v. Perry*, 36 Miss. 190; *Fifield v. Richardson*, 34 Vt. 410; *Tompkins v. Reynolds*, 17 Ala. 109; *Kearney v. Farrell*, 28 Conn. 317; *Rutland v. Hathorn*, 36 Ga. 380; *Riggs v. State*, 6 Cold. (Tenn.) 517.

"Thus in an action brought by a widow for damages resulting from the killing of her husband, it was held that, he being injured and almost *instantly* killed, his declarations, as to the manner in which the accident happened, were proper evidence as a part of the *res gestæ*; but if he had lingered for such a time that the declarations could fairly have been detached from the accident itself, they would not have been admissible. *Brownell v. Pacific, &c., R. R. Co.*, 49 Mo. 239. So, too, it is held that, whenever it becomes material to show the degree of bodily or mental pain sustained by a person at a particular time, the declarations of such persons at such time as to their condition, made in the usual way, are admissible as evidence to prove his or her real condition. Such expressions are regarded as natural evidence, and are to be submitted to the jury, with all the circumstances attendant upon their expression, to determine whether they are real or feigned, and to give them such weight as they may deem them entitled to in view of all the attendant circumstances; *Gray v. McLaughlin*, 26 Iowa, 279; *Phillips v. Kelley*, 29 Ala. 628; *Johnson v. State*, 17 Id. 618; *Looper v. Bell*, 1 Head. (Tenn.) 373; and if such statements are made, after the action for damages is commenced, to a physician to enable him to form a medical opinion as to the patient's condition, such statements are competent as a part of the *res gestæ*; but the time when they were made may detract from their weight; *Barber v. Merriam*, 11 Allen (Mass.), 322; *Towle v. Blake*, 48 N. H. 92; *Taylor v. Gr. Trunk R. R. Co.*, Id. 304; so it has been held in an action against a physician for malpractice, that exclamations of pain uttered by a patient may be given in evidence as a part of the *res gestæ*, for the purpose of

manor-book is offered in evidence, it must be proved that it comes from the proper custody. (*d*)

1378. *Evidence of title and seizing* may be proved by proof of the pernaney of the rents and profits of land, and of the exercise of acts of ownership over land, and the exercise of acts of ownership may be established by production of expired and ancient leases, or counterparts of leases, executed by deceased persons or their deceased lessees; (*e*) and declarations of deceased occupiers of land, as to the parties under whom they held, are admissible in evidence to show who was the owner of the inheritance in their time. (*f*) Entries by a deceased agent of the plaintiff charging himself with the receipt of money as rent are admissible for the same purpose, although the defendant does not claim through the person so proved to have paid rent. (*g*)

1379. *Amendment of variances between the declaration of the*

(*d*) *Evans v. Rees*, 10 Ad. & E. 151.

& E. 182.

(*e*) *Doe v. Pulman*, 3 Q. B. 622. And see as to land-tax assessments being evidence of seizin, *Doe v. Arkwright*, 2 Ad.

(*f*) *Peaceable v. Watson*, 4 Taunt.

16. *Doe v. Coulthred*, 7 Ad. & E. 235.

(*g*) *Doe v. Stacey*, 6 C. & P. 139.

establishing the claim, but not in aggravation of the damages; *Hyatt v. Adams*, 16 Mich. 180; and indeed it may be stated generally that the statements of a sick or injured person as to the nature, symptoms, or extent of the disease or injury, are always admissible to show his actual condition at the time when they are made. They must not relate to the *past* condition of the person, but to his real condition at the time when the declarations are made; *Hunt v. People*, 3 Park. Cr. (N. Y.) 569; *People v. Williams*, Id. 84; *Perkins v. Concord R. R. Co.*, 44 N. H. 223; *Stone v. Watson*, 1 Ala. Sel. Cas. 236; *Baker v. Griffin*, 10 Bosw. (N. Y. Superior Ct.) 140; *Caldwell v. Murphy*, 11 N. Y. 416; *Denton v. State*, 1 Swan (Tenn.) 297; *Kent v. Lincoln*, 32 Vt. 591; *Bacon v. Charlton*, 7 Cush. (Mass.) 581; *Lush v. McDaniel*, 13 Ired. (N. C.) 485; *Earl v. Tupper*, 45 Vt. 275; *Spatz v. Lyons*, 55 Barb. (N. Y.) 476; *Insurance Company v. Mosley*, 8 Wall. (U. S.) 387; but it is held that the declarations of a person under such circumstances as to the manner in which it occurred, however cotemporaneous with the act itself, are not admissible; *State v. Davidson*, 30 Vt. 377; but it seems that the cause of the injury may be proved by declarations of a party injured, so nearly allied as to the time of making them, with the injury itself, that they may fairly be regarded as a part of the *res geste*; *Stiles v. Danville*, 42 Id. 282. Thus, in *Com. v. M'Pike*, 3 Cush. (Mass.) 181, it was held that the declaration of a person who is wounded and bleeding, that she was stabbed by the defendant, is admissible after her death as a part of the *res geste*, even though made after she had received the injuries and had had time to go upstairs to her own room. But generally where such a length of time has elapsed as to fairly disconnect the statements with the original cause, the statements can not be received. For instances see *Matteson v. N. Y., &c., R. R. Co.*,

cause of action and the proof adduced in support of it.—By 3 & 4 Wm. 4, c. 42, s. 23, it is enacted, that any court of record in civil actions, or any judge at nisi prius, may cause the record, writ, or document on which any trial may be pending in a civil action, where any variance shall appear between the proof and the recital on the record, &c., of any contract, custom, prescription, name, or other matter, in any particular in the judgment of such court or judge not material to the merits of the cause, and by which variance the opposite party can not have been prejudiced in the conduct of his action or defense, to be forthwith amended, on such terms as to payment of costs or postponing the trial as the court or a judge shall think reasonable; and in case such variance shall be in some particular in the judgment of such court or judge not material to the merits, but such as that the opposite party may have been prejudiced thereby in the conduct of his action or defense, then the same may be amended on the payment of costs to the other party, and withdrawing the record and postponing the trial, as such court or judge shall think reasonable. The judge may, however, avoid (s. 24) the responsibility of deciding, by directing

35 N. Y. 487; two days after; *State v. Dominique*, 30 Mo. 585; thirty minutes after; *Denton v. State*, 1 Swan (Tenn.), 297; *Kinnard v. Burton*, 25 Me. 39.

"But a person's statements as to his condition are not admissible in an action to which he is not a party, for the purpose of establishing the *time* when he contracted the disease. *Ashland v. Marlborough*, 99 Mass. 47.

"In criminal cases, where there is evidence tending to show a privity and community of design to commit offenses of the character charged against them, great latitude is, and should be, given in allowing evidence of their acts to be shown, as well as the declarations and conduct of each or all of them, as go in furtherance of their criminal purposes and designs. *Mason v. State*, 42 Ala. 532.

"It was well observed by HOSMER, C. J., in *Enos v. Tuttle*, 3 Conn. 250, that 'to be a part of the *res gestæ*, the declarations must have been made at the time of the act done to which they relate and are supposed to characterize, and must be well calculated to unfold the nature and quality of the facts they were intended to explain, and to so harmonize with them as obviously to form one transaction.' As a general rule, that is as nearly perfect as can be given; but it will be seen at a glance that it furnishes but little aid to determine questions of this character. Necessarily, each case must stand by itself, and the court must, in view of the facts, the situation, and circumstances surrounding the transaction, judge whether the acts, declarations, and circumstances sought to be admitted are so intimately connected with the principal fact as to form a part of it, and thus fairly be a part of the *res gestæ*, admissible as evidence.

"Where one sues for injuries done to his property by another, while the property was in the possession of a servant, the declarations of the servant at the time of the

the jury to find the facts according to the evidence, and leave the question of the materiality of the evidence for the consideration of the court above.

In actions for libel and slander, the judge had power under this statute, if there was a variance between the libel or slander charged in the declaration and the writing adduced in evidence, or the words proved to have been uttered, to amend the variance, if the amendment did not create a new and different cause of action. (*h*)

By the Common Law Procedure Acts, 15 & 16 Vict. c. 76, s. 222, 17 & 18 Vict. c. 125, s. 96, and 23 & 24 Vict. c. 126, s. 36, it is now further enacted, that it shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceedings in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and

(*h*) *Smith v. Knowelden*, 2 M. & Gr. *Pater v. Baker*, 3 C. B. 854.
564. *Southee v. Denny*, 1 Exch. 196.

injury as to the cause thereof are admissible. *Toledo R. R. Co. v. Goddard*, 25 Ind. 185.

"So it has been held that the exclamations of passengers on a railway train at the time of the happening of an accident; *Galena R. R. Co. v. Fay*, 16 Ill. 556; the declarations of bystanders at a public sale; *Stewart v. Severance*, 43 Mo. 324; the acts and sayings of a constable at the time of making a levy; *Arnold v. Gorr*, 1 Rawle (Penn.) 223; *Dobb v. Justice*, 17 Ga. 624; *Grandey v. McPherson*, 7 Jones (N. C.) 347; of a public surveyor when running a line to establish the character or purpose of the survey; *George v. Thomas*, 16 Tex. 74; what is said by a claimant to the sheriff at the time of a levy; *Morgan v. Simms*, 26 Ga. 283; what is said by a person while engaged in carrying away property claimed by another; *Drumwright v. State*, 29 Id. 430; what is said by the plaintiff in a writ of attachment as to his reasons for having it issued, made at the time of its issue; *Wood v. Banker*, 37 Ala. 60; negotiations between parties are admissible to show to whom credit was given, and to explain the transaction; *Eastman v. Bennett*, 6 Wis. 232; instructions given by one of the parties to an assistant; *Wilson v. Smith*, 28 Ill. 495; what is said by a person when money is paid to him, to show whether it was received in full or not, as well as to show upon what debt it was to be applied; *Dillard v. Scruggs*, 36 Ala. 607; statements made by a person at the time when a demand is made upon him for property, or for any purpose; *Lamphy v. Scott*, 24 Miss. 528; the declarations of a servant at the time of leaving his master; *Hadley v. Carter*, 8 N. H. 40; the declarations of a person engaged upon work, to show who he was working for and the nature of the contract; *Printup v. Mitchell*, 17 Ga. 558; the declarations of a person on leaving home as to where he was going and the nature of his business; *State v*

upon such terms as to the court or judge may seem fit, and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be so made if duly applied for.

Under these statutes, where in a declaration for libel the substance only of the libel was set out, an amendment was allowed by the insertion of the actual letter verbatim in which the libel was contained, with the words "meaning thereby" immediately preceding the statement of the substance of the libel in the declaration. (i) So in an action for a false representation as to the takings of a public-house, an amendment that such takings were made chiefly over the counter, and not by out-door business, was allowed. (k) So, where the question in dispute was to whom the freehold belonged, a count in trespass has been amended by turning it into a count for an injury to the plaintiff's reversion. (l) So a statute omitted in the margin of a plea of not guilty by statute has been allowed to

(i) Saunders v. Bate, 1 H. & N. 402.

(l) May v. Footner, 5 Ell. & Bl. 595.

(k) Roles v. Davis, 4 H. & N. 484.

Howard, 32 Vt. 380; Autauga Co. v. Davis, 32 Ala. 713; declarations of the principal to a note, as to the relations of those whose names are already upon it, made to one whose signature he obtains thereto; Whitehouse v. Hanson, 42 N. H. 9; declarations of one in possession of property, made at the time when the property was delivered to him, to show the nature and purpose of his possession (State v. Scheider 35 Mo 533; Johnson v. Boyles, 26 Ala. 577) have been held admissible as a part of the *res gestæ*; as the declarations of the vendor before the sale as to the character or quality of the goods; Land v. Lee, 2 Rich. (S. C.) 168; or of one in the possession of land, as to the extent of his claim, and the character of his occupancy; Sailor v. Hertzogg, 2 Barr. (Penn.) 182; or his intention in doing a certain act, as that, by clearing land and burning charcoal thereon, he intended to settle and improve the lands; Jones v. Brownfield, Id. 55.

"So it has been held that the declarations of a person having personal property in his possession, made before any claim is made to the property by another, may be given in evidence in an action between him and a person claiming the property, but that the weight to be given to such evidence is for the jury. Gerry v. Terrill, 9 Ala. 206; Horton v. Smith, 8 Id. 73; Trotter v. Watson, 6 Humph. (Tenn.) 509.

"Thus it will be seen that, whenever the acts or declarations of a party, made at the time of a transaction, and so intimately connected therewith as to form a part of it, which tend to explain the transaction, or to aid in arriving at the real nature, character, and purpose of the transaction, are admissible in evidence as well for as against the party making them; and such evidence is admissible not only in actions between the parties themselves, but also in actions for or against their personal representatives, or those who are privy in interest with the parties. Greenleaf on Evidence, § 189.

be added. (*m*) And to a declaration for knowingly keeping a fierce and mischievous dog, an amendment by the addition of the words "and accustomed to bite mankind," has been allowed. (*n*)

The power of amendment, however, given by these statutes is not confined to the amendment of variances, but enables the judge to amend by adding fresh plaintiffs in an action of ejectment, (*o*) or a plea necessary for the trial of the substantial question between the parties, or to strike out a count, where by an inadvertence no issue has been joined thereon. (*p*) Thus, in an action for injuries sustained by the negligent driving of the defendant, a plea that the person driving was not at the time of the accident in the employ of the defendant as his servant, has been allowed to be added. (*q*) Whether or not the proposed amendment is necessary for the purpose of

(*m*) *Edwards v. Hodges*, 15 C. B. 477.

(*n*) *Worth v. Gilling*, L. R., 2 C. P. 1.

(*o*) *Blake v. Done*, 7 H. & N. 465; 31 Law J., Exch. 100; but not a fresh de-

fendant, *Garrard v. Giubelei*, 11 C. B., N. S. 616; 31 Law J., C. P. 270.

(*p*) *Berresford v. Geddes*, L. R., 2 C. P. 285.

(*q*) *Mitchell v. Crassweller*, 13 C. B. 239.

"The justice of the rule permitting all the acts and declarations of a party immediately connected with it, and material thereto, to be given in evidence to show the real intention, object, and purpose of parties to a contract, when any reasonable doubt exists, from the language of the contract itself, as well as the acts and declarations of parties to *any* transaction, to show the real nature and character of the transaction or act, is unquestionable. The real intention of a person in a transaction, which is not reduced to writing, can be gathered in no other way. Men act from secret motives, and their *declared* intention is very often quite at variance with the *real* motive which actuates them. Therefore, the only real key thereto is their acts; and any acts calculated to throw light upon that point, and intimately connected with it, are always admissible. Thus, it has been held that, when fraud in the purchase or sale of property is in issue, it is competent to show other similar frauds committed by the *same* parties, at or near the same time, as tending to establish the *animus* of the parties in the transaction in question, and to show their fraudulent intent—as, in a proceeding for the forfeiture of a distillery for fraudulent distillation, it has been held competent to show the fact that, by the decree of another court, liquors from the same distillery had been forfeited; *United States v. One Distillery*, 2 Bord. (U. S.) 399; *Butler v. Watkins*, 13 Wall. (U. S.) 456; so it has been held competent to show, in a proceeding for a forfeiture under the internal revenue law, that the defendants have been guilty of other similar frauds, in order to establish their fraudulent intent; *United States v. Merriam*, 3 Chicago Legal News, 114; *United States v. Thirty-six Barrels of High Wines*, 7 Blatch. (U. S.) 469; *United States v. Four Cases Merinoes*, 2 Paine (U. S.) 200; so in an action against a commission merchant for fraudulently selling the goods of a customer to

determining the real question in controversy between the parties is a matter to be decided by the judge, (r) but no amendment ought to be made which affords reasonable grounds of demurrer, (s) or which alters the cause of action set forth on the face of the declaration into another and a different cause of action, (t) unless it is manifestly necessary to determine the real question which both parties came to try. (u) Thus, an action for money lent may be altered into an action for a false representation of authority, where that is the real cause of action. (v) But in an action for fraudulent misrepresentation as to the defendant's reason for dismissing his clerk, in which it appeared that the clerk had as a fact been guilty of dishonesty while in the defendant's service, but that he was not dismissed for that reason, an amendment to the effect that the defendant fraudulently omitted to mention the fact of the clerk's dishonesty was disallowed, the question to be tried on the declaration as it stood being, whether the defendant assigned the right reason for dismissing him. (y) Nor will a

(r) Wilkin v. Reed, 15 C. B. 205; 23 Law J., C. P. 193.

(s) Martyn v. Williams, 1 H. & N. 817.

(t) Bradworth v. Foshaw, 10 W. R. 760.

(u) May v. Footner, *supra*.

(v) Richardson v. Williamson, *ante*.

(y) Wilkin v. Reed, *supra*.

an insolvent purchaser, evidence of similar fraudulent acts at about the same time have been held competent upon the question of intent; Carth v. Bullard, 23 How. (U. S.) 172; and in proceedings for forfeiture, under the customs laws, by means of false invoices, or undervaluation of goods, it is held that evidence of previous similar transactions, both before and after the transaction in question, may be shown; Taylor v. U. S., 3 How. (U. S.) 197; Wood v. N. Y., 16 Pet. (U. S.) 342; Buckley v. U. S., 4 How. (U. S.) 251; Alfonso v. U. S., 2 Story (U. S.) 421. In Rex v. Davis, 6 C. & P. 177, it was held that, in a prosecution for receiving stolen goods, it was competent to show that the respondents, who were pawnbrokers, had received other stolen goods from the *same person*, with a view to establishing the *scienter*. But, while the rule as applied to this case, and generally as restricted in that case to transactions between the *same parties*, may not be obnoxious to criticism, yet the case itself, and the consideration given in question by Gurney, J., on the trial, does not entitle it to great weight as an authority. The same rule, however, was adopted in Rex v. Dunn & Smith, 1 M. C. C. 146. In Coleman v. The People, 55 N. Y. 81, it was held that evidence that the respondent had received other stolen property from *other persons* was not admissible to establish the *scienter*; and in People v. Corbin, 56 N. Y. 363; 15 Am. Rep. 427; it was held that evidence of *other forgeries* by the respondent was not admissible in a prosecution against him for forging the name of *another person*. It was well said by RAPALLO, J., in the case referred to, that 'the fact that the prisoner made an unauthorized use of the name of one person,

count in trespass or trover by one tenant in common against another be allowed to be altered into a count for an account under 4 Anne, c. 16, s. 27. (z)

1380. *Admissions of liability*.—Admission of parties under a misapprehension of the responsibility which the law would cast upon them, is not such an admission as can be used with effect against them. (a) When a man, to prevent litigation, and by way of compromise, expresses a willingness to pay a sum of money, such conduct does not fairly raise an admission of such a liability as will make him answerable in law. Statements made to purchase peace and stave off litigation do not necessarily evince a consciousness of liability. (b)

1381. *Illness of witness*.—The deposition or examination of a witness on interrogatories, unable to attend a trial from "permanent" sickness, is made admissible by 1 W. 4, c. 22, s. 10, if the judge is satisfied, by such evidence as he shall think fit, of the sickness, and it is only necessary that the sickness shall be so far permanent as to prevent the witness being able to attend within any reasonable time. (c)

(z) *Jacobs v. Seward*, L. R., 5 Engl. & Ir. App. 464.

(a) *Ld. Tenterden, Bradley v. Waterhouse*, 3 C. & P. 321.

(b) *Bull*, N. P. 236 b, 7th ed.

(c) *Beaufort (Duke of) v. Crawshay*, L. R., 1 C. P. 699.

if established, shows that he was morally capable of committing the same offense against another, *but does not legitimately tend to show that he did so.*' Thus, it will be seen that, while, in order to show a person's intent in a particular matter, transactions between the *same parties* of a *similar character* may be shown, similar transactions between *other* persons, to which one of the parties was a party, are *never* admissible. *Jones v. Knowles*, *ante*. In *State v. Howard*, 32 Vt. 380, the respondent was arrested for procuring an abortion, and the fact of the death having been proved to have occurred at his house, and other circumstances tending to establish the crime, it was held that the declarations of the deceased at the time she left home as to her purpose in going to the respondent's house, were admissible as a part of the *res geste*."

CHAPTER XXII.

OF THE DAMAGES AND COSTS RECOVERABLE IN ACTIONS
EX DELICTO.**SECTION I.**—*Of damages recoverable in actions ex delicto.*

- 1382. Of the assessment of damages in actions *ex delicto*.
- 1383. Damages recoverable in particular actions.
- 1384. Special and extraordinary damages.
- 1385. Damages too remote, and not naturally resulting from the wrong done.
- 1386. Damages in actions of tort founded on contract.
- 1387. Expense of obtaining legal advice.
- 1388. Costs of previous legal proceedings.
- 1389. Recovery of damages which the plaintiff has become liable to pay through the default of the defendant.
- 1390. Medical expenses — Physician's fees.
- 1391. Prospective damages.
- 1392. Exemplary and vindictive damages.
- 1393. Evidence in mitigation of damages.
- 1394. Joint-trespasses — Recovery of damages from one of several co-trespassers.
- 1395. Damages when the plaintiff has insured against loss, or has received full indemnity under a contract of insurance.
- 1396. Double and treble damages.
- 1397. New trial on the ground of excessive and outrageous damages.
- 1398. New trial on account of the smallness of the damages.

- 1399. Arrest of judgment where the plaintiff has a verdict for greater damages than he is legally entitled to.

- 1400. Inquisition of damages before the sheriff.

SECTION II.—*Of the recovery of costs in actions ex delicto.*

- 1401. Award of costs to a successful plaintiff in the superior courts.
- 1402. Costs to a successful defendant.
- 1403. Costs on pleas setting up matters of defense which have arisen since the last pleading.
- 1404. Costs on a stay of proceedings.
- 1405. Costs on arrest of judgment, or judgment *non obstante veredicto*.
- 1406. Where the court has no jurisdiction it has no power to give costs.
- 1407. Effect on costs of withdrawing a juror.
- 1408. Costs in actions of slander and libel.
- 1409. When the certificate of a judge or presiding officer is necessary to enable the plaintiff to recover costs.
- 1410. Certificate that the action was brought to try a right.
- 1411. Within what time the certificate must be granted.
- 1412. County Court Acts depriving the plaintiff of costs in the superior courts.
- 1413. When the foundation of the action is a contract.
- 1414. When money has been paid into court.

- 1415. The certificate that it appeared to the judge that there was sufficient reason for bringing the action in the superior court.
- 1416. Costs on references.
- 1417. Costs of reference.
- 1418. Certificate for full costs' in actions for willful and malicious grievances.
- 1419. Full costs in actions for willful and malicious trespass, or after notice not to trespass.
- 1420. Costs in the superior courts in actions against justices.
- 1421. In actions against constables and officers, and parties acting or intending to act in the execution of statutory powers.
- 1422. Certificate for costs in actions for things done in supposed pursuance of the Act for the protection of property from malicious injuries.
- 1423. Costs in actions against executors.
- 1424. Costs in actions for duties and penalties at the suit of the Crown.
- 1425. In actions upon judgments.
- 1426. Costs on new trials.
- 1427. In cases of appeals from the decision of a county-court judge, or judge of an inferior tribunal.
- 1428. In the case of an appeal from a superior court to the Court of Exchequer Chamber.
- 1429. Costs on removal of actions by writ of certiorari.
- 1430. In cases of prohibition.
- 1431. On indictments for libel and slander.
- 1432. Costs of writs of mandamus and injunction.
- 1433. On an application for an injunction under the Railway and Canal Traffic Act.
- 1434. Repeal of divers statutes enabling plaintiffs in certain actions to recover double costs.
- 1435. Costs in compensation cases.
- 1436. Taxation of costs.
- 1437. Costs of particular issues.
- 1438. Where costs are to be taxed by the court in which the action is brought.
- 1439. Security for costs.
- 1440. Award of costs in the count, court.

SECTION I.

OF DAMAGES RECOVERABLE IN ACTIONS EX DELICTO.

1382. *Of the assessment of damages in actions ex delicto.*—In actions of tort a greater latitude is allowed by the court to a jury in the assessment of damages than is allowed in actions of contract. (a) "The damages must be excessive and outrageous to warrant a new trial;" (b) "for it is not to be expected that a jury will measure their verdict so nicely as in cases of contract." (c) Therefore, where some printer's devils, who had been unlawfully imprisoned for six hours, brought

(a) De Grey, C. J., *Sharpe v. Brice*, 2 W. Bl. 942.

(b) *Huckle v. Money*, 2 Wils. 205.

(c) Cresswell, J., *Williams v. Currie*, 1 C. B. 848. *Fabrigas v. Mostyn*, 2 W. Bl. 928.

their several actions, and the jury gave each of them £300 damages, the court declined to meddle with the verdict, although it was proved that each of the plaintiffs had been civilly treated and fed upon beef-steaks and porter during the period of their imprisonment. (*d*) "If the jury," observes PRATT, C. J., "had been confined by their oath to consider the mere personal injury only, perhaps £20 damages would have been thought sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial."

The court will not in general interfere with the damages unless the finding has proceeded from some mistake; or the jury have acted from some sinister feeling, and the judge is dissatisfied with their verdict. (*e*) If the jury give the plaintiff more damages than by his own showing he ought to recover, (*f*)¹ or if there be several counts in the declaration, and a verdict is entered generally on all the counts, and entire damages are given, and one count is bad, the damages so assessed cannot be recovered, and a venire de novo must be awarded. (*g*) If an action of slander be brought for words spoken at different times, and the action will not lie for the words spoken at one time, but will lie for words spoken at another, and a verdict is found for all the words, and entire damages are assessed, no judgment will be given; (*h*) but when words are all spoken at one time, and some of them are actionable, and some not, and damages are assessed generally, they shall be intended to be given only for those words which are actionable, and it shall be presumed that the others were inserted only for aggravation. (*i*)

1383. *Damages recoverable in particular actions.*—The damages recoverable in particular actions have already been in

(*d*) Huckle v. Money, 2 Wils. 205.

(*e*) Wallington v. Wood, C. P. Nov. 8th, 1860. Britton v. S. W. Rail. Co., 27 Law J., Exch. 355; see *post*, NEW TRIALS.

(*f*) Hambleton v. Veere, 2 Wms. Saund. 170.

(*g*) Grant v. Astle, Doug. 730. Leach

v. Thomas, 2 M. & W. 427.

(*h*) Popham, J., Brooke v. Clarke, Cro. Eliz. 328. Jaxon v. Tanner, Cro. Car. 237.

(*i*) Penson v. Gooday, Id. 327. Thaxbie v. Smith, Cro. Eliz. 788. Berkeley v. Earl of Pembroke, Moore, 706. Broughton's case, Id. 708.

■ Pierce v. Dart, 8 Cowen (N. Y.) 605; Pike v. Doyle, 14 La. Ann. 362; O'Mara v. R. R. Co., 38 N. Y. 455.

most cases considered under the headings of those actions. (*j*)

Where a person has been induced, by false accounts of the transactions and profits of a joint-stock company, to buy shares therein, and give for them a sum far beyond their real value, the measure of damages is the difference between the actual value of the shares at the time of the purchase, and the fictitious value imparted to them by the false representation. (*k*)

As against a manifest wrong-doer a jury is, as we have seen, justified in making the strongest presumptions, so that if an article of value, such as a diamond necklace, has been taken away, and part of it is traced to the possession of the defendant, the jury may reasonably infer that the whole thing has come into his hands, and give damages accordingly. (*l*) Where the plaintiff by his own dealings and acts, renders the nature of his interest in the property and the extent of the damages altogether doubtful, he may vacate his whole claim, or destroy his right to more than nominal damages. (*m*)

1384. *Special and extraordinary damages.*—All damages which ordinarily and in the natural course of things might fairly be expected to result, and have resulted, from the commission of the wrongful act, are recoverable, provided they are claimed by the plaintiff in his declaration. (*n*) If by reason of the defendant's negligence and breach of duty the property of the plaintiff has become deteriorated and reduced in value by rain, storm, or frost, or any destructive agencies of ordinary occurrence, the plaintiff will be entitled to recover all the damage he has sustained thereby. (*o*) All persons are responsible for all the natural consequences resulting from acts done by them in violation of the rights of others. The jury are entitled to look into all the circumstances and at the conduct of both parties, and see where the blame is, and what ought to be the compensation according to the way the parties have conducted

(*j*) As to damages in an action by a judgment-creditor against a sheriff for an escape, see *Hemming v. Hale*, 29 Law J. C. P. 137; but imprisonment for debt is now abolished.

(*k*) *Davidson v. Tulloch*, 3 Macq. 783.

(*l*) *Mortimer v. Craddock*, *ante*.

(*m*) *Pringle v. Taylor*, 2 Taunt. 150.

(*n*) *Pollock, C. B., Rigby v. Hewitt*, 5 Exch. 242. *Workman v. Gt. North. Rail. Co.*, 32 Law J., Q. B. 79. *Gilbertson v. Richardson*, 5 C. B. 502.

(*o*) *Smeed v. Foord*, 28 Law J., Q. B. 178.

themselves. (*p*)¹ Where the plaintiff has been compelled to pay money to release himself from the injurious consequences naturally resulting from the wrongful act of the defendant, such money is recoverable from the defendant as part of the damages.

Whenever one person commands or authorizes an act to be done by another, he is responsible for all that the other does in the necessary execution of his authority. If, therefore, an assault and imprisonment of the plaintiff are the necessary or probable consequence of orders given by the defendant, the defendant will be responsible in damages for such assault and imprisonment, although he did not directly order it, or contemplate the possibility of its occurrence. (*q*)²

(*p*) *Davis v. North-West. Rail. Co.*, 7 H. & N. 79.
W. R. 105. *Collard v. S. E. Rail. Co.*, 7 (*q*) *Glynn v. Houston*, 2 M. & Gr. 337.

¹ All damages that are the *natural* and *necessary* consequences of an act, may be recovered under a general allegation of damage; but damages that although a *natural* are not a *necessary* consequence of an act, are what are called *special* damages, and can not be recovered unless specially alleged in the complaint. *Vanderslice v. Newton*, 4 N. Y. 130; *Griggs v. Fackenstein*, 18 Minn. 92; *Furlong v. Polleys*, 30 Me. 491; *Olmstead v. Burke*, 25 Ill. 86; *Hart v. Evans*, 8 Penn. St. 13; *Burrill v. N. Y. & Co.*, 14 Mich. 34; *Hallock v. Belcher*, 42 Barb. (N. Y.) 199; *Alston v. Huggins*, 3 Brev. (S. C.) 185; *Teagarten v. Hetfield*, 11 Ind. 522; *Hemminway v. Woods*, 1 Pick. (Mass.) 524. In *Hunter v. Stewart*, 47 Me. 419, the rule, which is commonly accepted, is thus given: "In an action for injuries resulting from negligence, only such damages can be recovered as result *necessarily* from the act complained of; all other damages must be specially alleged or no recovery can be had therefor."

In an action against a railroad company for permitting the plaintiff's mules, in charge of the company, to escape, a part of which he recovered, it was held that the services and expenses of the plaintiff in recovering the mules was a proper element of damage. *Northern Mo. R. R. Co. v. Arhens*, 4 Kans. 453. So, where a carrier lost a canvas bag belonging to the plaintiff, containing ninety double eagles of the coinage of the United States, it was held that the plaintiff was entitled to recover the value of the coin, with the premium added thereto, at the time of the loss, with interest from the time of demand. *Cushing v. Wells*, 98 Mass. 550. So, where the defendant undertook to carry the plaintiff to San Francisco by way of Nicaragua, but failed to do so, it was held that the plaintiff might recover not only for lost time by reason of his detention, his expenses there, and his expense of return to New York, but that he might also recover the expense of his sickness after his return to New York, and for loss of time, so far as the same was occasioned by the defendant's negligence or breach of duty. *Williams v. Vanderbilt*, 28 N. Y. 217.

² But in such cases where the act is done by a servant or agent, exemplary damages should not be given unless the principal is shown to have directed the act to be done as it was done; *Hogan v. R. R. Co.*, 3 R. I. 88.

In an action for breaking and entering the plaintiff's dwelling-house, and assaulting and beating him, Lord ELLENBOROUGH allowed the plaintiff to give in evidence that his wife was so terrified by the conduct of the defendant that she was immediately taken ill and died soon afterwards, not as a substantive ground of damage, but for the purpose of showing how outrageous and violent had been the conduct of the defendant. (r) "But I entertain considerable doubt," observes POLLOCK, C.B., "whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated." (s)¹

1385. *Damages too remote, and not naturally resulting from the wrong done.* (t)—Where a passenger on board ship was assaulted and imprisoned for one night by the captain, and in consequence thereof took the first opportunity of leaving the ship, and paid £100 for his passage home in another vessel, it was held that, in order to recover the £100 as part of the damages for the assault and imprisonment, it was necessary for the plaintiff to prove that there was fair and reasonable ground for fearing a renewal of the ill-treatment, and that he left the vessel under the influence of such fear, and not merely because he was angered and displeased with the captain, and could not continue on board with ease and comfort. (u)²

(r) *Huxley v. Berg*, 1 Stark. 98. *Bracegirdle v. Orford*, 2 M. & S. 77.

(s) *Greenland v. Chaplin*, 5 Exch. 248.

(t) *Walker v. Olding*, 32 Law J.,

Exch. 142. *Wilson v. Lanc. and York. Rail. Co.*, ante.

(u) *Boyce v. Bayliffe*, 1 Campb. 58.

¹ *Daniels v. Ballatine*, 23 Ohio St. 532; *Clements v. R. R. Co.*, 53 Mo. 366; *Hamilton v. McPherson*, 28 N. Y. 72; *Adams Ex. Co. v. Egbert*, 36 N. Y. 360.

² Damages, in order to be recoverable, must be the proximate, natural, or necessary consequence of the act. The fact that the injury is a remote result of the act, or in other words, that the injury would not have occurred except for the act, is not enough, if some other cause intervened, which is the proximate cause of the injury. Thus, where A contracted with B to tow a boat for him from Bay City to Buffalo, but, before he had completed the voyage, suspended it, and afterwards resumed it, and a storm came on whereby the boat was lost, it was held, that the storm being the proximate cause of the injury, and the delay the remote cause, the damages resulting from the loss of the boat could not be charged to A., although his delay was unreasonable and unnecessary. *Daniels v. Ballatine*, 23 Ohio St. 532. Neither can damages be recovered that do not enter into the contemplation of the parties at the time when the contract was made. Thus, where A (a dentist) was a passenger

1386. *Damages in actions of tort founded on contract.*—

When the action of tort is founded on a breach of contract the damages recoverable are those which may fairly and reasonably be considered to arise naturally, according to the usual course of things, from the breach of contract itself, or which may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. If special circumstances exist which render the neglect or breach of duty productive of more than ordinary injury and damage to the plaintiff, such special circumstances must have been communicated to the defendant in order to make him responsible for the special and extraordinary damages resulting from any neglect or breach of duty on his part. (x) A man cannot, by merely changing the form of his action, entitle himself to recover greater damages than those to which he is by law entitled according to the true facts of the case and the real nature of the transaction. (y)¹

1387. *Expense of obtaining legal advice.*—The expense incurred by a plaintiff in consulting an attorney and obtaining a legal opinion upon the validity of his claim, is not recoverable as part of the damages. “Parties must do what they think is right, and the expense of getting the experience of attorneys to advise is not to be repaid by the other party. Nothing of

(x) *Hadley v. Baxendale*, 9 Exch. 354.
Portman v. Middleton, 4 C. B., N. S. 322.
 27 Law J., C. P. 231. *Theobald v. Rail*.
Pass. Ass. Co., 10 Exch. 45. *Peterson v.*

Ayre, 13 C. B. 353.

(y) *Chinery v. Viall*, 5 H. & N. 295.
Johnson v. Stear, 33 L. J., C. P. 130.

B's boat, and lost his baggage, which contained his set of dental instruments, it was held that he could recover for the actual value of the baggage, and could not recover for the loss of profits and earnings which he might have made if he had not lost his instruments, as such damages could not be said to have reasonably entered into the contemplation of the parties. *Clemens v. Hannibal, &c.*, R. R. Co., 53 Mo. 366; *Holloway v. Stephens*, 2 S. C. (N. Y.) 658. So in a case where the defendant entered into a contract with the plaintiff to keep his dam in repair, and in default, the plaintiff was at liberty to repair at the defendant's expense, it was held that the plaintiff could only recover the cost of making the repairs, and could not recover speculative damages for loss of profits while his mill was lying idle, nor for deterioration of machinery. *Fort v. Orndoff*, 7 Heisk. (Tenn.) 167.

¹ *Surrey v. Wells*, 5 Cal. 124; *Williams v. Vanderbilt*, 28 N. Y. 217; *Priestly v. No. Ind. R. R. Co.* 26 Ill. 205; *Amory v. McGregor*, 15 Johns. (N. Y.) 24; *Galena, &c. R. R. Co. v. Rae*, 18 Ill. 488; *Cooper v. Young*, 22 Ga. 269; *Ogden v. Marshall*, 8 N. Y. 340; *Laurent v. Vaughn*, 30 Vt. 90; *Kent v. Hudson R. R. Co.*, 27 Barb. (N. Y.) 278; *Weston v. Gd. Trank R. R. Co.*, 54 Me. 376.

that sort can be allowed in damages, and everything of that nature that a plaintiff is entitled to will be allowed in the taxation of costs." (z)¹

1388. *Costs of previous legal proceedings.*—A defendant in an action ex delicto is responsible in damages, as we have seen, for the natural and ordinary consequences of the wrong done. Where, therefore, the defendant, who was employed as architect to superintend the building of a church, ordered stone for the church from the plaintiffs in A's name, and on his account, and the plaintiffs supplied the stone, and afterwards sued A for the price, but failed in their action, and had to pay A's costs and the costs of their own attorney, because it was proved at the trial that the defendant had received no authority from A to order the stone in his name, and the plaintiffs then brought an action against the defendant to recover the damages they had sustained by reason of his false assumption of agency and pretense of authority for the order he gave, it was held that the plaintiffs were entitled to recover from the defendant not only the value of the stone ordered by him in A's name, but also the costs they had incurred and paid in the former action. (a)² So where a land agent professed to have authority from a landowner to let land, and signed an agreement for a lease and the landowner repudiated the lease and denied the authority, and the intended tenant, relying on the representation of the agent, filed a bill in Chancery against the landowner for a specific performance of the agreement, and notice of the suit was given to the agent, and the latter failed to withdraw his assertion of authority, he was held liable to pay the costs of the Chancery suit. (b) But no person relying on a pretended authority of this sort ought in prudence to take legal proceedings against the supposed principal without giving notice to the

(z) *Clare v. Maynard*, 7 C. & P. 743.

(a) *Randell v. Trimen*, 18 C. B. 786 ;
25 Law J., C. P. 307. *Richardson v.*
Dunn, 8 C. B., N. S. 655 ; 30 Law J., C.
P. 47.

(b) *Collen v. Wright*, 7 Ell. & Bl. 311 ;

8 Id. 647, in error ; 26 Law J., Q. B. 147 ;
27 Id. 215. *Hughes v. Græme*, 33 Law
J., Q. B. 335. *Spedding v. Nevell*,
ante.

¹ *Levy v. Baer*, 19 La. Ann. 464 ; *Welch v. R. R. Co.*, 12 Rich. (S. C.) 290 ; nor
are they a proper element of exemplary damages *Earl v. Tupper*, 45 Vt. 275 ;
Hoadly v. Watson, 45 Id. 289.

² *Chicago v. Robbins*, 2 Black (U. S.)

pretended agent, and giving him an opportunity of withdrawing or verifying his assertion of authority. (c)

Where a tenant gave his landlord notice to quit, and then refused to give up possession, it was held, as we have seen, that the landlord was entitled to recover the costs of an action brought against him by a person to whom he had contracted to let the premises, but to whom he was unable to give possession, in consequence of the refusal of the tenant to go out pursuant to his notice. "The letting to a new tenant," observes COCKBURN, C. J., "is the ordinary course of dealing on the part of an owner of land under such circumstances. The defendant, therefore, must have understood, that when the plaintiff gave him notice to quit he would enter into a new contract with a new tenant to let the premises to him from the expiration of such notice. And in this case the tenant was apprised of the fact that the landlord had re-let the premises, and was consequently aware of the inconvenience and loss he was exposing him to by his improper conduct." (d)

In an action for running down a ship, in which it appeared that the plaintiff had been obliged, in consequence of the injury, to employ a steam-tug, the owners of which demanded £150 for salvage, and commenced a suit in the Admiralty Court against the plaintiff, who paid £20, and the Court ultimately decreed the payment of £45, with costs, to the salvors, and the plaintiff sought to recover these costs as part of the damage he had sustained, it was held that the proper question for the jury was, whether the plaintiff, in paying only £20 into court, and risking the costs of the action, had pursued the course which a prudent and reasonable man would take in his own case, and that if the jury thought he had, the costs of the suit might be recovered. (e)

If the buyer of a horse or a picture with a warranty, relying on the warranty, re-sells the horse or the picture with a warranty, and being sued thereon by his vendee, gives notice to the defendant of the action, and receives no direction from the latter to give up the cause, and proceeds to defend, and is worsted, the costs and damages of the defense to that action

(c) Wightman, J., in *Collen v. Wright*,
26 Law J., Q. B. 151.

(d) *Bramley v. Chesterton*, 2 C. B., N.
S. 605.

(e) *Tindall v. Bell*, 11 M. & W. 228.

are part of the damages, which the plaintiff sustains by reason of the false warranty, and may be recovered by the plaintiff in an action against the defendant for damages for the breach of warranty. (*f*) But if the plaintiff has made a rash and improvident defense, after having had an opportunity of ascertaining by examination that the warranty could not be supported, he will not be permitted to recover the costs of his defense; (*g*) for "no person has a right to inflame his own account against another by incurring expenses in an unrighteous resistance to an action which he can not defend with any prospect of success." (*h*) If the costs have been taxed, the taxed costs only can be recovered. (*i*)

If the costs incurred in legal proceedings are not part of the consequences of the wrong done, (*j*) or if they do not naturally result from the breach of any warrant of authority, or if they are the remote, unexpected, and unusual consequence of the wrong, such as costs incurred in upholding a defense which is manifestly wholly untenable, (*k*)¹ they are not recoverable. (*l*)

1389. *Recovery of damages which the plaintiff has become liable to pay through the default of the defendant.*—A liability on the part of the plaintiff to pay damages to a third party, by reason of the default of the defendant, is enough, as we have seen, to enable the plaintiff to recover those damages from the defendant. It is not necessary that the money itself should be actually paid. Thus, where the defendant sold barley to the plaintiff, warranted to be chevalier seed-barley, and the plaintiff re-sold it with a similar warranty, and the barley was not

(*f*) *Lewis v. Peake*, 7 Taunt. 152.
Pennell v. Woodburn, 7 C. & P. 118.
Randall v. Raper, 27 Law J., Q. B. 266;
 Ell. Bl. & Ell. 84.

(*g*) *Wrightup v. Chamberlain*, 7 Sc. 589.

(*h*) *Ld. Denman, C. J., Short v. Kallo-way*, 11 Ad. & E. 31.

(*i*) *Grace v. Morgan*, 2 Sc. 793. But

see per *Martin, B.*, in *Howard v. Lovegrove*, L. R., 6 Exch. 45.

(*j*) *Holloway v. Turner*, 6 Q. B. 928.

(*k*) *Ronneberg v. Falkland Islands' Co.*, 34 Law J., C. P. 34.

(*l*) *Pow v. Davis*, 1 B. & S. 220; 30 Law J., Q. B. 256. *Richardson v. Dunn*, 8 C. B., N. S. 655; 30 Law J., C. P. 44;

¹ When a person is evicted from lands which he holds under a covenant of warranty, he may, in addition to the price paid and interest thereon, recover all the expenses reasonably incurred by him in defense of his title. *Hale v. New Orleans*, 18 La. Ann. 321; *Cady v. Allen*, 22 Barb. (N. Y.) 388; *Marshal v. Betner*, 17 Ala. 832; *Allen v. Blunt*, 2 W. & M. (U. S.) 121; *Lee v. Dean*, 3 Whart (Penn.) 316; *Jackson v. Halliday*, 3 T. B. Mon. (Ky.) 363; *Wheeler v. Styles*, 28 Tex. 240; *Hall v. New York*, 22 Id. 641; *Roberts v. Heim*, 27 Ala. 678; *Gibbs v. Jamison*, 12 Ala. 820; *Foly v. McKegan*, 4 Iowa, 1; *Gary v. Hastings*, 39 Cal. 360; 2 Am. Rep. 456.

chevalier seed-barley, and the sub-purchaser claimed damages from the plaintiff, whereupon the plaintiff fell back upon the defendant and sued him for these damages, it was held, as we have seen, that he was entitled to recover them, although he had not actually paid them to the sub-purchaser. "I consider," observes CROMPTON, J., "that it was not necessary that there should be a payment before the right to recover these damages accrued, and that the jury may well calculate all the mischief which, according to the breach of contract, might accrue to the plaintiff. This matter has been a good deal discussed in cases of special damage, and it has been usual to give in evidence the amount of the bills sent in by surgeons and attorneys, but it has never been said that the liability to pay is not enough to enable the plaintiff in an action of that kind to recover, and from the very nature of the thing here the amount of damages is ascertainable from the kind of crop which grows up. Then, another reason for so holding is, that according to the principle upon which damages are assessed they are only to be assessed once, and therefore the jury ought to take all these circumstances into consideration in estimating the amount of damages to which the plaintiffs are entitled." (*m*)

1390. *Medical expenses—Physician's fees.*—Where the plaintiff had been wounded by the negligence of the defendant in the management of a gun, and had employed a surgeon and physician for the cure of the injury he had sustained, Lord ELLENBOROUGH told the jury, that as to the surgeon's bill, they were to consider the amount as paid by the plaintiff, since the surgeon could compel the payment of it as a legal debt, but that the physician's fees could not be taken into account, since they had not been actually paid, and the physician could not enforce payment by action. (*n*)¹

But where the declaration alleged an actual payment of the charges of a third person, the allegation was held material, and necessary to be proved in order to enable the plaintiff to recover the amount of them. (*o*)

(*m*) *Randall v. Raper*, *supra*. Spark v. Heslop, 28 Law J., Q. B. 197. Dingle v. Hare, 29 Id. C. P. 143. Addison on Contracts, 6th Ed. 1054, *et seq.*

(*n*) *Dixon v. Bell*, 1 Stark 289. *Loosemore v. Radford*, 9 M. & W. 657. Spark v. Heslop, 28 Law J., Q. B. 197.

(*o*) *Jones v. Lewis*, 9 Dowl. P. C. 150. *Pritchett v. Boevey*, 1 Cr. & M. 778.

¹ *Mills v. Hall*, 9 Wend. (N. Y.) 315; *Folsom v. Underhill*, 36 Vt. 380.

1391. Prospective damages. (*p*)—Although a plaintiff is not to be compensated for uncertain and doubtful consequences which may never ensue, yet he is entitled to compensation for losses which will “almost to a certainty happen.” The jury may take into their consideration, in making up their minds on the damages, losses which will in all probability be sustained by the plaintiff; for “when the cause of action is complete, when the whole thing has but one neck, and that neck has been cut off by the act of the defendant, it would be most mischievous to say—it would be increasing litigation to say—you shall not have all you are entitled to in your first action, but you shall be driven to bring a second, a third, or a fourth action for the recovery of your damages.” (*q*)¹

In estimating the damages in an action for a libel against a trader, the jury may take into consideration the prospective injury which will probably accrue to the trader from the publication of the libel. (*r*) It has been said that the damage sustained at the time of the commencement of the action is all that the plaintiff can recover, and that the jury can not take into account the prospective injury; but “it appears to me,” observes BOSANQUET, J., “that the jury were warranted in proportioning the damages to the amount of injury that would naturally result from the act of the defendant, though it might not affect him until a subsequent period.” (*s*) And the jury may, it seems, give damages for the mental suffering arising from the apprehension of the future consequences of the publication of the libel. (*t*)²

(*p*) See *ante*.

(*q*) Best, C. J., *Richardson v. Mellish*, 2 Bing. 240. See *Fetter v. Beal*, *ante*. *Hodsoll v. Stallebrass*, *ante*.

(*r*) *Gregory v. Williams*, 1 C. & K. 568.

(*s*) *Ingram v. Lawson*, 8 Sc. 477.

(*t*) *Goslin v. Corry*, 8 Sc. N. R. 25. See *Randall v. Raper*, *ante*. *Lawrence v. Gt. North. Rail. Co.*, and *Bagnall v. London and N.-West. Rail. Co.*, *ante*.

¹ The loss of *probable* profits is not the subject of damages. *Olmstead v. Burke* 25 Ill. 86. But where there is proper data upon which to estimate the loss of anticipated profits, in a proper case they may be recovered. *Washburn v. Hubbard*, 6 Lans. (N. Y.) 11; *Miller v. Lapham*, 40 Vt.; *Masterton v. Mayor, &c.*, 7 Hill (N. Y.), 61; *Nightingale v. Scannell*, 18 Cal. 315; *Fox v. Harding*, 7 Cush. (Mass.) 516; *Kane v. Johnston*, 9 Bos. (N. Y.) 154; *Wright v. Petrie*, 1 S. & M. (Miss.) 282; *French v. Ramage*, 2 Neb. 254. In an action for an injury to the person, the plaintiff is entitled to recover not only the amount of damages already sustained by him, but also all those which it can reasonably be expected he will sustain in the future as the natural and inevitable result of the act. *Filer v. N. Y. Central R. R. Co.*, 49 N. Y. 42; *Walker v. Erie R. R. Co.*, 63 Barb. (N. Y.) 260.

² *Fry v. Bennett*, 3 Bos. (N. Y.) 200; *Hunt v. Bennett*, 19 N. Y. 173. In an

1392. *Exemplary and vindictive damages*.—We have already seen that in actions of tort the damages are left very much to the discretion and judgment of the jury; and in all cases of malicious injuries and trespasses accompanied by personal insult, or oppressive and cruel conduct, juries are told to give what are called exemplary damages, although the actual personal injury, measured by any pecuniary standard, may be but small. “It tends,” observes HEATH, J., “to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages. I remember a case where a jury gave £500 damages for knocking a man’s hat off, and the court refused a new trial.” (u) “Where,” observes GIBBS, C. J., “a man is disposed to disregard every principle which actuates the conduct of a gentleman, what is to restrain him except large damages?” (x) So, where an action was brought by the plaintiff for the seduction of his daughter, and damages were recovered, and a motion for a new trial was grounded on circumstances showing the damages to be excessive, WILMOT, C. J., stated that “actions for seduction are brought for example’s sake; and although the plaintiff’s loss in this case may not really amount to the value of 20s., yet the jury have done right in giving liberal damages.” (y)¹

(u) *Merest v. Hervey*, 5 Taunt. 442.

(x) 5 Taunt. 441.

(y) *Tullidge v. Wade*, 3 Wils. 18.

And see *Huckle v. Money*, *ante*.

action for personal injuries received by a person, it is competent to show, in aggravation of damages, that he has no means of support except his labor, and how his capacity for earning a livelihood will be affected by the injuries received. *Donaldson v. R. R. Co.*, 18 Iowa, 280. Thus, in *N. J. Exp. Co. v. Nichols*, 32 N. J. 166, the plaintiff, an architect who had been injured by the negligence of the defendants, was permitted to show his average annual profits from his profession, as a means of estimating the damages that should be given him. So in *Potter v. Chicago, &c.*, R. R. Co., 22 Wis. 615, the plaintiff, in an action for the negligent killing of his daughter, was permitted to show his pecuniary condition, and the reasonable expectations of pecuniary benefit from a continuance of the child’s life. So in *McDonald v. Chicago, &c.*, R. R. Co., 26 Iowa, 124, in an action for an injury to the wife that had disabled her for life, so as to render it probable that another person would have to be employed to attend to her usual duties, the *Carlisle Tables* were permitted to be used to show the expectancy of the wife’s life, as means of enabling the jury to estimate the damages. See also, *Kinney v. Crocker*, 18 Wis. 74; *Grant v. Brooklyn*, 41 Barb. (N. Y.) 381; *Lincoln v. Saratoga R. R. Co.*, 23 Wend. (N. Y.) 425; *Brown v. Cummings*, 7 Allen (Mass.), 507; *Chicago v. Allen*, 43 Ill. 496; *Bannon v. R. R. Co.*, 24 Md. 108; *Donaldson v. R. R. Co.*, 18 Iowa, 280.

¹ In cases where the damage is the result of the fraud, malice, or willful act of

Wherever the wrong or injury is of a grievous nature, done with a high hand, or is accompanied with a deliberate intention to injure, or with words of contumely and abuse, and by cir-

the defendant, and the circumstances of the case are such as call for such damages, vindictive damages may be given. The general rule is that, when the injury has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not restricted to actual damages, but may give such damages in addition thereto as the circumstances of the case seem to warrant, to deter others from the commission of like offenses. *Phila. R. R. Co. v. Quigley*, 21 How. (U. S.) 202; *Graham v. Roder*, 5 Tex. 141; *Hodson v. Millwood*, 3 Grant's Cas. (Penn.) 406; *Burkett v. Lanata*, 15 La. Ann. 337. Actual malice need not exist in order to entitle a party to primitive damages; if the act is wantonly or recklessly done, vindictive damages may be given, although there is no *actual* malice shown. *Dickey v. McDonnell*, 41 Ill. 62. Any act conceived in a spirit of mischief, or in evident disregard of the rights of others, or of civil or social obligations, comes within the idea of a malicious act. *Dibble v. Norris*, 26 Conn. 416; *Hopkins v. Atlantic, &c. R. R. Co.*, 36 N. H. 9; *Bell v. Morrison*, 27 Miss. 68. Every person is presumed to know the law, and when he violates it, is presumed to have acted with general malice. *Farwell v. Warren*, 51 Ill. 467; *Green v. Craig*, 47 Mo. 90. But, in order to warrant a jury in giving vindictive damages, something more than *mere* unlawfulness must be shown; there must be evidence, either of malice, fraud, wantonness, or oppression. The act must have been done under such circumstances as show a disregard for the rights of others, or an intention to set at defiance the legal rights of others, or the ordinary obligations of society. *N. O. &c. R. R. Co. v. Statham*, 42 Miss. 607; *Green v. Craig*, 47 Mo. 90; *Welch v. Durand*, 36 Conn. 182. Thus, in all cases where such damages are proper to be given, the jury should always be directed to have in view the nature of the offense, the circumstances attending it, and, in some cases, the standing of the parties, and make the damages as nearly commensurate with the nature of the offense in view of all the circumstances as possible. *Burkett v. Lanata*, 15 La. Ann. 337. The principle upon which these damages are given, is that, through this species of punishment, the interests of society are protected, at the same time that the party sustaining the injury is compensated therefor, and that in this way people are in a measure, at least, deterred from committing that species of injuries that partake of both civil and criminal elements. *Cole v. Tucker*, 6 Tex. 266; *Etchberry v. Sevielle*, 2 Hilt. (N. Y.) 40; and the fact that the defendant is liable to prosecution criminally for the act, or that he has been so punished therefor, is no bar to such recovery. *Hoodly v. Watson*, 45 Vt. 433; *Wilson v. Middleton*, 2 Cal. 54; *Cook v. Ellis*, 6 Hill (N. Y.), 466; *Jefferson v. Adams*, 4 Harr. (Del.) 321; *McNamara v. King*, 7 Ill. 432; *Edwards v. Leavitt*, 43 Vt. 126. When it is said that, in order to recover vindictive damages, *malice* must be shown, it is not meant that *actual* malice must be proved to have existed, but that something more than mere unlawfulness must be shown. That the circumstances must have been such as to indicate wantonness, or a willful disregard of the rights of others; an act done without circumstances of mitigation or excuse. *Brown v. Allen*, 35 Iowa, 106; *Moore v. Crasse*, 43 Ind. 30; *Stilwell v. Barnett*, 60 Ill. 219; *Tripp v. Grouner*, 60 Id. 474; *Hamilton v. Third Av. R. R. Co.*, 53 N. Y. 251; *Jones v. Turpin*, 6 Heisk. (Tenn.) 181. There is a disposition in some of the courts to refuse to allow such damages in a case where the party is also liable to punishment criminally, for the same cause. But neither the wisdom, policy, or

cumstances of aggravation, the jury are authorized in giving, and may be told to give, vindictive damages. (z) Thus, where in an action against a colonel of militia for ordering the

(z) *Thomas v. Harris*, 27 Law J., J., C. P. 281. *Emblen v. Myers*, 6 H. & Exch. 353. *Willes, J., Bell v. Mid.* N. 54; 30 Law J., Exch. 71. *Rail. Co., 10 C. B., N. S.* 307; 30 Law

reason of the rule are apparent, nor do they commend it to favorable reception. *Smith v. R. R. Co.*, 23 Ohio St. 10; *Fay v. Parker*, 53 N. H. 342; *Lucas v. Flinn*, 35 Iowa, 9; *Mooney v. Kennett*, 19 Mo. 551.

In actions for assault and battery exemplary damages may be given, and evidence to show circumstances in aggravation is always admissible; but, generally, instead of vindictive or exemplary damages, the jury are instructed that, in estimating the damages they may take into consideration the circumstances surrounding the transaction, and when they are of an aggravating character, may give damages in excess of the actual damage by way of aggravation, which, in effect, although not in name, is an allowance of exemplary damages. *Dickey v. McDowell*, 41 Ill. 62; *Keyes v. Devlin*, 3 E. D. S. (N. Y.) 378; *West v. Forrest*, 22 Mo. 344; *Wilson v. Middleton*, 2 Cal. 54; *McNamara v. King*, 7 Ill. 432; *Cook v. Ellis*, 6 Hill (N. Y.), 466; *Whitney v. Hitchcock*, 4 Den. (N. Y.) 461; *Causee v. Andrews*, 4 Dev. & B. (N. C.) 246. In actions for injuries resulting from the negligence of another, exemplary damages are not recoverable, unless the act or omission was of such a wanton character that it might properly be said to be willful. *Mere negligence* is not enough. It must be such as shows an utter disregard of the safety of those liable to be affected thereby, and such as is entirely inconsistent with the duties which the person or corporation owes to third persons. *Penn. R. R. Co. v. Ogier*, 35 Penn. St. 60; *Telper v. Northern R. R. Co.*, 30 N. J. 188; *Pierce v. Millay*, 44 Ill. 189; *Gaetz v. Ambs*, 27 Mo. 28; *Floyd v. Hamilton*, 35 Ala. 235; *St. Peter's Church v. Beach*, 26 Conn. 355; *Allison v. Chandler*, 11 Mich. 542; *Penn. R. R. Co. v. Kelly*, 31 Penn. St. 372. Thus, in an action against a physician for malpractice, the measure of damage can not be increased by an award of exemplary damages; *Long v. Morrison*, 14 Ind. 495; unless gross negligence is established. *Cochran v. Miller*, 13 Iowa, 128. So, in a case where the defendant placed a young child in a buggy in a perilous position, and, in consequence, the child was thrown out and injured, in the absence of malice, it was held that exemplary damages could not be awarded. *Pierce v. Millay*, 44 Ill. 189. And in no case of negligence simply, unaccompanied by fraud or malice, can damages be given beyond the actual damage. *Gaetz v. Ambs*, 27 Mo. 28; *Moody v. McDonald*, 4 Cal. 297. But where the injury is inflicted wantonly, maliciously, or under circumstances showing a flagrant disregard of the rights of others, or of the duties which the law imposes upon the defendant, vindictive damages may be given. *Kountz v. Brown*, 16 B. Monr. (Ky.) 577; *Phila. &c. R. R. Co. v. Quigley*, 21 How. (U. S.) 202; *Dibble v. Morris*, 26 Conn. 416; *Wallace v. Mayor, &c.*, 2 Hilt. (N. Y.) 440; *Dickey v. McDonnell*, 41 Ill. 62.

In actions for deceit, exemplary damage may be given where it is shown that the defendant *willfully* purposed to deceive and defraud the plaintiff. *Nye v. Merriam*, 35 Vt. 438; but ordinarily, in such actions, the damages are confined to the actual loss, and in order to warrant the giving of vindictive damages the circumstances of fraud and willful design, on the one hand, and of hardship and injury on the other, must be clearly shown. *Carr v. Moore*, 41 N. H. 131; *Warren*

plaintiff, a common soldier, to be whipped, it appeared that the colonel had acted unjustifiably and illegally, and out of mere spite and revenge, and the jury gave £150 damages, and a new trial was moved for on the ground that the man appeared to have been moderately punished, and not much hurt, and that the damages were disproportioned to his sufferings, the court refused the application, because the man was scandalized and disgraced by such a punishment. (a)

Wherever injury has been done to the fair fame, reputation, or character of the plaintiff, juries are generally invited to give, and are justified in giving, such a sum as marks their sense of the maliciousness or recklessness of the wrong-doer in offering the insult and injury; their belief in the groundlessness of the charge; and their desire to vindicate the character of the plaintiff. (b) Thus, in all actions of libel and slander, where the object of the plaintiff is to clear himself from aspersions that have been cast upon him, the jury are in the habit of giving large damages, with a view of vindicating the plaintiff's character from the aspersions cast upon it. And in an action for oral slander, where the cause of action rests upon special damage alleged and proved, the jury, in assessing their damages, are not limited to the amount of special damage proved, but may give their verdict for general damages, which would in their judgment be the natural and probable result of it. They must, however, as we have seen, exclude from their consideration damages resulting from the repetition of the slander by third

(a) *Benson v. Frederick*, 3 Burr. 1847. (b) *Doe v. Filliter*, 13 M. & W. 51.

v. *Cole*, 15 Mich. 265. In actions for false representation the measure of damage is the *actual loss* resulting therefrom, and exemplary damages are not permissible. *Bowman v. Parker*, 40 Vt. 410; *Maberly v. Alexander*, 19 Iowa, 162; *Haight v. Hoyt*, 19 N. Y. 464; *Spikes v. English*, 4 Strob. (S. C.) 34; *Foster v. Kennedy*, 38 Ala. 359; *Reynolds v. Cox*, 11 Ind. 262. In actions for libel or slander, exemplary damages may be given, when *actual malice* is proved, whether the words were actionable *per se*, or otherwise; *Gaard v. Risk*, 11 Ind. 156; *Knight v. Foster*, 39 N. H. 579; *Harbison v. Shook*, 41 Ill. 142; *Hunt v. Bennett*, 19 N. Y. 173; *Littlejohn v. Greeley*, 22 How. Pr. (N. Y.) 345; so in actions for false imprisonment, where *bad faith* or malice on the part of the defendant is shown, exemplary damages may be given; *Blythe v. Tompkins*, 2 Abb. Pr. (N. Y.) 468; *Brown v. Chalsey*, 39 Barb. (N. Y.) 253; *Jay v. Almy*, 1 W. & M. (U. S.) 262; but, where the imprisonment did not result from any wrongful motive on the part of the defendant, vindictive damages should not be given; *Jay v. Almy*, *ante* · *Osborne v. Moore*, 12 La. Ann. 714.

parties who had no authority from the defendant to repeat it. (c)

1393. *Evidence in mitigation of damages.* (d)—Circumstances can not be given in evidence in mitigation of damages where they would amount to a complete justification, and might have been pleaded as such; but where they fall short of a complete justification, and do not amount to a defense to the action, they may be given in evidence in mitigation of damages, as establishing a less aggravated case against the defendant. (e) Thus, in an action for an assault and battery, the jury are not at liberty to take into consideration the circumstances that led to the assault, with a view to the reduction of the damages, if those circumstances amount to a justification, and could have been pleaded as such; (f) but if they merely palliate the character of the offense and mitigate the wrong, they are admissible in evidence in reduction of the damages under the general issue. (g) ¹

In an action for assaulting the plaintiff and seizing his goods, it may be shown in mitigation of damages that the defendant was a custom-house officer, and that the plaintiff was going away from a vessel with goods liable to duty, without

(c) Dixon v. Smith, 5 H. & N. 450; 29 Law J., Exch. 125. Evans v. Harries, 26 Ib. 31. Allsop v. Allsop, 5 H. & N. 534.

(d) See *post*.

(e) Tindal, C. J., Perkins v. Vaughan,

7 Sc. N. R. 886. Speck v. Phillips, 7 Dowl. 470; 5 M. & W. 281.

(f) Watson v. Christie, 2 B. & P. 224.

(g) Linford v. Lake, 3 H. & N. 276; 27 Law J., Exch. 334.

¹ In an action for *mesne profits*, permanent and valuable improvements made upon the land may be given in evidence in mitigation; Gill v. Patten, 1 Cr. C. C. (U. S.) 465; so, too, in an action by a husband against his wife's father for enticing her away, evidence may be given in mitigation that the husband is an habitual drunkard, a frequenter of brothels, or any facts that go to show that he is such a person, or has so conducted himself, that it was improper for the wife to remain with him; Bennett v. Smith, 21 Barb. (N. Y.) 439; so in an action for an assault and battery, the defendant may show in mitigation, provocations immediately before the assault, as insulting language, conduct, &c.; Avery v. Ray, 1 Mass. 12; Donnelly v. Harris, 41 Ill. 126; so, in any action where malice is an element, or more than actual damages are claimed, the defendant may prove, in mitigation, that he acted honestly and in good faith, and with no improper motive, or any fact that goes to affect the amount of the injury; Bohm v. Dunphy, 1 Mon. 333; Daily v. Crowley, 5 Lans. (N. Y.) 301; R. R. Co. v. Ramsey, 3 Id. 178; Potter v. Merchants' Bank, 28 N. Y. 641; Morris v. Morrill, 40 N. H. 395; Williams v. Anderson, 9 Minn. 50; Palmer v. Crook, 7 Gray (Mass.), 418; Squire v. Hallenbeck, 9 Pick. (Mass.) 551.

paying the duty, whereupon the defendant detained him and took possession of his goods; for this evidence does not amount to a complete justification, inasmuch as a custom-house officer cannot forcibly take goods from the person without a previous demand. (*h*) Where the defendant gave the plaintiff in charge for stealing fat, and it appeared that there was no legal evidence of any felony, but the defendant *bona fide* believed that his fat had been stolen, and that the plaintiff had stolen it, and there was reasonable ground for his belief, BEST, C. J., allowed the grounds of suspicion to be given in evidence in mitigation of damages. (*i*)

In an action for libel or slander, where the plaintiff claims damages on the ground of the disparagement of his character, general evidence of the plaintiff's bad character prior to the publication of the libel is admissible in evidence, as we have seen, in reduction of the damages, but not evidence of the truth of the words spoken, or anything, which, if pleaded, would have amounted to a justification. (*k*)

Where the defendant wrote a novel, and the plaintiff in reviewing it went beyond the bounds of fair criticism, and libelled the defendant and his family, and the defendant thrashed the plaintiff, who brought an action for the assault, it was held that the libel might be given in evidence in mitigation of damages, although it was the subject of another action by the defendant against the plaintiff; but the jury were told that, as the defendant had chosen his remedy for the libel by his action for damages, he could not fairly be allowed to take much advantage of it in mitigation of damages in the action for the assault. (*l*)

Where the plaintiff painted a picture, which he designated "The Beauty and the Beast," and caused it to be exhibited in Pall Mall for money, where crowds went to see it, and the defendant went and hacked the picture in pieces, and the plaintiff claimed the full value of the picture, and compensation for the loss of the exhibition, the defendant was permitted to show in mitigation of damages that the picture was a scandalous libel upon the defendant's brother and sister, and the exhibition of

(*h*) Ld. Denman, C. J., *De Gondouin* v. Lewis, 10 Ad. & E. 120.

(*i*) *Chinn v. Morris*, 2 C. & P. 364.

(*k*) Keilw. 203b. *Dennis v. Pawling*, Vin. Abr. Evidence, 1b, pl. 16.

(*l*) *Fraser v. Berkeley*, 7 C. & P. 625.

it a public nuisance. "If," observes Lord ELLENBOROUGH, "this picture was a libel upon the persons introduced into it, the law can not consider it valuable as a picture. Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it. The jury, therefore, in assessing the damages must not consider this as a work of art, but must award the plaintiff merely the value of the canvas and paint which formed its component parts." (*m*)

If a vendor has sold goods to a purchaser, and delivered them to him without payment of the price, and then, fearing that he never will be paid, goes and takes them out of the possession of the debtor, and the latter brings an action for damages, the jury can not lawfully take into their consideration, in reduction or mitigation of the damages, the fact that the goods had not been paid for, and that there was reasonable ground to believe that the purchaser never would pay for them, as that would be equivalent to allowing a set-off of a debt in an action of trespass. (*n*)

In actions for damages for seizing goods under irregular or void process, it is no ground for mitigation of damages that a regular judgment had been recovered against the plaintiff. Parties are not to extort even what is justly due by the improper execution of a warrant, and wherever goods are seized under process in a place to which the process does not run, the full value of the goods and all provable damage are recoverable. (*o*)

1394. *Joint-trespasses—Recovery of damages from one of several co-trespassers.*—We have already seen that where several persons commit a trespass in pursuit of one common design, each is answerable for the aggregate damage done by all. (*p*) The jury can not regularly assess several damages for one trespass with which the defendants are jointly charged; for though in fact one was more malicious and did greater wrong than the other, yet, all coming to do an unlawful act, the act of one is the act of all the parties present; and it is a rule of law, that what the plaintiff hath laid joint in his declaration,

(*m*) *Du Bost v. Beresford*, 2 Campb. 511.

(*n*) *Gillard v. Brittan*, 8 M. & W. 575.

(*o*) *Sowell v. Champion*, 6 Ad. & E. 407.

Edmondson v. Nuttall, 34 Law J., C. P. 102.

(*p*) *Hume v. Oldacre*, *ante*. *Clark v. Newsam*, *ante*.

the jury cannot sever. (*q*) Whenever, therefore, two or more persons are charged with a joint trespass, and both or all are found jointly guilty, the jury cannot afterwards assess several damages. (*r*) The damages must be assessed against all jointly, though all may not have been equally culpable. (*s*) Where an action of trespass was brought against three defendants, and two of them pleaded, and the other let judgment go by default, and several damages was given, thirty-five shillings against the two, and two shilling against the single defendant, the court held that the plaintiff might either take judgment of the thirty-five shillings, or enter a remittitur, but could not take the whole damages (thirty-seven shillings) assessed. (*t*)

No contribution can be claimed as between joint wrong-doers. If, therefore, a plaintiff who has recovered judgment against two defendants for a joint trespass, levies the whole damages on one of them, that one has no claim for a moiety of the damage from the other. (*u*)¹

1395. *Damages when the plaintiff has insured against loss, or has received full indemnity under a contract of insurance.*—Where a contract of insurance has been entered into, and a loss has been sustained by the assured for which he has received indemnity from the underwriters, and the assured has afterwards brought an action against the wrong-doer who occasioned the loss, and recovered damages, the insurer or underwriter who has paid the amount of the loss may recover from the assured the amount of the damages he has received from the wrong-doer. Thus, the owner of goods who has entrusted them to a carrier, by land or by water, to be carried, and insures them against loss, and then sustains loss through the negligence of the carrier, is entitled to recover an indemnity on the contract of insurance, and also the full value of the goods from the carrier who has lost them; but he is not entitled to double satisfaction. As soon as he has received

(*q*) *Brown v. Allen*, 4 Esp. 158.

(*r*) *Hill v. Goodchild*, 5 Burr. 2791.

(*s*) *Eliot v. Allen*, 1 C. B. 18.

(*t*) *Sabin v. Long*, 1 Wils. 30.

(*u*) *Merryweather v. Nixan*, 8 T. R.

186. *Farebrother v. Ansley*, 1 Campb. 344.

¹ In tort there are no degrees of guilt. Any one of a number of wrong-doers is liable for all the damage sustained from the joint act, without any reference to the extent of his individual act. *Ricker v. Freeman*, 50 N. H. 420; *Fultz v. Wycoff*, 25 Ind. 321.

from the underwriter or insurer the amount for which he has insured, he becomes a trustee for the latter in respect of any compensation paid or payable by the wrongdoer, and is bound to hand over to the insurer whatever money he receives from the wrong-doer over and above the actual loss he has sustained, after taking into account the amount he has received under the contract of insurance. The insurer, moreover, who has paid the loss, is entitled to sue in the name of the insured, for the purpose of recovering from the wrong-doer full compensation for the injury; (x) and in such an action the court will not allow the sum received by the plaintiff on the policy of insurance to be given in evidence in reduction of damages. "If a plaintiff who has received full indemnity for his loss under a contract of insurance, could not recover from a wrong-doer the latter," observes TINDAL, C. J., "would take the benefit of a policy of insurance without paying the premium."

In an action for the injury done to the plaintiff's vessel from negligence in running it down at sea, the fact of the plaintiff's having received from the underwriters the amount of the loss, was held to be no answer to the plaintiff's claim for damages. (y) And where certain insurers had paid the amount of the loss occasioned by the demolition of a house by rioters, it was held that they might maintain an action in the name of the assured against the hundred, under the statute, to recover compensation for the injury. (z)¹

1396. Double and treble damages.—Various statutes give, as we have seen, double and treble damages against persons who violate their provisions, such as the statutes prohibiting and punishing a forcible entry into lands and tenements; (a) or the improper impounding of a distress; (b) or the levying of a

(x) *Randall v. Cockran*, 1 Ves. sen. 97. *Clark v. Blything*, 2 B. & C. 254; 3 D & R. 489.

(y) *Yates v. Whyte*, 5 Sc. 640; 4 B. N. C. 272. (a) 8 Hen. 6, c. 9; *Dyer*, 214a.

(z) *Mason v. Sainsbury*, 3 Doug. 64. (b) 1 & 2 Ph. & M. c. 12, s. 1.

¹ *Althorf v. Wolfe*, 22 N. Y. 355; *Harding v. Townsend*, 43 Vt. 536; 5 Am. Rep. 304; *Clark v. Wilson*, 113 Mass. 219; 4 Am. Rep. 532. In a case where the plaintiff's buildings were burnt, by the negligence of the defendant, it was held that the plaintiff was entitled to recover their full value without reference to the amount of insurance he had received. *Weber v. Morris, & Co*, R. R. Co., 35 N. J. 409; 10 Am. Rep. 253.

distress; (c) or the taking by sheriff's bailiff, their officers deputies, &c., more than the appointed fees or recompense on executions. In these cases, it should, be ascertained at the trial whether the amount of damage assessed by the jury is the actual damage sustained, or the statutory damage of double or treble the actual damage; for if the jury assess the damages generally at a certain sum, and there is nothing on the record to show that the jury have found only the single value, the court can not allow the matter to be explained by affidavit and the *postea* amended; for they are bound to conclude from the *postea* that the jury have taken into their consideration and have assessed all the damages that the plaintiff is entitled to recover. But if the jury find the actual or single damage expressly, then the plaintiff may come into court to have the judgment entered upon for double or treble value according to the statute. (d)

In the case of actions brought by the Crown for penalties of double or treble the amount of duty fraudulently kept back, the practice appears to be "for those who attend to the interests of the Crown to get the jury to find the actual amount of the duty which ought to have been paid, and then, without any further communication with them, to enter upon judgment for double or treble the amount." (e) When the jury have by their verdict found only the single damage, the application to the court to increase the damages to the statutory amount should, it seems, be made within four days of the return of the jury process. (f)

1397. *New trial on the ground of excessive and outrageous damages.*—"I should be sorry to say," observes Lord MANSFIELD, "that in cases of personal torts, no new trial should ever be granted for damages which manifestly show the jury to have been actuated by passion, partiality, or prejudice. But it is not to be done without very strong grounds indeed, and such as carry internal evidence of intemperance in the minds of the jury." (g)¹ "I always have felt that it is extremely difficult

(c) 2 Wm. & M. sess. 1 c. 5, s. 4.

(e) Attorney-General v. Hatton, M'Clel.

(d) *Baliwyn v. Girries*, Godb. 245. 216.

Sanford v. Clarke, 2 Chitt. 352. *Buckle*

(f) *Masters v. Farris*, 1 C. B. 716.

v. Bewes, 4 B & C. 154. *Baker v. Brown*,

(g) *Gilbert v. Burtenshaw*, Cowp. 230

2 M. & W. 199.

¹ Much discretion must necessarily be given the jury, and unless they have clear¹

to interfere and say when damages are too large. You may take twenty juries, and every one of them will differ from £2000 down to £200. Nevertheless it is now well acknowledged in all the courts of Westminster Hall that if the damages are clearly too large, the courts will send the inquiry to another jury. Where they interfere, they always go into all the circumstances, put themselves in the situation of the plaintiff and defendant, and examine closely into all their conduct." (*h*)

"I think further," observes ASHHURST, J., "that before the court can set a verdict aside merely for excess of damages, they ought to be able to ascertain some rule by which the damages are to be measured, and to which the facts may be applied. Where damages depend in anywise upon calculation, the court have some medium to direct them by which they are enabled to correct any mistake of the jury. But where there is no such light to guide them, where the damages depend upon mere sentiment and opinion, the court have no line to go by; and, therefore, it would be very dangerous for us to interfere. We have no right in such a case to set up our own judgment against that of the jury, to which the constitution has referred the decision of the question of damages." (*i*)¹

But when there is any rule or guidance for the assessment of the damages, and the jury have not been properly directed on the point, or have disregarded the ruling of the judge, and have manifestly given excessive damages, the court will grant a new trial. So where the plaintiff has himself fixed the amount of damage and received it, and the jury give him a sum altogether disproportionate to his own estimate, the court will interpose and grant a new trial, unless the plaintiff consents to reduce the damages to a reasonable amount. Thus, where

Lofft. 771. *Britton v. South Wales Rail. Co.*, 27 Law J., Exch. 355.

(*h*) *Hewlett v. Cruchley*, 5 Taunt. 281.

Pym. v. Gt. North. Rail. Co., 31 Law J. Q. B. 252.

(*i*) *Duberly v. Gunning*, 4 T. R. 656.

abused it, their verdict will not be disturbed. *Frank v. N. O., &c., R. R. Co.*, 2 La. Ann. 25; *Choppin v. Same*, 17 Id. 19. But if the verdict is clearly excessive, and can not be remitted, a new trial will be granted. *Cross v. Wilkins*, 43 N. H. 332; *Moore v. Martin*, 1 B. Mon. (Ky.) 97; *Dworell v. Carver*, 9 Ohio St. 72.

¹ *Pierce v. Dant*, 8 Cow. (N. Y.) 605; *Omara v. R. R. Co.*, 38 N. Y. 455; *Pike v. Doyle*, 19 La. Ann. 362.

an importunate beggar having refused to quit the defendant's premises, the defendant ordered him to be apprehended by a constable, which was done, and he remained in custody one night at an inn, and was brought before the defendant the following morning, when he demanded compensation, and the defendant told him he might have two sovereigns or go before a justice, and the plaintiff consented to take the money, but said at the same time that he must have something for the keep of his horse, and the defendant then gave him half a crown, and directed the butler to give him some refreshment, and the butler did so, and the plaintiff went away, and then brought an action against the defendant, and, there being no plea of accord and satisfaction on the record, recovered a verdict with damages to the amount of £100, it was held that the damages were enormous and disproportionate, on account of the limit which the plaintiff himself had put on his demand in the first instance. "It seems to me," observes TINDAL, C. J., "that if accord and satisfaction had been pleaded, it would have been a bar to the action. A verdict for £100 is far beyond the merits, as we can not but see, on the evidence of the plaintiff himself, who has set the measure on his own damages." (*k*)

Wherever the facts show that the plaintiff has taken upon himself to avenge his own wrongs, and to retaliate upon the defendant, these facts ought to be taken into consideration by the jury in reduction of damages; and if the jury have not been directed to do this, or have disregarded the direction, and have given excessive damages, the court will grant a new trial. Where an action was brought by a servant for an assault alleged to have been committed upon him by his master, and it appeared that the master had given the servant a slight blow for impertinent behaviour, whereupon the servant turned upon his master and gave him a violent thrashing, and then brought an action for the original assault upon himself, and recovered £40 damages, the court granted a new trial. (*l*)

Where also the plaintiff himself has been guilty of misconduct in the matter of his complaint, and does not come into court with clean hands and a fair case for damages, and the cir-

(*k*) *Price v. Severn*, 7 Bing. 319.

(*l*) *Jones v. Sparrow*, 5 T. R. 257.

cumstance has been overlooked by the jury, and excessive and disproportionate damages have been given, the court will allow the matter to be revised by another jury. (*m*) And when a defendant against whom excessive damages have been recovered appears to have been acting in the discharge of some duty, or in the intended execution of an Act of Parliament, or in the bona fide exercise of some power or authority which he supposed that he possessed, and intended to act right, but by mistake did wrong, and the damages are manifestly out of all proportion to the injury actually sustained, the court will interfere and grant a new trial for the purpose of confining the damages within moderate and reasonable limits. (*n*)

1398. *New trial on account of the smallness of the damages.*—A new trial will sometimes be granted in actions ex delicto for smallness of damages, when it appears that if the plaintiff is entitled to a verdict at all he is manifestly entitled to much greater damages than have been given by the jury. Thus, where it was proved that by reason of the defendant's negligence in driving an omnibus the plaintiff was run over and his thigh broken, and that the doctor's bill for setting his leg and attending upon him came to £10 3s. 6d., and the jury gave the plaintiff a verdict with a farthing damages, the court ordered a new trial. (*o*) But where there is no standard for estimating the damages, and the court are unable to lay down any rule for the guidance of the jury, the court will not grant a new trial, although they may think the damages much too small. (*p*)

1399. *Arrest of judgment where the plaintiff has a verdict for greater damages than he is legally entitled to.*—Whenever some of the damages claimed in the declaration are not legally recoverable, and damages are assessed generally, so that the plaintiff has recovered more damages than he ought, judgment will be arrested. (*q*) Where the plaintiff declared against the defendant for seducing the plaintiff's apprentice from his service, and for the loss of the service of the apprentice for the whole residue of the term of apprenticeship, and the jury assessed the damages generally, and it appeared that the term was not expired, judgment was arrested on the ground that the plaintiff

(*m*) Buller, J., in *Duberly v. Gunning*,
4 T. R. 658.

(*n*) *Eliot v. Allen*, 1 C. B. 40.

(*o*) *Armytage v. Haley*, 4 Q. B. 918.

(*p*) *Strafford's case*, cited 4 T. R. 655.

(*q*) *Prince v. Molt*, 2 Salk. 663.

was not entitled to recover damages for all the term, as well for the time to come as for the time past, as claimed in the declaration; for the apprentice may return to his master and serve him for the residue of the term yet to come, or the master may compel the apprentice by law to serve him for the residue of the term, and the plaintiff ought not to have both the service and damages for the loss of it. (r)

"The cases seem to establish this principle, that where it is positively and expressly averred in the declaration that the plaintiff has sustained damages from a cause subsequent to the commencement of the action, or previous to the plaintiff's having any right of action, and the jury give entire damages, judgment will be arrested; but where the cause of action is properly laid, and the other matter either comes under a scilicet, or is void, insensible, or impossible, and therefore it can not be intended that the jury ever had it under their consideration, the plaintiff will be entitled to his judgment." (s)

The plaintiff can recover no more damages than he has claimed in his declaration, although the jury give him more, for he best knows the measure of his own wrong, and the amount of compensation to which he is entitled. If, therefore, the jury give him more than he claims, he must relinquish the extra damages, or there will be error on the record. (t)¹

1400. *Inquisition of damages before the sheriff.*—When judgment has been suffered by default in an action of tort, a writ of inquiry must be issued for the summoning of a jury, and the assessment of the damages before the sheriff. (u) The plaintiff must appear at the time and place appointed for the execution of the writ, and prove the amount of damages sustained by him; and he must be careful to confine his claim to matters which can lawfully be made a ground for compensation; for if he gives evidence of losses which are not the natural result of the injury of which he complains, and induces the jury to in-

(r) *Hambleton v. Veere*, 3 Wms. Saund. 171c, *in notis*.
Saund. 170.

(t) *Cheveley v. Morris*, 2 W. Bl. 1300.

(s) *Hambleton v. Veere*, 3 Wms.

(u) *Chit. Arch. Pr.*, INQUIRY.

¹ But in such cases the error may be cured by *remittitur* at the same time. *Linder v. Monroe*, 33 Ill. 388; *Taylor v. Jones*, 42 N. H. 25; *Collins v. R. R. Co.*, 12 Barb. (N. Y.) 492; *Starbird v. Eaton*, 42 Me. 569; *Glen v. Davis*, 2 Grant's cases, (Penn.) 153; *Cross v. Wilkins*, 43 N. H. 332; *Ashmore v. Charles*, 14 Rich. (S. C.) 63; *Ranney v. McRae*, 14 Ga. 589.

clude in their verdict damages which are not legally recoverable, the court will set aside the inquisition, (x) unless it appears that no objection was taken by the defendant, and that both parties mutually consented to take the verdict of the jury upon the matters submitted to them. It is the duty, however, of the sheriff to point out to the jury the true grounds and measure of compensation, and if he directs them wrongly, and they go beyond their authority, the court will interfere to set matters right.

SECTION II.

OF THE RECOVERY OF COSTS IN ACTIONS EX DELICTO.

1401. *Award of costs to a successful plaintiff in the superior courts.*—The expenses that a party has incurred in obtaining his right, such as the fees of counsel, the attorneys' bills, and the expenses of witnesses, are termed costs, and these are given by the court and taxed by their officer. "In contemplation of law the word damages emphatically includes costs. It is so considered by Lord COKE, and in various authorities. Costs, therefore, properly fall under the nomen generale of damages." (y) ¹

By the statute of Gloucester, 6 Ed. 1, c. 1, there was no mode of giving a successful plaintiff his costs unless the jury assessed them, and included them in the amount of damages, but that statute enables the plaintiff to recover his costs, by the judgment of the court, in all cases where he recovers damages. (z) And the 4 Anne, c. 16, which enabled defendants to plead several matters, enacts (s. 5) that if any such matter shall, upon demurrer joined, be judged insufficient, costs shall be given at

(x) Penny, In re, 7 Ell. & Bl. 668; 26 Law J., Q. B. 225.

(y) Per Ld. Ellenborough, C. J., Phillips v. Bacon, 9 East, 303; Co. Litt. 257 a. As to costs in error, see Parker v. Tootal, L. R., 1 Exch. 41, 115.

(z) Jackson v. Calesworth, 1 T. R. 72. As to costs in actions of ejectment, see New Pleading Rules, Hil. Term, 1853, R. 29 30; Ell. & Bl. Appendix, lxxxiii. Mobbs v. Vandenbrande, 33 Law J., Q. B. 177. Cole on Ejectment.

¹ The subject of costs, being a matter of statutory regulation, the bringing together of special cases in this chapter would be of no practical value.

the discretion of the court; or if a verdict shall be found upon any issue in the said cause for the plaintiff, costs shall be given in like manner, unless the judge who tried the issue shall certify that the defendant had a probable cause to plead such matter. (a)

1402. *Costs to a successful defendant.*—By the 23 Hen. 8, c. 15, it is enacted, that if the plaintiff, in any action of detinue, or account, or upon the case, or upon any statute for any offense or personal wrong, should be nonsuited, or a verdict should pass against him, the defendant should have judgment to recover his costs against the plaintiff, to be assessed and taxed by the discretion of the judges of the court. And the 4 Jac. 1, c. 3, enacts (s. 2) that if any person shall commence any action of trespass or ejectment, or any other action whatsoever, wherein the plaintiff or demandant might have costs, in case judgment should be given for him, and the plaintiff or demandant be nonsuited, or any verdict happen to pass against him, then the defendant shall have judgment to recover his costs against the plaintiff or demandant. This statute, therefore, gives a successful defendant his costs in all cases where the plaintiff, if successful, would be entitled to costs. (b)

By 8 & 9 Wm. 3, c. 11, s. 1, it is further enacted, that where several persons shall be made defendants to any action or plaint of trespass, assault, or false imprisonment, and any one or more of them shall, upon the trial thereof, be acquitted by verdict, every person so acquitted shall recover his full costs of suit, unless the judge shall, immediately after the trial, in open court, certify upon the record under his hand that there was reasonable cause for making such person a defendant. And (s. 2) that if upon any demurrer, either by the plaintiff or defendant, judgment shall be given against such plaintiff, or if, after judgment given for the defendant, the plaintiff shall sue a writ of error, and the judgment shall be affirmed, or the writ be discontinued, or the plaintiff shall be nonsuited, therein, the defendant shall have judgment to recover his costs, and have execution for the same.

The 32nd section of 3 & 4 Wm. 4, c. 42, also enacts, that

(a) As to costs under this statute, see *Partridge v. Gardner*, 4 Exch. 306. (b) *Cobbett v. Wheeler*, 30 Law. J., Q. B. 64.
Howell v. Rodbard, ib. 317.

where several persons shall be made defendants, and any one or more of them shall have a nolle prosequi entered as to him or them, every such person shall recover his reasonable costs; and if a verdict shall pass for any one or more of them, every such person shall have judgment for and recover his reasonable costs, unless the judge shall certify that there was reasonable cause for making him a defendant. And by s. 34 it is enacted, that in all writs of sci. fa. the plaintiff, obtaining judgment on an award of execution, shall recover his costs upon a judgment by default, as well as upon a judgment after plea pleaded, or demurrer joined, and that where judgment shall be given either for or against a plaintiff, or for or against a defendant, upon demurrer in any action whatever, the successful party shall have his costs.

Where one of two defendants is struck out at the trial and the plaintiff obtains a verdict against the other, the ordinary course is to tax the whole costs of the action on each side and deduct from the plaintiff's costs a moiety of the costs of the defense. (c)

1403. *Costs on plea setting up matters of defense which have arisen since the last pleading.*—It seems that formerly, if a defendant pleaded puis darrein continuance, that pleading operated as a withdrawal of all other pleas, and the defense rested on this alone, so that the plaintiff had nothing but this one plea to traverse; and if he was obliged to confess this he could get no costs, because he could only get them under the statute of Gloucester by a judgment, and the defendant was entitled to judgment. But justice seemed to require that if the plaintiff was prosecuting a just claim up to a certain point, he ought to have his costs of suit up to that time, and the pleading rules made under statutory authority have accordingly given the plaintiff his costs up to the time of pleading the plea, if he admits the truth of it. (d)

1404. *Costs on a stay of proceedings.*—Upon a summons to stay proceedings, on payment of a certain sum and costs, if the plaintiff refuses to take the amount offered in discharge of his

(c) Redway v. Webber, 13 C. B., N. S. 254.

(d) Reg. Gen. Trin. Term, 1853, R. 22, 23; 1 Ell. & Bl. App. lxxxii. How-

arth v. Brown, 32 Law J., Exch. 99. Bennett v. Lond. and North-West. Rail. Co., 5 H. & N. 604; 29 Law J., Exch. 473.

claim, but afterwards accepts it, there is no absolute rule which entitles the defendant to his costs incurred subsequently to the summons. (e)

1405. *Costs on arrest of judgment, or judgment non obstante veredicto.*—By the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, it is enacted (s. 145), that upon arrest of judgment, or judgment non obstante veredicto, the court shall adjudge to the party against whom such judgment is given, the costs occasioned by the trial of any issues of fact arising out of the pleading, for defect of which such judgment is given, upon which such party shall have succeeded, and such costs shall be set off against any money or costs adjudged to the opposite party, and execution may issue for the balance, if any. (f)

1406. *Where the court has no jurisdiction it has no power to give costs.*—When a case has been dismissed by a court of law for want of jurisdiction, the court can not give judgment for costs, (g) unless it is empowered so to do by express statutory authority. (h) By the County Court Act, 9 & 10 Vict. c. 95 s. 79, it is enacted, that if the plaintiff shall not make proof of his demand to the satisfaction of the court, it shall be lawful for the judge to nonsuit the plaintiff, or to give judgment for the defendant, and, in case where the defendant shall appear and shall not admit the demand, to award to the defendant by way of costs such sum as the judge shall think fit. It has been held that this enactment does not empower the judge to nonsuit and award costs when the case is out of his jurisdiction, for the plaintiff might be able conclusively to prove the cause of action brought before the court, but for the objection to the jurisdiction on the part of the defendant. Under such circumstances the court has merely power to declare its own incompetency to try the cause, and to direct that the suit shall abate, the plea to the jurisdiction being a plea in abatement of the suit. “We are of opinion,” observes POLLOCK, C. B., “for the same reason, that the provision over costs in the 88th section of the same Act only applies to cases within the jurisdiction of the county court to hear and determine.” (i)

(e) *Walton v. Brown*, 3 H. & N. 879.

(f) *Whaley v. Laing*, 5 H. & N. 480.

(g) *Strader v. Graham*, 18 How. Rep. Supreme Court, U. S. 602. Reg. v. Justices of Hampshire, 32 Law J., M. C.

47. *Isle of Wight Ferry Co. v. Ryde Com. &c.*, 7 L. T. R. N. S. 391.

(h) 8 & 9 Wm. 3, c. 30, s. 3; 12 & 13 Vict. c. 45, s. 6.

(i) *Lawford v. Partridge*, 1 H. & N. 626; 26 Law J., Exch. 147.

1407. *Effect on costs of withdrawing a juror.*—If on the trial of a cause a juror is withdrawn by consent, each party pays his own costs; (*k*) there is an end to the action, and, if the withdrawal was made by virtue of an agreement between the parties under circumstances showing that the particular cause of action was abandoned, no future action can be brought for the same cause. If, therefore, a second action is brought, the court will stay the proceedings therein. (*l*)

1408. *Costs in actions of slander and libel.*—By 21 Jac. I, c. 16, s. 6, it is enacted, that in all actions for slanderous words, if the jury upon the trial of the issue in such actions, or the jury that shall inquire of the damages, do find or assess the damages under 40s., the plaintiff shall have and recover only so much costs as the damages so given or assessed amount unto. In the construction of this statute it has been held, that where the words are in themselves not actionable, but the action is maintainable by reason of special damage sustained by the plaintiff, the statute does not apply, and the plaintiff is consequently entitled (independently of the County Court Acts), to full costs, though the damages are under 40s., for it is not the words but the special damage which is the cause of action; but that when the words are actionable in themselves, and the special damage is laid by way of aggravation, then if the damages are under 40s. there should be no more costs than damages, for the action is properly an action for words within the statute. (*m*) Nor does the statute apply to cases where no damages at all are given. Where, therefore, to a declaration for slander the defendants pleaded not guilty and a justification, and at the trial no evidence was offered upon the second issue, and a verdict was given thereon for the plaintiff without any damages, but under the issue upon the plea of not guilty the defendants proved that the words spoken were a privileged communication, and upon that issue the verdict was for the defendants, it was held that the statute of James did not affect the case, and that the plaintiff was entitled to his full costs upon the second issue under the statute of Anne. (*n*) Nor does the statute apply, it seems, to actions referred before trial, and

(*k*) Stodhart v. Johnson, 3 T. R. 657.

(*l*) Gibbs v. Ralph, 14 M. & W. 804;
15 Law J., Exch. 7. Harries v. Thomas,
8 M. & W. 38.

(*m*) Burry v. Perry, 2 Ld. Raym. 1588.

Brown v. Gibbons, Ib. 831; 1 Salk. 236.

(*n*) Skinner v. Shoppee, 8 Sc. 276; 6
B. N. C. 131

where therefore there is no verdict. A plaintiff, therefore, would, in such a case, be entitled (independently of the County Court Act) to full costs in such a case, although he recovered but 20s. (*o*)

The 3 & 4 Vict. c. 24, s. 2, enacts, that if the plaintiff in any action on the case recovers less than 40s. damages, he shall not be entitled to any costs, unless the judge or presiding officer certifies in manner therein provided that the grievance was willful and malicious. This section, however, does not conflict with the 21 Jac. I, c. 16, s. 6, so as to repeal it, but both enactments stand together. If the judge certifies under s. 2 of the statute of Victoria, the certificate will have the effect of taking the case out of the enacting part of that section, and will leave the plaintiff in the same position with respect to costs as he would have been in if the 3 & 4 Vict. c. 24 had never been passed. In cases where the statute of Gloucester applies, this would give the plaintiff his full costs, but where the right under the statute of Gloucester is qualified by any subsequent statute (by the County Court Act, for instance), the certificate under 3 & 4 Vict. c. 24, leaves the plaintiff with that qualified right. A plaintiff, therefore, in an action for slander, who has obtained a certificate under 3 & 4 Vict. c. 24, s. 2, that the slander was willful and malicious, and under 30 & 31 Vict. c. 142, s. 5, that there was sufficient reason for bringing the action in a superior court, is nevertheless only entitled to the same costs as he would have been entitled to if those statutes had not been passed, *i. e.*, independently of 21 Jac. I, c. 16, to full costs, but under that statute to as much costs only as damages. (*p*) Where, therefore, the words giving rise to an action of slander are not actionable in themselves, and the action is maintainable only by reason of special damage, the certificate of the judge or presiding officer under the statute of Victoria will entitle the plaintiff (independently of the County Court Acts) to full costs. (*q*)

Where to an action for a libel in a newspaper the defendant pleaded the insertion of an apology and payment of 40s. into

(*o*) Frean v. Sargent, 2 H. & C. 293; L. R., 5 Q. B. 239.
32 Law J., Exch. 281.

(*p*) Evans v. Rees, 9 C. B., N. S. 391;
30 Law J., C. P. 16. Goodall v. Ensell,
2 Cr. M. & R. 249. Marshall v. Martin,

(*q*) Burry v. Perry, *ut sup.* Turner v.
Horton, Barnes, 132; Willes, 438. Foster
v. Pointer, 8 M. & W. 398; 1 Wms.
Saund. note to Craft v. Boite, 246 a.

court, and the jury found that the apology was not sufficient, but that the money paid into court was sufficient to cover the damage sustained, and thereupon the judge directed a verdict for the plaintiff with 1s. damages, it was held that the plaintiff was deprived of costs, and that, the plea not being proved, the payment into court was not warranted by law, and the defendant ought to have his money back again. (r) The damages in such cases must be assessed wholly irrespective of the plea, which is not proved; the jury may give less or more than the amount paid in, and according to what they give will the plaintiff be entitled to costs or the contrary. (s)

1409. *When the certificate of a judge or presiding officer is necessary to enable the plaintiff to recover costs.*—By the 43 Eliz. c. 6, s. 2, it was enacted, that in any personal action in the superior courts (not being for any title or interest in land, or for any battery), the plaintiff should not recover more costs than damages where the damages recovered did not amount to 40s. But the 3 & 4 Vict. c. 24, s. 1, repealed the above statute so far as it relates to costs in actions of trespass or on the case, and therefore practically altogether, so far as actions of tort are concerned. (t) It also repealed so much of 22 & 23 Car. 2. c. 9, as relates to costs in personal actions, and enacts (s. 2) that if the plaintiff in any action of trespass or trespass on the case in any of the courts at Westminster, or the Court of Common Pleas at Lancaster or Durham, shall recover by the verdict of a jury less than 40s. damages, the plaintiff shall not be entitled to recover any costs whatever, whether it shall be given upon an issue tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought to try a right, besides the mere right to recover damages for the trespass or grievance for which the action has been brought, or that the trespass or grievance in respect of which the action is brought was willful and malicious.

(r) *Lafone v. Smith*, 4 H. & N. 158.
Newton v. Rowe, 1 C. B. 187.

(s) *Jones v. Mackie*, L. R., 3 Exch. 1.

(t) See *Danby v. Lamb*, 11 C. B., N. S. 423; except, perhaps, under certain

circumstances, in actions of detinue, which is in form an action *ex contractu*, though the gist of the action is the wrongful detainer. S. C.

Under this statute, the under-sheriff who presides at a writ of inquiry of damages after judgment by default, may grant the certificate, but he should sign it in the name of the sheriff, and not in his own name. (*u*)

1410. *Certificate that the action was brought to try a right.*—

Wherever a defendant in an action for a trespass upon the plaintiff's land sets up a bona fide claim to the enjoyment of some easement, privilege, or profit thereon, such a right to take water from the plaintiff's well, or to dig turves on the plaintiff's common, and has any colorable ground for the claim, the action is brought to try a right, and the judge or presiding officer ought to certify to that effect upon the record. (*x*) In actions for a nuisance, there is in general a question of right between the parties. The action may be brought to recover damages for the infringement of an acknowledged right, or to try whether the defendant has a right to do the act of which the plaintiff complains. In actions for a nuisance to a house, where the plaintiff asserts his right to occupy his house free from the nuisance caused by the defendant, and the latter declares that the acts complained of are not a nuisance, a right beyond the mere right to recover damages comes in question, and the judge has power to certify.

An action may be brought to try a right, though nothing appears on the record to indicate such an intention. Wherever the plaintiff seeks to negative the right of the defendant to do the act of which he complains, the action may be brought to try a right beyond the mere question of damages. (*y*) "Suppose," observes TINDAL, C. J., "a case can be put of a declaration in trespass or case (although I do not think it can) in which a right could not by possibility come in question, still, if it should appear to the judge that the plaintiff had really intended to try a right, I conceive that the judge would have power to certify. If an action be really brought to try a right, whether it is calculated for that purpose or not, the party is within the letter, and, as it seems to me, also within the spirit, of the Act." (*z*)

Wherever the record is so framed that a right beyond the

(*u*) *Stroud v. Watts*, 2 C. B. 929.

(*x*) *Tyler v. Bennett*, 5 Ad. & E. 377.
Macdougall v. Patterson, 11 C. B. 755.

(*y*) *Shuttleworth v. Cocker*, 1 M. & Gr. 839; 2 Sc. N. R. 47.

(*z*) *Morison v. Salmon*, 2 M. & Gr. 394.

mere right to recover damages may come in question, the court will not inquire whether or not the judge has exercised a sound discretion in granting a certificate. It is a matter entirely for the discretion of the judge, upon the effect of the evidence and the course taken at the trial. (a).

1411. *Within what time the certificate must be granted.*—The words “immediately afterwards,” in s. 2 of the 3 & 4 Vict. c. 24, do not mean that the certificate is to be granted the very instant afterwards. “We interpret the words to mean,” observes Lord ABINGER, “within such reasonable time as will exclude the danger of intervening facts operating upon the mind of the judge, so as to disturb the impression made upon it by the evidence in the cause.” Where, therefore, the certificate was given by the judge after the jury had been dismissed, and the court adjourned, and the judge had retired to his lodgings in the town, it was held that the certificate was well given. (b) So where the under-sheriff, as presiding officer, on the execution of a writ of inquiry, on being asked for a certificate, said he would take time to consider, and adjourned the court, and subsequently in the evening of the same day gave a certificate, it was held that the time taken by the under-sheriff to consider his judgment was perfectly reasonable. “I do not,” observes Lord ABINGER, “limit the reasonable time to the interval before the trial of another cause, or even necessarily to the same day.” (c) But whenever the under-sheriff certifies, the certificate must be given before the return of the writ of inquiry. (d) And a certificate not applied for till ten days after the trial can not be granted. (e) Where under a local statute, the London Small Debts Act, (f) the certificate was to be granted “forthwith,” and the judge took time to consider before he granted it, and the defendant did not object, it was held that he must be taken to have assented to the course pursued by the judge. (g)

Where, on an application for a certificate under the above statute, the judge said that he would certify, if necessary, that

(a) *Bosanquet, J., Shuttleworth v. Cocker*, 1 M. & Gr. 837.

(b) *Thompson v. Gibson*, 8 M. & W. 287.

(c) *Page v. Pearce*, 8 M. & W. 679.

(d) *Knapman v. Pryer*, 1 H. & N. 721.

(e) *Forsdyke v. Stone*, L. R., 3 C. P. 607.

(f) 15 & 16 Vict. c. lxxvii., s. 121, which has been repealed by 30 & 31 Vict. c. 142, s. 33, and sched. C.

(g) *Heden v. Atlantic Mail, &c., Co.*, 29 Law J., Q. B. 191.

the right came in question, and made a memorandum to that effect on his notes, it was held that a certificate subsequently indorsed on the record had the same effect as if it had been indorsed at the trial. (*h*)

1412. *County court acts depriving the plaintiff of costs in the superior courts.*—By the 30 & 31 Vict. c. 142, which was passed on 20th August, 1867, but came into operation on the 1st January, 1868 (*i*) (s. 33 and sched. C.), all the sections of previous county court acts as to costs are repealed, (*j*) and by s. 5 it is enacted, that “if in any action commenced after the passing of this act in any of Her Majesty’s superior courts of record, the plaintiff shall recover a sum not exceeding £20 if the action is founded on contract, or £10 if founded on tort, (*k*) whether by verdict, judgment by default, or on demurrer, (*l*) or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record (*m*) that there was sufficient reason for bringing such action in such superior court, or unless the court or a judge at chambers shall, by rule or order, allow such costs.”

It has been held that this section applies to actions which have been commenced in an inferior court, but have been removed into a superior court by certiorari; (*n*) à fortiori therefore to actions which have been commenced in a superior court, but have been sent for trial before a county court judge under 19 & 20 Vict. c. 108, s. 20. (*o*) It also applies to actions referred by consent to an arbitrator who is to have the power of a judge at nisi prius as to certifying, &c. (*p*) It has been held also that it applies to all actions, both to those which can and to those which can not be brought in the county

(*h*) Jones v. Williams, 13 M. & W. 423.

(*i*) See Wood v. Riley, L. R., 3 C. P. 26. Ings v. Lond. and South-West. Rail. Co., L. R., 4 C. P. 17.

(*j*) See Butcher v. Henderson, L. R., 3 Q. B. 335. Levi v. Sanderson, L. R., 4 Q. B. 330. Mount v. Taylor, L. R., 3 U. P. 645.

(*k*) As to detainee, see Danby v. Lamb, ante.

(*l*) The prohibition as regards costs was held under the repeal acts to apply to issues of law as well as of fact, so that if in an action of tort there was an issue

of fact and an issue of law, both of which were determined in favor of the plaintiff, but the damages recovered were less than the statutable amount, the plaintiff was wholly deprived of costs, unless he obtained an order or a certificate. Dunston v. Paterson, 5 C. B., N. S. 279. Abley v. Dale, 11 C. B. 893.

(*m*) See Jones v. Williams, *supra*.

(*n*) Pellas v. Bresslaue, L. R., 6 Q. B. 438.

(*o*) Taylor v. Cass, L. R., 4 C. P. 614.

(*p*) Harland v. Mayor, &c., of New castle-on-Tyne, L. R., 5 Q. B. 47.

court, (*q*) but that if the plaintiff in an action of slander recovers any amount beyond 40s., inasmuch as he could not have sued in the county court, (*r*) he ought, in the absence of circumstances showing that the action was vexatious, or of a trumpety character, or that the amount given was too large, &c., (*s*) to be allowed his costs, under the general power given by the concluding words of the section, although the judge had refused to certify. (*t*) It is no ground for the exercise of the discretion of the court under the above section, that the plaintiff was misled by the registrar of the county court, or that the expense and delay of the proceedings in the county court would have exceeded those of the proceedings in the superior court, (*u*) or that the parties reside a long way from one another. (*v*)

1413. *When the foundation of the action is a contract*, and no right to sue exists independently of the contract, the action, though in form *ex delicto*, is in substance an action *ex contractu*, and the plaintiff must recover more than £20, or obtain a certificate, rule, or order, in order to entitle himself to costs in the superior courts. (*w*)

1414. *When money has been paid into court* not exceeding £20 or £10, as the case may be, and the plaintiff accepts it in satisfaction of the cause of action, he can not get any costs, as he has not recovered more than the amount mentioned in the act; (*x*) but if he pays in more than £20 or £10, the plaintiff will then be entitled to his costs. And if the amount recovered in the action, together with the amount paid into court, exceeds the amount mentioned, the plaintiff will be entitled to his costs. What the legislature meant by the word “recover” was what the plaintiff is to get and put into his pocket” (*y*) by means of the action; and therefore, if the action is referred, although by consent, and the arbitrator awards a sum less or more than £20 or £10 as the case may be, the plaintiff will be

(*q*) *Craven v. Smith*, L. R., 4 Exch. 246; 38 Law J., Exch. 90.

(*r*) See *post*.

(*s*) *Sampson v. Mackay*, *infra*.

(*t*) *Gray v. West*, L. R., 4 Q. B. 175.

Sampson v. Mackay, L. R., 4 Q. B. 643; 38 Law J., Q. B. 245. *Hinde v. Sheppard*, *post*.

(*u*) *Holborow v. Jones*, L. R., 4 C. P.

14.

(*v*) *Thompson v. Dallas*, L. R., 3 Q. B. 359.

(*w*) *Legge v. Tucker*, 1 H. & N. 500; 26 Law J., Exch. 71.

(*x*) *Boulding v. Tyler*, 3 B. & S. 472; 32 Law J., Q. B. 85. *Parr v. Lillicrap*, 1b. Exch. 151.

(*y*) *Gowens v. Moore*, 3 H. & N. 540.

entitled to or deprived of his costs accordingly. (*z*) If the cause is referred compulsorily, the same rule holds, both with regard to the costs of the cause and also the costs of the reference or award, which in such a case form part and parcel of the costs of the cause. (*a*) Where, however, an action is referred by consent, and the costs of the reference are in the discretion of the arbitrator, the plaintiff will be entitled to them if the arbitrator so awards, although he recover less than the statutable amount, and so can not have the costs of the cause. (*b*) If the reference is of the cause and all matters in difference, and the submission states that the costs are to follow "the event of the reference," and the arbitrator finds, on a balance of accounts, less than the statutable amount due to the plaintiff, the plaintiff may nevertheless obtain his costs if the arbitrator so decides, for he can not be said to "recover" such amount within the meaning of the County Courts Act. (*c*)

Where an action is brought against a common carrier for breach of the common-law duty to carry safely, the action is not founded on contract, but is an action *ex delicto* for negligence. It is an action on the case, and, therefore, if the plaintiff recovers more than £10, he is entitled to his costs. (*d*) Where the plaintiff in the first count of his declaration complained of an assault, and in the second count of slander, and recovered less than the statutable amount on the first count, but failed on the second, it was held that he was entitled to no costs without a certificate or judge's order. (*e*)

1415. *The certificate that it appeared to the judge that there was sufficient reason for bringing the action in the superior court is very much a matter of discretion with the judge. There is no rule to guide him, but he must form his own opinion from the materials before him at the trial, and the court will not review his decision where the question is one of damages only. (f)* Where, however, an action is brought to try a right, and the right is of sufficient importance to make the action one proper

(*z*) Cowen v. Amman Coll. Co., 34 Law J., Q. B. 161. See *post*.

(*a*) Moore v. Watson, L. R., 2 C. P. 314.

(*b*) Farshaw v. De Wette, L. R., 6 Exch. 200.

(*c*) Stevens v. Chapman, L. R., 6 Exch. 213.

(*d*) Tattan v. Gt. West. Rail. Co., 29 Law J., Q. B. 184.

(*e*) Smith v. Harnor, 3 C. B., N. S. 829.

(*f*) Hatch v. Lewis, 7 H. & N. 367; 31 Law J., Exch. 26. Dimdale v. Lond., Brighton and South Coast Rail. Co., 11 W. R., Q. B. 729.

to be brought in a superior court, the judge ought to certify, and if he does not, his decision will be reviewed. (*g*) The certificate, when granted, does not in anywise modify or control s. 2 of the 3 & 4 Vict. c. 24, for the discouragement of trifling and vexatious suits. Therefore, if such a certificate be obtained in a case where a less sum than 40s. is recovered in an action for a wrong, the plaintiff can not get his costs without the further certificate that the action was brought to try a right, or that the grievance was willful and malicious. (*h*) A judge may, under this statute, it would seem, certify for costs at any time before taxation; (*i*) but the under-sheriff, or presiding officer on a writ of trial, must probably certify before the writ is returned. (*k*)

If it appears that the cause of action was one for which a plaint could not have been entered in the county court, although the judge or presiding officer should refuse to certify, the plaintiff will, generally speaking, obtain an order for his costs as above mentioned. (*l*) Where, under the repealed Acts, an action was brought in a superior court for the detention of goods exceeding the value of £50, and the goods were returned to, and taken back by, the defendant after action, and the plaintiff went on with the action to recover further damages, and his costs, and obtained a verdict for a shilling damages, but the jury found that the value of the goods detained exceeded £50, it was held that the plaintiff was entitled to judgment for his costs, as no plaint would lie in the county court for goods of the value assessed. (*m*) But where an action of trover was brought for the detention of a portmanteau of the value of £25 for a claim of 1s. 6d., and the portmanteau was delivered up to the plaintiff, and received back by him in court, and the jury then gave a verdict for 40s. damages, and the plaintiff failed to take a verdict for the value of the portmanteau, it was held that an order for costs could not be made, as a plaint could have been entered

(*g*) *Hinde v. Sheppard*, L. R., 7 Exch. 71.

(*h*) *Powle v. Gandy*, 7 C. B., N. S. 556.

(*i*) *Martin, B., Mason v. Tucker*, 4 H. & N. 538. *Bennett v. Thompson*, 6 Ell. & Bl. 683; 25 Law J., Q. B. 378.

(*k*) *Craven v. Smith*, *ante*.

(*l*) See *Macdougall v. Paterson*, 11 C. B. 773, decided under the repealed sections.

(*m*) *Leader v. Rhys*, 10 C. B., N. S. 369; 30 Law J., C. P. 345.

in the county court, and no sufficient reason was shown for bringing the action in the superior court. (*n*)

1416. *Costs on references*.—Neither the 21 Jac. 1, c. 16, nor the 3 & 4 Vict. c. 24, apply to cases where, before trial, an action is referred by consent, or (semble) compulsorily and where consequently no verdict is given. (*o*) But where a verdict is taken, subject to a reference, they do, the verdict in such a case being the verdict of the jury, and the arbitrator merely determining the amount. (*p*) But under the County Court Acts there is no distinction in this respect between causes referred, either before or after verdict. (*q*) When the cause has been referred, therefore, the plaintiff can not obtain judgment for his costs, unless he recovers, through the instrumentality of the award and the verdict, a sufficient sum to carry costs under those acts. (*r*) So in the case of a compulsory order of reference, in the common form, made under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125; by which the costs of the cause are to abide the event, if the plaintiff recovers less than the statutable amount mentioned in the act, he is not entitled to his costs without a rule or order for them. (*s*)

1417. *Costs of reference*.—Whenever on a reference before issue joined, the costs are to abide the event, and the plaintiff succeeds as to a very small part of the claim for which he brings his action, and fails as to the greater part of it, he is not entitled, as against the defendant, to the costs of the reference, for the event, in such a case, is substantially in favor of the defendant. (*t*) It is otherwise on a reference after issue joined. (*u*) But if the plaintiff recovers less than the amount mentioned in the County Court Acts in a cause compulsorily referred under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), he is not entitled to the costs of the reference. (*x*)

1418. *Certificate for full costs in actions for willful and ma-*

(*n*) *Dimsdale v. Lond. and Brighton Rail. Co.*, 11 W. R., Q. B. 729.

(*o*) *Wigens v. Cook*, 6 C. B., N. S. 784.

(*p*) *Reid v. Ashley*, 13 C. B. 897.

(*q*) *Cowell v. Amman Coll. Co.*, *ante*.

(*r*) *Smith v. Edge*, 2 H. & C. 659; 33 Law J., Exch. 9. But see *Stevens v.*

Chapman, *ante*.

(*s*) *Robertson v. Sterne*, 13 C. B., N. S. 248.

(*t*) *Kelcey v. Stupples*, 32 Law J. Exch. 6.

(*u*) *Wigens v. Cook*, *supra*.

(*x*) *Moore v. Watson*, L. R., 2 C. P. 314.

licious grievances.—The 3 & 4 Vict. c. 24, s. 2, which deprives plaintiffs in the superior and palatine courts of their costs, if they recover by the verdict of a jury less than 40s., except cases in which the judge or presiding officer immediately afterwards certifies on the back of the record, &c., that the trespass or grievance in respect of which the action was brought was willful and malicious. Whenever the judge certifies that the grievance for which the action was brought was willful and malicious, the plaintiff is entitled to his costs under this statute. This has been held to be the case in an action for libel, where the plaintiff recovered a farthing damages, and the judge certified that the grievance was willful and malicious.

(*y*) If a man inadvertently walk across another person's close, and the latter bring an action, the action would be frivolous, and the judge ought not to certify. But if the walking across the close be proved to have been done audaciously, and with a view of annoying the owner or his family, then the judge would be justified in granting the plaintiff a certificate that the trespass was willful and malicious. (*z*) A trespass which is committed after notice may fairly be deemed to be a willful and malicious trespass. Originally the judges considered themselves absolutely bound to certify in all cases where the trespass was after notice, but it is now held that the judge has a discretion in the matter; but the discretion will generally be exercised in favor of the plaintiff when notice has been given. Where the defendant went to the plaintiff's house to make a seizure under process from the county court, and, being refused admittance, unlawfully broke open the outer door of the plaintiff's house with an axe, after a warning not to do so, and the jury gave only 40s. damages, the judge certified that the trespass was willful and malicious, so as to give the plaintiff his full costs. (*a*)

1419. *Full costs in actions for willful and malicious trespass, or after notice not to trespass.*—By 8 & 9 Wm. 3, c. 11, s. 4, it is enacted, that in all actions of trespass in any of her Majesty's Courts of Record at Westminster, wherein at the trial of the cause it shall appear and be certified by the judge under his

(*y*) *Foster v. Pointer*, 9 C. & P. 721; 836.
8 M. & W. 398.

(*a*) *Sherwin v. Swindall*, 12 M. & W. 783.
(*z*) *Shuttleworth v. Cocker*, 1 M. & Gr. 783.

hand, upon the back of the record, that the trespass upon which any defendant shall be found guilty, was willful and malicious, the plaintiff shall recover not only his damages but his full costs of suit. And the 3 & 4 Vict. c. 24, s. 2 (*supra*), excepts cases where the judge certifies that the trespass was willful and malicious.

But the 3 & 4 Vict. c. 24, further enacts (s. 3), that nothing therein contained shall deprive any plaintiff of costs in any actions brought for a trespass over lands, commons, wastes, closes, woods, plantations, or inclosures, or for entering into any dwellings, outbuildings, or premises, in respect of which any notice not to trespass thereon or therein shall have been previously served by or on behalf of the owner or occupier of the land trespassed over or upon, or left at the last reputed or known place of abode of the defendant or defendants in such action. The plaintiff therefore is, under this section, entitled as of right to his full costs in an action for a trespass committed after notice, though he recover less than 40s. damages, and though the judge has refused to certify. The proper course for the plaintiff to adopt to entitle himself to costs is by entering a suggestion on the record, to the effect that the trespass was committed after notice, leaving the defendant to traverse the suggestion if so advised. (*b*) If the defendant has a right of way over the plaintiff's land, a general notice not to trespass will not entitle the plaintiff to his costs under this section. The notice should be framed so as to warn the defendant not to deviate from the way. "The plaintiff," observes PATTESON, J., "should say in effect, It is true you have a right of way over a particular part of the close, but you are to take care that you do not go out of that way. Here he has given a notice not to come upon the close at all." (*c*)

1420. *Costs in the superior courts in actions against justices.*—By 11 & 12 Vict. c. 44, s. 14, it is enacted, that if the plaintiff in an action against a justice of the peace for anything done by him in the execution of his office recovers a verdict, or the defendant allows judgment to pass against him by default, the plaintiff shall be entitled to costs as if the Act had not been passed; or if, in such case, it be stated in the declaration, or in the summons and particulars in a county court action, that

(*b*) *Bowyer v. Cook*, 4 C. B. 236.

(*c*) *Bourne v. Alcock*, 4 Q. B. 625.

the act complained of was done maliciously and without reasonable or probable cause, the plaintiff, if he recover a verdict for any damages, or if the defendant allow judgment to pass against him by default, shall be entitled to his full costs of suit, to be taxed as between attorney and client; and that in every action against a justice of the peace for anything done by him in the execution of his office, the defendant, if he obtain judgment upon verdict, or otherwise, shall in all cases be entitled to his full costs in that behalf, to be taxed as between attorney and client. The exception to the above rule contained in s. 13 has been mentioned.

The 24 Geo. 2, c. 44, s. 6, enacts, as we have seen, that the constable or officer executing a justice's warrant shall, in a certain event, be sued only in conjunction with the justice or justices who issued the warrant, and that the jury on proof of the warrant shall find for the constable; and as regards the costs, it is enacted, that if the verdict be given against the justice, the plaintiff shall recover his costs, to be taxed so as to include the costs the plaintiff is liable to pay to the defendant for whom such verdict shall be found.

1421. *In actions against constables and officers, and parties acting or intending to act in the execution of statutory powers*, such as those contained in the 1 & 2 Wm. 4, c. 41, the plaintiff, though he obtains a verdict, can not (s. 19) recover any costs from the defendant unless the judge before whom the trial takes place certifies his approbation of the action and of the verdict; and generally when an action is brought against a constable or a police-officer, or against private individuals, for anything done in pursuance of an Act of Parliament, or with the bona fide intention of executing the provisions of some particular statute, and a verdict passes for the defendant, or the plaintiff becomes nonsuit or discontinues the action after issue joined, or if, upon demurrer or otherwise, judgment is given against the plaintiff, the defendant is entitled to recover his full costs as between attorney and client, and has the like remedy for the same as any defendant has in ordinary cases. (d)

1422. *Certificate for costs in actions for things done in supposed pursuance of the Act for the protection of property from malicious injuries.*—By the 71st section of the 24 & 25 Vict. s.

(d) See 5 & 6 Wm. 4, c. 76, s. 133.

97, it is enacted, that though a verdict shall be given for the plaintiff in an action against any person for anything done in pursuance of the Act, such plaintiff shall not have costs against the defendant unless the judge before whom the trial shall be shall certify his approbation of the action. If, therefore, the judge does not at the trial give a certificate of approbation in conformity with the statute, the defendant is entitled to a suggestion of the fact on the record, in order to deprive the plaintiff of costs which he would otherwise recover. (e)

1423. *Costs in actions against executors.*—By 3 & 4 Wm. 4 c. 42, s. 31, it is enacted, that in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the superior courts, shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against him, and in all other cases in which he would be liable if he were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner. (f)

1424. *Costs in actions for duties and penalties at the suit of the Crown.*—By 16 & 17 Vict. c. 107, s. 263, it is enacted, that in all suits or proceedings at the suit of the Crown for the recovery of any duty or penalty, or the enforcement of any forfeiture under that Act, or any Act relating to the customs, the parties thereto shall be entitled to recover costs against each other, in the same manner as if such suits or proceedings were conducted and had between subject and subject.

1425. *In actions upon judgments,* the plaintiff is not entitled to any costs of suit, unless the court in which the action is brought, or some judge of the same court, makes an order for costs, 43 Geo. 3, c. 46, s. 4. And the 31 & 32 Vict. c. 54, which enables Scotch and Irish judgments to be registered in England, and vice versa, contains a similar provision (s. 6). But these statutes apply only where the action is brought on the judgment alone. Where, therefore, a declaration contained two counts, one on a judgment, and another on a separate and distinct cause of action, and the plaintiff succeeded on both

(e) *Norwood v. Pitt*, 5 H. & N. 801; 28 Law J., Exch. 212; decided under the 41st section of the repealed Act, 7 & 8 Geo. 4, c. 30.

(f) See Gray on Costs, 227-235.

counts, it was held that he was entitled to his full costs without any order. (*g*)

1426. *Costs on new trials.*—If a new trial be granted without any mention of costs in the rule, the costs of the first trial will not be allowed to the successful party, though he succeed on the second. (*h*) In the case of a new trial granted by reason of the misdirection of the judge, in an action in the superior courts, the party who succeeds in obtaining the rule absolute gets no costs. And where the judgment of the court below is reversed in a court of error, inasmuch as the judgment is not given for the defendant, but merely that the plaintiff nil capiat per breve, the statutes which give costs to the successful party in actions brought in the superior courts do not apply. (*i*)

1427. *In cases of appeals from the decision of a county-court judge, or judge of an inferior tribunal,* (*k*) it is entirely in the discretion of the court to make such order with respect to costs as it thinks fit. "The rule," observes WILLES, J., "which will in future be adopted in this court, is, that the successful party, whether appellant or respondent, will be entitled to his costs, unless there are some special circumstances which take the case out of the general rule; for we do not think that there is, for the purpose of costs, any analogy between the case of a new trial obtained by reason of the misdirection of a judge in an action brought in one of the superior courts, and an appeal from a county court on the ground of misdirection." (*l*) But the costs must be asked for at the time the case is disposed of. (*m*) If the judgment below be reversed, that part of it that deals with costs will be reversed also. (*n*)

In the case of an appeal to the Privy Council from the decision of the judge of the Court of Admiralty, the Privy Council, having reversed the decision, gave the appellant not only his costs of appeal, but also the costs in the court below,

(*g*) Jackson v. Everett, 1 B. & S. 857; 31 Law J., Q. B. 59.

(*h*) Reg. Gen. Hil. Term, 1853, R. 54; 1 Ell. & Bl. App. xii.

(*i*) Schroder v. Ward, 13 C. B., N. S. 410; 32 Law J., C. P. 150.

(*k*) As to costs on appeals against the decisions of magistrates, see *Wendesbury Board of Health v. Stephenson*, 33 Law J., M. C. 111.

(*l*) *Schroder v. Ward*, *ut sup.*, dissenting from *Gee v. Lanc. & York. Rail. Co.*, 6 H. & N. 221; 30 Law J., Exch. 11. *Conybeare v. Farries*, L. R., 5 Exch. 16.

(*m*) *Taylor v. Gt. North. Rail. Co.*, L. R., 1 C. P. 430. *Budenberg v. Roberts*, L. R., 2 C. P. 292.

(*n*) *Gage v. Collins*, L. R., 2 C. P. 381.

saying that the unsuccessful party must take the consequences of bringing an action which he could not sustain. (*o*)

1428. *In the case of an appeal from a superior court to the Court of Exchequer Chamber*, the general rule is, that costs follow the affirmance of the judgment below; but when the court is equally divided there can be no judgment for costs. (*p*)

1429. *Costs on removal of actions by writ of certiorari.*—When an action *ex contractu* is removed by *certiorari*, the plaintiff is not bound to follow the action into the superior courts. If, therefore, the plaintiff fails to proceed, the defendant has no means of getting judgment for his costs. (*q*) If, however, the plaintiff proceeds with the action so removed and obtains a verdict, he will be entitled to his full costs, to be taxed on the higher scale, though he recovers less than £20. (*r*)

1430. *In cases of prohibition*, a plaintiff for whom a verdict is given by the jury is not entitled to recover the costs of the proceedings in the court below as damages under the 1 Wm. 4, c. 21 s. 1. (*s*)

1431. *On indictments for libel and slander*, preferred by a private prosecutor, if judgment is given for the defendant, the defendant is entitled to his costs; but if there be a special plea of justification, and the issue thereon be found for the prosecutor, the latter will be entitled to recover from the defendant the costs he has sustained by reason of such plea, 6 & 7 Vict. c. 96, s. 8.

1432. *Costs of writs of mandamus and injunction.*—By the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, s. 32, it is enacted, that when a writ of *mandamus* or of *injunction* is issued under the provisions of the Common Law Procedure Act, 1854 (*post*, ch. 23), such writ shall, unless otherwise ordered by the court or a judge, in addition to the matter directed to be inserted therein, command the defendant to pay to the plaintiff the costs of preparing, issuing, and serving such writ; and payment of such costs may be enforced in the same manner as costs payable under a rule of court.

(*o*) *Valentine v. Cleugh*, 8 Moo. P. C. C. 167; and see 7 *ib.* Appendix.

(*p*) *Archer v. James*, 2 B. & S. 61.

(*q*) *Garton v. Ct. West. Rail. Co.*, 28 Law J., Q. B. 103.

(*r*) *Perry v. Bennett*, 14 C. B., N. S. 402.

(*s*) *White v. Steel*, 12 C. B., N. S. 383; 32 Law J., C. P. 1.

1433. *On an application for an injunction under the Railway and Canal Traffic Act*, costs will be awarded to the successful applicant, for the court will not without strong reason depart from the rule, that when a company has so acted as to make it proper for any person to come to the court for relief under the statute, that relief ought to be obtained at the costs of those whose acts have occasioned the application. (*t*)

1434. *Repeal of divers statutes enabling plaintiffs in certain actions to recover double costs.*—By the 5 & 6 Vict. c. 97, s. 1, it is enacted, that so much of any clause or enactment in any local and personal Act, or in any act of a local or personal nature, whereby it is enacted that either double or treble costs, or any other than the usual costs between party and party, may be recovered, shall be repealed, and in lieu thereof the usual costs between party and party may be recovered, and no more. And (s. 2) that so much of any enactment in any public Act, not local or personal, whereby it is enacted that either double or treble costs, or any other than the usual costs between party and party, may be recovered, shall be repealed, and instead of such costs the party shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action or other legal proceeding as shall be taxed by the proper officer in that behalf.

No double costs in error are to be allowed to either party. (*u*)

1435.—*Costs in compensation cases* (*x*).—An offer of compensation by a railway company to a person whose land has been injuriously affected by the construction of a railway, must be made at least ten days before the holding of the inquisition of damages, in order to throw upon the party seeking compensation, and not obtaining more than the sum offered, the burden of paying his own costs. (*y*) There is nothing, however, to prevent the company from subsequently making a larger offer, provided they make it in time, and if the aggregate of the sums

(*t*) *Baxendale v. Lond. & South-West. Rail Co.*, 12 C. B., N. S. 758.

(*u*) 5 & 6 Vict. c. 97, s. 2; 17 & 18 Vict. c. 125, s. 44. *New Pleading Rules*, Hil. Term, 1853, R. 69; 1 Ell. & Bl. App. xiv. *Cooper v. Slade*, 1 Ell. & Ell. 336. *Gray on Costs*, 181–186.

(*x*) By 32 & 33 Vict. c. 18, "The Lands Clauses Act, 1869," such costs may be taxed by a master; but the Act

only refers to arbitrations pure and simple under the Lands Clauses Act, and not to cases where other matters are involved. *Doulton v. Met. Board of Works*, L. R., 5 Q. B. 333.

(*y*) *Metrop. Rail. Co. v. Turnham*, 14 C. B., N. S. 212. See *Owen v. Lond. and North-West. Rail. Co.*, L. R., 3 Q. B. 54.

recovered by the claimant does not exceed the aggregate of the sums so offered by the company, he will not be entitled to his costs. (z) The offer must be unconditional. An offer of one sum for compensation and costs is, therefore, bad. (a) In the case of a landowner, whose land has been severed, demanding a communication to be made, and the company preferring to take to the land as being of less value than the expense of making the communication, the act makes no provision as to costs. (b) A person whose lands are injuriously affected, and who recovers by the verdict of a jury under s. 68 of the 8 & 9 Vict. c. 18, more than the company offered is entitled to the costs of the inquiry. (c)

1436. *Taxation of costs.*—By the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 223, the judges, or eight or more of them, with their chiefs, are empowered to make general rules and orders for fixing costs, apportioning costs of issues, and for enforcing uniformity of practice in the allowance of costs. “Costs are an indemnity; they are given to the person who receives them to indemnify him in respect of the cost of some proceeding which the other person has compelled him to take. They are not a punishment on the party who is to pay them, nor a bonus to the party who is to receive them. The principle, therefore, is to find out the extent of the damnification, and then you can find out the amount of costs you are to allow. (d) They ought to be a fair indemnity to the party, and if they are not so, the rules which govern the taxation of costs ought to be altered. (e)

A plaintiff who has been kept attending as a material witness in his own cause may be allowed the expenses of his attendance, for the reasonable expenses to which a plaintiff is put by being obliged to attend and be examined as a witness to seek redress for an injury should be thrown upon the wrongdoer. (f) And if the plaintiff has been obliged to quit his vessel and abandon an intended voyage, and remain in England

(z) *Hayward v. Metrop. Rail. Co.*, 33 Law J., Q. B. 73. See *Caledonian Rwy. v. Carmichael*, L. R., 2 Sc. App. 56.

(a) *Balls v. Metrop. Board of Works*, L. R., 1 Q. B. 337.

(b) *Cobb v. Mid. Wales Rail. Co.*, L. R., 1 Q. B. 342.

(c) *South-East. Rail. Co. v. Richardson*, 21 Law J., C. P. 122.

(d) *Bramwell, B., Harold v. Smith*, 5 H. & N. 381; 29 Law J., Exch. 141.

(e) *Pollock, C. B., Doe v. Filliter*, 13 M. & W. 51.

(f) *Howes v. Barber*, 18 Q. B. 588, 21 Law J., Q. B. 254.

to give evidence, the reasonable and necessary expenses of his maintenance may be allowed him. (*g*) And where the defendant's presence in court is reasonably necessary for his defense, the expense of his attendance will be allowed if the defense is successful. (*h*)

When there are several defendants who defend jointly, and one of them gets a verdict, he will be entitled to an aliquot portion of the joint costs of the defense, and to any additional costs that were reasonably necessary for his defense. (*i*) If several defendants defend separately by separate attorneys, and a verdict is given in favor of some or all of them, each successful defendant is entitled to the costs of his defense. (*k*)

Where the jury, being unable to agree upon their verdict, are discharged by the judge, and the plaintiff afterwards discontinues, the defendant is not entitled to the costs of the trial. (*l*)

The court is bound not to allow a successful party all the expense he may have thought proper to incur when it can see that part of it has been needless. Where there is matter ascertained in the cause, whether appearing upon the face of the proceedings or established by the statement of the judge, founded upon his judicial knowledge of the facts, whereby the master is satisfied that witnesses called by the successful party have been wholly useless, he ought to disallow the expenses of such evidence. (*m*)

1437. Costs of particular issues.—The costs of any issue, either of fact or of law, follow the finding of judgment upon such issue, and will be adjudged to the successful party, whatever may be the result of the other issues. (*n*) But when issues in law and fact are raised, the costs of the several issues, both in law and fact, will follow the finding or judgment; and if the party entitled to the general costs of the cause obtain a verdict on any material issue, he will also be entitled to the general costs of the trial; (*o*) but if no material

(*g*) Ansett v. Marshall, 22 Law J., Q. B. 118.

(*h*) Flower v. Gardner, 3 C. B., N. S. 187; 27 Law J., C. P. 56.

(*i*) Griffiths v. Kaynaston, 2 Tyr. 757. Bartholomew v. Stephens, 5 M. & W. 386. Gray on Costs, 96.

(*k*) Newton v. Boodle, 4 C. B. 359.

Gambrell v. Falmouth, 5 Ad. & E. 403.

(*l*) Wall v. Lond. and South-West. Rail. Co., 11 Exch. 696.

(*m*) Reynolds v. Harries, 3 C. B., N. S. 291; 26 Law J., C. P. 26.

(*n*) 15 & 16 Vict. c. 76. s. 81.

(*o*) See Dignam v. Bailey, L. R., 5 Q. B. 53.

issue in fact be found for the party otherwise entitled to the general costs of the cause, the costs of the trial will be allowed to the opposite party. (*p*) If judgment goes by default, the plaintiff is entitled to nominal damages on each count. He is, therefore, entitled to the expenses of witnesses called to prove damage on every count, although the jury on the inquisition disbelieve such witnesses, and find there was no damage as to one count. (*q*)

The party who is entitled to the costs of the cause is entitled to the costs of evidence applicable to any issue or issues found for him, though also applicable to an issue or issues found against him, and the other party is entitled only to the costs of evidence exclusively applicable to an issue or issues upon which he has succeeded. Costs apart from costs in the cause are only given by the rule of court and the statute to a party succeeding upon an issue. (*r*) It is for the master to ascertain whether any and what costs have been incurred as to part of the issue found for the defendant, and when they can be ascertained to have been incurred relative to that only, to tax them to the defendant, though the plaintiff has succeeded, and is entitled to the general costs of the cause. (*s*)

Where a plea consists of several parts, the party succeeding on any one of those parts is entitled to have that part treated as if it were a separate plea raising a several issue. (*t*)

1438. *Where costs are to be taxed by the court in which the action is brought*, under the provisions of certain acts of parliament, giving a defendant costs in certain cases where he would not otherwise be entitled to them, and the cause is removed by writ of certiorari from an inferior to a superior court, the superior court can not give judgment for costs, as it is not the court in which the action was brought. (*u*)

1439. *Security for costs*.—When the plaintiff in the action

(*p*) Reg. Gen. Hil. Term, 16 Vict., R. 62; 1 Ell. & Bl. App. xiii. As to this, see Chitty's Arch. Pr. 11th ed. 498.

(*q*) Dods v. Evans, 33 Law J., C. P. 146.

(*r*) Reynolds v. Harries, 3 C. B., N. S. 289.

(*s*) Traherne v. Gardner, 8 Ell. & Bl. 182. As to costs of abortive issues, 15 &

16 Vict. c. 76, s. 145, and the New Pr. Rules, Hil. Term, 1853, R. 63; 1 Ell. & Bl. App. xiii.

(*t*) Davis v. Thomas, 5 Jur. N. S. 709

(*u*) Connell v. Watson, 2 Dowl. P. C. 139. Woodhall v. Voight, 6 H. & N. 153; 30 Law J., Exch. 31. Costello v. Corlett, 4 Bing. 474.

is a foreigner, having no permanent place of abode in this country, the court will stay proceedings in the action until he has given security for costs to the satisfaction of the master. (*x*) Where, also, a sham plaintiff, a pauper, is set up to sue for penalties for the benefit of others who keep in the background, the court may require him to give security for costs. (*y*) If, also, the plaintiff is residing abroad out of the jurisdiction of the court, he may be required to give security for costs. (*z*) But an officer engaged in the service of the Crown in a foreign country cannot be required to give such security; (*a*) nor is it necessary for a plaintiff suing in England but residing in Ireland or Scotland, or vice versa, to find security, "unless the court on special grounds, shall otherwise order" (31 & 32 Vict. c. 54 s. 5); nor for the trustee of a bankrupt, or the executor of a deceased person, suing for the benefit of the estate, although such trustee or executor be in insolvent circumstances. (*b*) The proviso in the 30 & 31 Vict. c. 142, s. 10, has been mentioned.

Where a limited liability company is plaintiff, it may be required to give security for costs, if it be shown that there is reason to believe that the assets of the company will not suffice to pay the defendant his costs, in case he is successful, and proceedings may be stayed until such security is given. (*c*)

1440. *Award of costs in the county court.*—By 9 & 10 Vict. c. 95, s. 88, it is enacted, that all the costs of any action or proceeding in the county court, not therein otherwise provided for, shall be paid by or apportioned between the parties, in such manner as the judge shall think fit, and in default of any special direction shall abide the event of the action. And by the 30 & 31 Vict. c. 142, s. 14, it is enacted, that whenever an action or suit is brought in the county court, which the court has no jurisdiction to try, the court shall order the cause to be struck out, and shall, unless the parties consent to the trial of the cause in the county court, have power to

(*x*) *Nylander v. Barnes*, 30 Law J., Exch. 150. *Zychlinski v. Maltby*, 14 C. B., N. S. 322. *Chapple v. Watt*, 29 Law J., Q. B. 167.

(*y*) *Browne v. Redmond*, 11 Ir. C. L. R., App. xxviii. *Rice v. Dub. and Wick. Rail. Co.*, 8 Ib. 155, C. P.

(*z*) *Holmes v. Pemberton*, 28 Law J., B. 172.

(*a*) *Whittall v. Campbell*, 5 H. & N. 601.

(*b*) *Denston v. Ashton*, L. R., 4 Q. B. 590. *Sykes v. S. s. Lye. R.*, 4 C. P. 645; 38 L. J., C. P. 281.k

(*c*) 20 & 21 Vict. c. 14, s. 24. See *Caillaud's Patent Tanning Co. v. Caillaud*, 28 Law J., Ch. 357.

award costs in the same manner as if the court had jurisdiction, and the plaintiff had not appeared, or had appeared and failed to prove his demand. If the cause has been sent by a superior court to a county court for trial under 30 & 31 Vict. c. 142, s. 10, the costs are entirely in the jurisdiction of the county court. (d)

1440a. *Costs of prosecutions.*—When any person has been convicted on an indictment for a common assault, or an assault with wounding, &c., the court may, in addition to the sentence pronounced upon the offender, order him to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for loss of time as the court may, by affidavit, or other inquiry and examination, ascertain to be reasonable; and if the sum awarded is not paid, the offender may be imprisoned, or the amount levied by distress and sale of his goods and chattels. (e)

(d) *Moody v. Stewart*, L. R., 6 Exch. (e) 24 & 25 Vict. c. 100, ss. 74, 75.
35.

CHAPTER XXIII.

OF DAMAGES IN CHANCERY, AND THE REMEDY BY INJUNCTION, PROHIBITION, AND CERTIORARI.

SECTION I.—*Of damages in chancery and the remedy by injunction.*

- 1441. Award of damages in the court of chancery.
- 1442. The writ of injunction issuing out of chancery.
- 1443. Injunction to restrain a public company from exceeding its statutory powers.
- 1444. Injunction to restrain disturbance of grave-yards, and obstructions to rights of burial.
- 1445. Injunction to restrain the infringement of patent-rights and copyright.
- 1446. Injunction to restrain the sale or detention of chattels.
- 1447. Effect of laches and delay in applying for an injunction.
- 1448. Acquiescence precluding a plaintiff from relief.
- 1449. Of the statutory obligation upon the court of chancery to decide all questions of law and fact on the determination of which the title to relief in equity depends.
- 1450. Of the remedy by injunction at common law.
- 1451. Injunction at common law to restrain infringements of patent-right and copyright.
- 1452. Injunctions and orders to stay proceedings.

SECTION II.—*Of the remedy by prohibition for the prevention of judicial wrongs.*

- 1453. The writ of prohibition.
- 1454. Prohibition before judgment.

- 1455. Prohibition after judgment and execution.
- 1456. Prohibition where appeal lies.
- 1457. Prohibition to the ecclesiastical courts.
- 1458. Notwithstanding an appeal entered.
- 1459. The writ of prohibition to restrain a county court judge.
- 1460. Prohibition to the Lord Mayor's court.
- 1461. Proceedings in prohibition.
- 1462. The application for a prohibition.
- 1463. The rule or summons to show cause why a writ of prohibition should not issue to a county court.
- 1464. Notice of the issue of the writ.
- 1465. Refusal of writ when final.
- 1466. Of the setting aside writs of prohibition issuing out of chancery.

SECTION III.—*Of the remedy by certiorari.*

- 1467. The writ of certiorari.
- 1468. Where the inferior court has jurisdiction.
- 1469. Where the inferior court has no jurisdiction.
- 1470. Limitation of time for issuing the writ.
- 1471. Grounds for the issue of the writ.
- 1472. Certiorari to remove causes from the county court.
- 1473. Of the concurrent remedy by appeal and by certiorari—County court appeals.
- 1474. The application for the writ.
- 1475. Affidavits, when necessary.
- 1476. Notice of the issue of the writ.

1477. The effect of the issue of the writ.

1478. The effect of the refusal of a writ of certiorari.

1479. Proceedings after removal.

1480. Quashing of the writ — *Procedendo*.

SECTION I.

OF DAMAGES IN CHANCERY AND THE REMEDY BY INJUNCTION.

1441. *Award of damages in the Court of Chancery.*—By the Chancery Amendment Act, 1858, 21 & 22 Vict. c. 27, commonly called Lord Cairn's Act, it is enacted (s. 3), that in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against the commission or continuance of any wrongful act, it shall be lawful for the court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction, and such damages may be assessed in such manner as the court shall direct. (*a*) The meaning of the statute is, that where the court has jurisdiction in the suit, it may award damages in substitution for specific performance. (*b*) Damages independent of relief in the Court of Chancery will not be given, for the statute, it has been observed, was never intended to transfer the jurisdiction in a simple case of damages from a court of common law to a court of equity, (*c*) and throw upon a court of equity the functions which properly belong to a jury. (*d*) But this will not prevent a plaintiff, who at the time of filing his bill is entitled to an injunction to restrain the infringement of his patent, from pursuing his remedy for damages in Chancery, although the patent expires between the time of the filing of the bill and the hearing; (*e*) nor is the plaintiff prevented by the Act from pursuing his remedy for damages at common law, though he may also be suing for relief in equity. (*f*) He is not entitled, however, to damages in a court of equity if he filed his

(*a*) *Mold v. Wheatcroft*, 30 Law J., Ch. 598. *Schotsman v. Lancashire and Yorkshire Rail. Co.*, L. R., 1 Eq. Ca. 349.

(*b*) *Soames v. Edge*, Johns. 669.

(*c*) *Howe v. Hunt*, 32 Law J., Ch. 36. *Chinnock v. Sainsbury*, 30 ib. 409. *Betts v. Gallais*, *infra*.

(*d*) *Rogers v. Challis*, 27 Beav. 175;

29 Law J., Ch. 240. *Betts v. De Vitre*, 34 Law J., Ch. 289. *Durell v. Pritchard*, L. R., 1 Ch. App. 244. *Ferguson v. Wilson*, L. R., 2 Ch. App. 77. *Scott v. Rayment*, L. R., 7 Eq. Ca. 112.

(*e*) *Davenport v. Rylands*, L. R., 1 Eq. Ca. 302.

(*f*) *Anglo-Danubian Co. v. Rogers*, on, L. R., 4 Eq. Ca. 3.

bill only four days before the expiration of the patent. (*g*) If the plaintiff, a patentee, and also a manufacturer, has been in the habit of licensing others to use his patent, at a fixed royalty, the loss of that royalty is the measure of damages against a person who has infringed the patent, and the plaintiff can not claim in addition manufacturer's profit, on the supposition that the articles made by the defendant, and in which the infringement took place, might have been sent to him to be fitted with the patent. (*h*)¹

1442. *The writ of injunction issuing out of chancery* is a prohibitory writ granted at the discretion of the court, restraining a defendant from the repetition or continuance of a wrongful act; and enforceable, in case of disobedience, by attachment. (*i*) The object of the equitable interference by injunction, is to prevent the infringement or disturbance of a clear legal right, (*j*) or for the purpose of better enforcing legal rights, or preventing mischief until such rights have been ascertained. (*k*) Various instances of the granting of this writ for the protection and preservation of legal rights have been already given in the case of injunctions to prevent the disturbance of rights incident to the possession and ownership of land, easements and profits à prendre, for the prevention of brick-burning (*l*) and nuisances, for the prevention of waste, for the prevention of trespasses, to enforce compliance by railway and canal companies with the provisions of the Railway and Canal Traffic Act, to restrain public companies from doing acts ultra vires, and to prevent and repress fraud and the fraudulent use of trade-marks. (*m*).

The interference of the court is not, as we have seen, confined to the prevention of the continuance of an injury already done, but its assistance may be invoked for the purpose of

(*g*) *Betts v. Gallais*, L. R., 10 Eq. Ca. 392.

(*h*) *Penn v. Jack*, L. R., 5 Eq. Ca. 81.

(*i*) *Drewry on Injunctions*, *Kerr on Injunctions*, *Goldsmith's Eq. Pr.*, 5th ed.

(*j*) *Herr v. Union Bank*, 2 Giff, 686.

(*k*) *Saunders v. Smith*, 3 Myl. & Cr. 729.

(*l*) *Beardmore v. Tredwell*, 3 Giff. 683.

(*m*) As to infringement of right of access to a public river, *Attorney-General v. Thames Conservators*, 1 H. & M. 1.

¹ In a proper case a court of equity will settle all the rights of the parties, even to the extent of assessing damages. *Bassett v. Company*, 43 N. H. 249; *Dunnett v. Dunnett*, 43 id. 499.

averting a threatened mischief. (n)¹ The court will not interfere for the protection of public rights, unless it is satisfied that the interests of the public require the issue of the injunction. (o)

I443. *Injunction to restrain a public company from exceeding its statutory powers* will be granted at the suit of a private person who has sustained some private individual injury thereby, but not, as we have seen, at the instance of a rival company, or any public body not qualified to represent the interests of the public. (p) Thus it will issue to restrain a public company which by its deed of settlement was empowered to refuse to authorize a transfer to any person not approved by them, from refusing to transfer at all, though whether it would issue to compel them to authorize a transfer of shares to a nominee of a rival company was considered doubtful. (q) So to restrain a railway company from paying dividends out of capital, (r) or from prosecuting a suit not instituted by it. (s)²

I444. *Injunction to restrain disturbance of grave-yards, and obstructions to rights of burial.*—If a person takes a mortgage of the ground of a cemetery belonging to a company, and the company continues after the mortgage to grant permanent rights of burial, and persons are buried in the mortgaged land with the knowledge of the mortgagee, the Court of Chancery

(n) *Ante.* Tinkler v. Wandsworth District Board, 2 De G. & J. 272. Gibson v. Smith, 2 Atk. 182.

(o) Felkin v. Ld. Herbert, 30 Law J., Ch. 604. Ryde Com. v. Isle of Wight Ferry Co., 30 Beav. 616. Wandsworth Board, &c. v. Lond. and South-West. Rail. Co., 31 Law J., Ch. 854. Wintle v. Brist. & South-West. Rail. Co., 6 L. T. R., N. S. 20.

(p) *Ante.* Stockport District Water Co. v. Manchester (Mayor, &c.), 11 W. R. 156. Bostock v. North Staff., &c.,

ante. Tinkler v. Wandsworth, &c., *ante.*

(q) Robinson v. Chartered Bank, L. R., 1 Eq. Ca. 32.

(r) Bloxam v. Metrop. Rail. Co., L. R., 3 Ch. App. 337. Salisbury v. Metrop. Rail. Co., 38 Law J., Ch. 249. See Hoole v. Gt. West. Rail. Co., L. R., 3 Ch. App. 262.

(s) Kernaghan v. Williams, L. R., 6 Eq. Ca. 228. See Abrahams v. Lord Mayor, &c., of London, L. R. 6 Eq. Ca. 625.

¹ See Wood on Nuisances, 838, 839, 840, 841.

² In a case where an injunction is sought to restrain a public company authorized by the legislature to erect its works and carry on a special business, a clear case of an unlawful exercise of power must be shown; Sparhawk v. Phenix Iron Co., 54 Penn. St. 401; Lee v. Pembroke Iron Co., 57 Me. 481; Stevens v. Canal Co., 12 Met. (Mass.) 466; either because in excess of its powers; Sanford v. R. R. Co., 24 Penn. St. 344; H. R. R. Co. v. Artcher, 6 Paige (N. Y.) 83; or because it is so carelessly and recklessly done as to be a nuisance; Stainton v. Woolrych, 23 Beav. 225; or because it is not within the contemplation of the act; Brock v. Conn. & Pass. R. R. Co., 35 Vt. 373; Wood on Nuisances, 858-859.

will, by injunction, restrain the latter from disturbing the ground and interfering with the graves and the right of burial. The Act to amend the laws concerning the burial of the dead in the metropolis (15 & 16 Vict. c. 85), putting an end to the general right of burial therein, specially reserves permission for particular individuals having private rights to bury in the grounds which are within the provisions of the Act, provided they previously obtain the sanction of one of Her Majesty's principal secretaries of state for the time being, for the purpose. The legislature, therefore, has in a qualified manner preserved these rights, and the interference of the court may be obtained for their protection against the acts of wrong-doers who seek to interfere with the graves or the soil of the burying ground. (*t*)

1445. *Injunction to restrain the infringement of patent rights and copyright.*—If a plaintiff is in a position to support by proper evidence his title to a patent, and to prove the fact of its having been infringed, he is entitled to an injunction to stop the mischief, (*u*) both against the manufacturer and the person who uses the patent, (*v*) and to an account of the profits they may have made by their invasion of the plaintiff's privilege, or to an inquiry as to damages, at his option. (*w*) But it is not the practice of the courts of equity to grant a perpetual injunction to restrain the infringement of a patent, unless the legal validity of the patent has been conclusively established, (*x*) which must now, under the 25 & 26 Vict. c. 42. the Chancery Regulation Act, 1862, be done before the Court of Chancery itself. (*y*) If, after the decree has been pronounced, the patent becomes void, by the decision of a court of competent jurisdiction or otherwise, the injunction becomes of no effect. (*z*) Where the patentee manufactures and sells the patent both in this country and abroad, the onus lies upon him to show not only that the article of which the sale is com-

(*t*) *Moreland v. Richardson*, 26 Law J., ch. 690; 25 Ib. 883.

(*u*) *Gardner v. Broadbent*, 2 Jur. N. S. 1041. *Bacon v. Jones*, 4 Myl. & Cr. 433. *Davenport v. Rylands*, *ante*; *Bovill v. Goodier*, L. R., 2 Eq. Ca. 195.

(*v*) *Penn v. Bibby*, L. R., 3 Eq. Ca. 308.

(*w*) *Neilson v. Betts*, L. R., 5 Eng. & Ir. App. 1. See *Saxby v. Easterbrook*,

L. R., 7 Exch. 207. As to interrogatories, see *Hoffman v. Postill*, L. R., 4 Ch. App. 673.

(*x*) *Hills v. Evans*, 31 Law J., Ch. 457. As to the legal validity of patent rights, see *Lang v. Gisborne*, Id. 771.

(*y*) *Fernie v. Young*, L. R., 1 Eng. & Ir. App. 63.

(*z*) *Daw v. Eley*, L. R., 3 Eq. Ca. 496

plained of was not made by him in this country, but also that it was not made by him or his agents abroad. (*a*)

We have seen that an injunction may be obtained to prevent persons attending lectures from taking notes and publishing such lectures for profit without the author's consent; (*b*) also to restrain the publication of private letters without leave of the person who wrote them, or, in case of his death, without the leave of his executor, (*c*) and from printing and publishing any private manuscript or unpublished work without the consent of the author or proprietor. (*d*) If a person under the pretense of writing a criticism upon an author's work, copies out the most attractive parts of it, and so large a quantity of the text as to injure and interfere with the sale of the work, the author or proprietor is entitled to an injunction. (*e*) But where the reviewer or critic takes no more than is reasonably sufficient for a mere review or critique, an injunction will be refused. (*f*) A fair abridgment is in certain cases allowable, but not where it is merely colorable or evasive, and is so far a reproduction of the original work as to injure the sale of it. (*g*)

An injunction may also be obtained to restrain an infringement of the statutory copyright in printed books, including maps, (*h*) lectures, dramatic literary property, and musical compositions, sculpture, useful and ornamental designs, prints and engravings, paintings, drawings, and photographs. It is maintainable by the grantee or assignee of a printed work, although he has not paid the author the price agreed upon for the writing of the work; (*i*) but before the court will interfere in his favor, it must be shown that he has a good legal title to the copyright. (*j*) Where a person, being about to publish a periodical publication under a certain title, and knowing another publisher was engaged in the production of a periodi-

(*a*) *Betts v. Willmott*, L. R., 6 Ch. App. 239.

(*b*) *Abernethy v. Hutchinson*, *ante*.

(*c*) *Thompson v. Stanhope*, Ambl. 737. See *Hopkinson v. Ld. Burghley*, L. R. 2 Ch. App. 447.

(*d*) *Queensbury (Duke of) v. Shebbeare*, *ante*. *Prince Albert v. Strange*, *ante*. *Macklin v. Richardson*, Ambl. 694.

(*e*) *Campbell v. Scott*, 11 Sim. 31.

Saunders v. Smith, 3 Myl. & Cr. 711. *Bramwell v. Holcomb*, 3 Id. 737.

(*f*) *Bell v. Walker*, 1 Bro. Ch. C. 450.

(*g*) *Tonson v. Walker*, 3 Swanst. 672; *ante*.

(*h*) *Stannard v. Lee*, L. R., 6 Ch. App. 346.

(*i*) *Cox v. Cox*, 11 Hare, 118.

(*j*) *Stevens v. Benning*, 24 Law J., Ch. 153. *Addison on Contracts*, 6th ed., 120, 121.

cal under a similar title, allowed the latter to continue his preparations without objection, and himself advertised it, it was held that he could not restrain the latter from using the title, although as a matter of fact his periodical was published first. (*k*)

1446. *Injunction to restrain the sale or detention of chattels.*—Where specific chattels necessary for conducting a particular business are in the possession of persons who claim a lien upon them, and threaten an immediate sale, the court will interfere by injunction, and give the debtor an opportunity of redeeming his property. (*l*) And a court of equity has also jurisdiction to enforce a right of stoppage in transitu (*m*). The Court of Bankruptcy also has jurisdiction, under the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, to prevent by injunction a third person from dealing with property fraudulently assigned before a bankruptcy. (*n*)

1447. *Effect of laches and delay in applying for an injunction.*—The court, in the exercise of its discretion with regard to the granting of an injunction, will, as we have seen, be influenced by any laches or delay which may have taken place in the institution of the proceedings. (*p*) Long delay may amount to absolute proof of acquiescence in the act complained of, and will, if unexplained, certainly throw considerable doubt on the reality of the alleged injury. (*q*)¹

1448. *Acquiescence precluding a plaintiff from relief.*—A man who lies by while he sees another person expend his capital and bestow his labor upon any work which he claims to have a right to prevent, without giving that person any notice or attempting to interrupt him, and who thus acquiesces in proceedings inconsistent with his own claims, will in vain ask for an injunction, the effect of which would be to render all the

(*k*) *Maxwell v. Hogg*, L. R., 2 Ch. App. 307.

(*l*) *North v. Gt. Northern Rail. Co.*, 69 *f* 29 Law J., Ch. 301.

(*m*) *Schotsmans v. Lanc. and York. Rail. Co.*, L. R., 2 Ch. App. 332.

(*n*) *Ex parte Anderson*, L. R., 5th Ch. App. 473.

(*p*) *Bridson v. Benecke*, 12 Beav. 1. *Bovill v. Crate*, L. R., 1 Eq. Ca. 388.

(*q*) *Ware v. Regent's Canal Co.*, 3 De G. & J. 230. *Wicks v. Hunt*, 1 Johns. 372.

¹ *Atlanta v. R. R. Co.*, 40 Ga. 471; *Wood on Nuisances*, 831; *Meigs v. Lester*, 23 N. J. 199; *Carlisle v. Cooper*, 25 Id. 576; *Atty.-Gen. v. R. R. Co.*, 24 Id. 49; *Goodwin v. Canal Co.*, 18 Ohio St. 169.

expense useless which he voluntarily suffered to be incurred. (r) Where there was a parol agreement for the making of a watercourse through the defendant's land, for a certain consideration to be paid to the latter, and the watercourse was made and used for some time, and the parties could not afterwards agree upon the amount to be paid for the easement, and the defendant then stopped up the watercourse, an injunction was granted to restrain him from interfering with the plaintiff's use of it, and it was referred to the master to ascertain the amount that ought to be paid for the enjoyment of the privilege. (s)²

1449. *Of the statutory obligation upon the Court of Chancery to decide all questions of law and fact on the determination of which the title to relief in equity depends.*—Formerly, when an injunction was granted for the protection of a legal right, and a question was raised as to the existence of the right, the court made the continuance of the injunction dependent upon an action being brought to try the right, or it required the complainant first to establish his title at law, and suspended the grant of the injunction until the result of the legal investigation had been ascertained; (t) but the Chancery Amendment Act, 15 & 16 Vict. c. 86, s. 62, provides, that in cases where it is the practice of the court to decline to grant equitable relief until the legal title or right of the parties seeking such relief has been established in a proceeding of law, the court may itself determine such title or right without requiring the parties to proceed at law to establish the same; and the 21 & 22 Vict. c. 27, s. 3, provides for the trial of questions of fact arising in any suit or proceeding in chancery, either before a common or special jury, or (s. 5) before the court itself without a jury. (u) When the trial takes place before a jury, the court has the same powers, jurisdiction, and authority as any judge of any of the superior courts sitting at nisi prius. But this

(r) Parrott v. Palmer, *ante*. Birmingham Canal Co., v. Lloyd, 18 Ves. 515. Cotchin v. Bassett, *ante*. Maxwell v. Hogg, *supra*.

(s) Devonshire (Duke of) v. Elgin, 20 Law J., Ch. 495. See *ante*.

(t) Earl Ripon v. Hobart, 3 Myl. & K. 177. Clowes v. Beck, 13 Beav. 354 20 Law J., Ch. 505. Bacon v. Jones, 4 Myl. & Cr. 436.

(u) See Simpson v. Holliday, L. R., 2 App. Ca. 316.

¹ Bridge Co. v. Bragg, 11 N. H. 102; Lefevre v. Lefevre, 4 S. & R. (Penn.) 241; Hepburn v. McDowell, 17 S. & R. 333; Houston v. Laffe, 46 N. H. 608; Ricker v. Kelly, 1 Greenl. (Me.) 117. But see Cook v. Stearns, 11 Mass. 553; *Ex parte* Coburn, 1 Cow. (N. Y.) 570; Prince v. Case, 10 Conn. 375.

provision does not, by its reference to proceedings at common law, impose limits upon the right of appeal previously existing upon questions both of law or fact, against any order made by the court of chancery. (*u*) Nor does it give the defendant a right *ex debito justitiæ* to have his case tried by a jury, where, as in a patent case, a trial by the judge alone is preferable. (*v*)

And by 25 & 26 Vict. c. 42, s. 1, it is enacted, that in all cases in which any relief or remedy within the jurisdiction of the courts of chancery is sought in any cause or matter instituted or pending in either of the said courts, and whether the title to such relief or remedy be, or be not, incident to, or dependent upon, a legal right, any question of law or fact cognizable in a court of common law, on the determination of which the title to such relief or remedy depends, shall be determined by or before the same courts. (*y*) But whenever it shall appear (s. 2) that any question of fact may be more conveniently tried by a jury at the assizes, or at any sitting in London or Middlesex for the trial of issues, the court may, nevertheless, direct any issue to try the question at the assizes, or at a sitting for the trial of issues in London or Middlesex. (*z*) All the provisions with reference to the trial of questions of fact by courts of chancery, contained in the Chancery Amendment Act, 1858, 21 & 22 Vict. c. 27, apply to the determination of questions of fact under this act. But the court is not bound to grant relief in any matter respecting which a court of common law has concurrent jurisdiction, if it shall appear that such matter has been improperly brought into equity, and that the same ought to have been left to the sole determination of a court of common law; 25 & 26 Vict. c. 42, s. 4. This section applies to cases where there has been some interference with the plaintiff's rights, but not sufficient to entitle the plaintiff to an injunction. (*a*)

This act of parliament renders it compulsory upon the courts of chancery to decide the whole question brought before them, both as regards the legal title of the parties, and the claim to equitable relief. (*b*) The act applies not merely to rights, but to remedies, given by the courts of equity, and does away

(*u*) *Curtis v. Platt*, L. R., 1 App. Ca. 337.

(*v*) *Bovill v. Hitchcock*, L. R., 3 Ch. App. 417.

(*y*) See *Fernie v. Young*, *ante*.

(*z*) See *Roskell v. Whitworth*, L. R., 5 Ch. App. 459.

(*a*) *Durell v. Pritchard*, L. R., 1 Ch. App. 244.

(*b*) *Fernie v. Young*, *ante*.

with the power of refusing or postponing remedies until the legal title has been established by a trial at law. (*c*) But there is nothing in the act which authorizes the court to transfer to itself an action actually pending in a court of law, (*d*) or to take cognizance of wrongs and interfere by injunction, when the act complained of has been done, and the question whether the act is wrongful or not depends upon matters of fact and law, for the trial of which no tribunal is so fit as a jury having the assistance of a judge to direct them. (*e*)

1450. *Of the remedy by injunction at common law.*—By 17 & 18 Vict. c. 125, s. 79, it is enacted, that in all cases of injury where the party injured is entitled to maintain, and has brought, an action, such party may indorse upon the writ and copy to be served, a notice that the plaintiff intends to claim a writ of injunction, and the plaintiff may thereupon claim a writ of injunction against the repetition or continuance of such injury, or the committal of any injury of a like kind; and he may also, in the same action, include a claim for damages, or other redress, and judgment may be given (s. 81) that the writ of injunction do or do not issue, as justice may require. In case of disobedience, such writ of injunction may be enforced by attachment by the court, or, when the courts shall not be sitting, by a judge. The claim of the injunction, however, in the writ and declaration, is merely a preliminary formality to enable the plaintiff to ask for an injunction at the proper time, and it can not therefore be pleaded to. (*f*)

It is further provided (s. 82), that it shall be lawful for the plaintiff, at any time after the commencement of the action, and whether before or after judgment, to apply ex parte to the court or a judge for a writ of injunction to restrain the defendant, in such action, from the repetition or continuance of the wrongful act, or the committal of any injury of a like kind, relating to the same property or right; and the writ may be granted or denied by the court, or judge, upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to the court or judge shall seem rea-

(*c*) Hooper *In re*, 32 Law J., Ch. 55.

(*d*) Curlewis v. Carter, 33 Law J., Ch. 370.

(*e*) Att.-Gen. v. United King. Tel. Co., 30 Beav. 287; 31 Law J., Ch. 329.

Dowling v. Betjemann, 2 Johns. & H. 544.

(*f*) Booth v. Taylor, L. R., 1 Exch. 51.

sonable and just. (*g*) In case of disobedience, the writ may be enforced by attachment by the court, or when the court is not sitting, by a judge. But the order, or any writ issued by virtue thereof, may be discharged, or varied, or set aside by the court, on the application of any party dissatisfied with the order.

The court will, by injunction under this statute, compel a wrong-doer to pull down a building, or remove a wall obstructing ancient windows, and will, in certain cases, retain the writ in the office, on the defendant undertaking to pull down so much of a building as may be necessary (in the opinion of a surveyor, to be selected by the parties or nominated by a judge), to restore to the plaintiff the full enjoyment of the light and air he previously possessed. (*h*) The practice in equity is to direct an issue to try the right and that an account be taken in the meantime, and to grant an interlocutory injunction until the cause is determined, and the courts of common law will mould their proceedings as nearly as possible in accordance with the proceedings in equity. (*i*)

There being no appeal from the exercise of this jurisdiction, the courts are slow to exercise it, where the applicant can obtain an adequate remedy by action (although repeated actions may be necessary), and in cases to which the powers of the Court of Common Pleas to grant an injunction under the Railway and Canal Traffic Act (17 & 18 Vict. c. 31, s. 3), are especially applicable. (*k*)

When once an injunction has been obtained under s. 82 of this statute (17 & 18 Vic. c. 125), it is in itself a continuing injunction, and, if it is disobeyed at any time, the plaintiff may apply to the court, or, if the court be not sitting, to a judge, to enforce obedience to it by attachment. (*l*)

The court has no power to grant an injunction in an action of ejectment. (*m*)

1451. *Injunction at common law to restrain infringements of patent-right and copyright.*—By the Patent Law Amendment Act, 15 & 16 Vict. c. 83, s. 42, it is enacted, that in any action

(*g*) As to costs, see *Gridley v. Booth*, 34 Law J., Exch. 135.

(*h*) *Jessel v. Chaplin*, 2 Jur. N. S. 931; 4 W. R. 610.

(*i*) *Gittins v. Symes*, 15 C. B. 362.

(*k*) *Sutton v. South-East. Rail. Co., L.*

R., 1 Exch. 32.

(*l*) *De La Rue v. Fortescue*, 2 H. & N. 324; 26 Law J., Exch. 339.

(*m*) *Baylis v. Le Gros*, 26 Law J., C. P. 176.

in the superior courts for the infringement of letters patent, it shall be lawful for the court in which the action is pending, or, if the court be not sitting, then for a judge of such court, on the application of the plaintiff or defendant, to make an order for an injunction, &c.; and by 25 & 26 Vict. c. 68, s. 9, it is further enacted, that in any action for an infringement of copyright in paintings, drawings, and photographs, in the superior courts, the court in which the action is pending, or a judge of the court, if the court is not sitting, may make an order for an injunction.

Where the plaintiff, in the first count of his declaration, alleged that the defendant wrongfully took, and kept possession of, certain photographic plates of the plaintiff for printing portraits, and printed and sold portraits therefrom, and thereby rendered the plates less valuable to the plaintiff, and deprived him of the profits he would have derived from printing and selling portraits from the said plates; and in a second count charged the defendant with detaining the said photographic plates, and claimed a return of them, or their value, and £10 for their detention, and £1,000 in respect of the causes of action in the first count mentioned, and also claimed an injunction to restrain the defendant from continuing to print portraits from the said plates, it was held that the plaintiff was entitled to recover damages on both counts of his declaration, and was also entitled to an injunction. (n)

1452. *Injunctions and orders to stay proceedings.*—If any action, suit, or proceeding is commenced, or prosecuted, in disobedience of a writ of injunction, rule, or order from the superior courts, or a judge thereof, the proceeding will be utterly null and void, and the parties prosecuting it will be liable to an attachment, 15 & 16 Vict. c. 76, s. 226. The court also will stay proceedings after order made, and before the writ of injunction is actually issued. (o)

(n) *Mayall v. Higby*, 31 Law J., Exch. 329; 1 H. & C. 148.

(o) *Corbett v. Ludlam*, 11 Exch. 450
25 Law J., Exch. 25.

SECTION II.

OF THE REMEDY BY PROHIBITION FOR THE PREVENTION OF JUDICIAL WRONGS.

1453. *The writ of prohibition* is a writ issuing out of chancery, (*p*) or one of the superior courts at Westminster, directed to the judge or officers of an inferior court, prohibiting them from intermeddling with, or executing, anything of which, by law, they ought not to take cognizance. The object of the writ is to enforce the due administration of justice by keeping all inferior courts within the limits and bounds of their several jurisdictions, as defined by the laws, customs, and statutes of the realm. (*q*)¹ Where an inferior court proceeds in a course properly within its jurisdiction, no prohibition can be awarded till the pleadings raise some issue which the court is incompetent to try. But where the foundation for the jurisdiction is itself defective, a prohibition may be applied for at once. (*r*)¹

The writ of prohibition, therefore, from the Queen's courts at Westminster, still goes to the ecclesiastical courts, (*s*) as well as to the courts of admiralty, (*t*) courts-martial, county courts, courts baron, the Vice-Chancellor's court, the court of the Earl Marshal, the Lord Mayor's court, courts of quarter sessions, municipal councils, and to all magistrates, sheriffs, commissioners, and persons acting in a judicial capacity, to restrain their proceedings when they are acting, or are about to act, in excess of their jurisdiction. (*u*) It lies also in certain cases to restrain the proceedings of courts of criminal jurisdiction, and will be granted to prevent a coroner holding an inquest from

(*p*) See *Re Bateman*, L. R., 9 Eq. Ca. 660.

(*q*) Bac. Abr. PROHIBITION. Prohibitions del Roy, 12 Co. 63-64.

(*r*) See *Mayor of London v. Cox*, L. R., 2 H. of L. Ca. 239.

(*s*) 2 Inst. 598, 599.

(*t*) *James v. Lond. and South-West Rwy.*, L. R., 7 Exch. 187, 287.

(*u*) Bac. Abr., PROHIBITION (1). *Birch, In re*, 15 C. B. 743. *Chabot, In re*, 17 Law J., Q. B. 336. *Church v. Inclos. Com.*, 31 Law J., C. P. 201. *Mayor of London v. Cox, supra*.

¹ Prohibition is a proper remedy when a judge attempts to proceed in execution of a judgment after an appeal has been taken. *State v. Judge of 5th Dist. Court*, 21 La. Ann. 113; *State v. Judge of 4th Dist. Court*, 21 Id. 123.

² *Hanger v. Keating*, 26 Ark. 51; *Ex parte Little Rock*, 26 Id. 52.

extending his inquiries beyond the proper limits of his office. (*v*)

When the act sought to be prohibited is not a judicial act, a prohibition will not lie; (*w*)¹ but all acts based upon a decision judicial in its nature, and affecting either a public or a private right, are judicial acts; such as an order by church-building commissioners to stop up a footpath through a churchyard, (*x*)² or the apportionment of a county-rate by commissioners; (*y*) or an order of sessions regulating the fees of the clerk of the peace. (*z*)

1454. *Prohibition before judgment.*—Wherever the case is of such a nature as to show on the face of the proceedings a want of jurisdiction in the inferior court, it is the bounden duty of the superior court to issue the writ of prohibition, in whatever stage of the proceedings below that fact is made manifest, either by the Crown or by any one of its subjects. The misconstruction of an act of parliament by an inferior tribunal, whereby it is about to do something which it is not authorized to do, is one of these cases; the enforcement of a rate of tax imposed without lawful authority is another. (*a*)³

When it appears from the very form of an information or plaint, and particulars of a cause of action in the inferior court,

(*v*) Reg. v. Herford, 39 Law J., Q. B. 854.

249.

(*w*) Death, *Ex parte*, 18 Q. B. 647; 21 Law J., Q. B. 337. Reg. v. Salford, 18 Q. B. 687.

(*x*) Reg. v. Arkwright, 12 Q. B. 960.

(*y*) Reg. v. Aberdare Canal Co., 14

(*z*) Reg. v. Coles, 8 Q. B. 75.

(*a*) Burder v. Veley, 12 Ad. & E. 263.

Veley v. Burder, *Ib.* 311. White v. Steel, 13 C. B., N. S. 231; 31 Law J., C. P. 265. Foster v. Foster, 32 Law J., Q. B. 314.

¹ Casly v. Thompson, 42 Mo. 133; Home Ins. Co. v. Flint, 13 Minn. 244; The People v. Supervisors, 1 Hill (N. Y.), 195; State v. Allen, 2 Ired. (N. C.) 183.

² The writ does not lie to restrain the institution of a threatened suit, but only one already commenced, nor to restrain any threatened judicial act unless a part of the proceedings of an action already instituted; but if the act is judicial, and can be performed without the existence of an action. Hence, if the act will be illegal and in excess of the lawful jurisdiction of the person or body upon whom its execution rests, a writ of prohibition may issue to restrain the doing of it at all. Thus, where an act of the Legislature which was unconstitutional, provided for the appointment of commissioners to carry into effect an act authorizing a town to borrow money and donate it to a railroad company, which act required him to appoint such commissioners under his hand and seal, upon application of three freeholders of the town, it was held that this was a judicial act, to restrain which a writ of prohibition was the proper remedy. Sweet v. Hurlbert County Judge, 51 Barb. (N. Y.) 312.

³ A writ of prohibition will not be issued to restrain an act which can be disposed of on an appeal, or other method of review. People v. Wayne, 11 Mich. 333.

that the court has no jurisdiction in the matter, the party served with the process may at once apply for a prohibition, without entering any appearance, or taking any steps to defend himself in the court below, (*b*) or he may appear and take the objection, and go for a prohibition, in case the judge rules against him. When the defect of jurisdiction is not made manifest at the commencement of the proceedings by the plaintiff himself, but depends upon certain questions of fact, the defendant may bring before the court the facts depriving it of jurisdiction, and object to any further proceeding in the matter, and go for a prohibition, if the judge comes to an erroneous decision upon the facts before him, and assumes to have jurisdiction when in point of law he has none. (*c*)

Cases are to be met with where the courts have refused to grant writs of prohibition upon motion, where the question of the cause of action having arisen within or without the limits of a limited jurisdiction might be raised by plea in the court below, and the question, being one of fact, seemed proper for the decision of the inferior court, and there was no reason to suppose that it would come to a wrong conclusion and exceed its jurisdiction; (*d*) but the court will grant a writ even in these cases, if it deems it advisable; and it is laid down that the writ ought to go in any stage of the proceedings below, if the superior court see sufficient reason to suppose that the inferior court is exceeding, or is about to exceed, its jurisdiction. (*e*)

(*b*) *De Haber v. Queen of Portugal*, 20 Law J., Q. B. 489. *Crompton, J., Manning v. Farquharson*, 30 Law J., Q. B. 22. *Mayor of London v. Cox, supra.*

(*c*) *Ante.* *Jackson v. Beaumont*, 11 Exch. 300. *Hardy v. Walker*, 23 Law J., Exch. 57.

(*d*) *Joseph v. Henry*, 19 Law J., Q. B. 369. *Reg. v. Twiss*, L. R., 4 Q. B. 407; 38 L. J., Q. B. 228.

(*e*) *Cox v. Mayor, &c., of London*, 32 Law J., Exch. 285; 1 H. & C. 338; L. R., 2 H. of L. 239.

¹ The writ of prohibition is a remedy to restrain an inferior tribunal from doing an illegal act beyond its jurisdiction, where there is no remedy by *certiorari* or other adequate remedy. *People v. Seward*, 7 Wend. (N. Y.) 418; *People v. Court of Oyer and Terminer*, 27 How. Pr. (N. Y.) 14; *People v. Russell*, 49 Barb. (N. Y.) 351; *People v. Marine Court*, 36 Id. 341; *United States v. Peters*, 3 Dallas (U. S.) 121. So to restrain an *unauthorized* act, even where the court has jurisdiction; *Quimbo Appo v. People*, 20 N. Y. 531; *Sweet v. Hurlbert*, 51 Barb. (N. Y.) 312; but not where their proceedings are merely erroneous; *Ex parte Gordon*, 2 Hill (N. Y.) 363; or are subject to review by *certiorari*; *People v. Clute*, 42 How. Pr. (N. Y.) 157; or other adequate remedies; *People v. Supervisors*, 31 How. Pr. 237; nor does it lie to a merely *ministerial* officer; *People v. Supervisors*, 1 Hill (N. Y.) 195; *State v. Clerk Co. Ct.*, 41 Mo. 44. It only lies to *prevent* the doing of an act,

1455. Prohibition after judgment and execution.—"The king's courts at Westminster," observes Lord COKE, "being informed either by the parties themselves, or by any stranger,

and can *never* be used as a remedy for acts already done. U. S. v. Hoffman, 4 Wall. (U. S.) 158. It will not lie to restrain executive or administrative officers; State v. Kellogg, 33 Wis. 93; nor merely ministerial acts of a judicial tribunal; Norton v. Dowling, 46 How. Pr. (N. Y.) 7; nor to arrest the proceedings of a board of supervisors, unless they are acting in excess of their powers; People v. Supervisors, 47 Cal. 81; nor to restrain proceedings in a cause over which the court has jurisdiction. Washburn v. Phillips, 2 Met. (Mass.) 296; Arnold v. Shields, 5 Dana (Ky.) 18. The writ can not be issued to prohibit those who are *de facto* in possession of a public office from exercising its functions during the pendency of proceedings to determine his title thereto. State v. Allen, 2 Ired. 183. The writ is only granted upon petition and after a rule to show cause, and never upon *ex parte* motion; Withers v. Comms. of Roads, 3 Brev. (S. C.) 83; Williams, *ex parte*, 4 Pike (Ark.) 537; and can only operate upon a pending suit, and can not be used to prevent the institution of an action. Mealing v. City Council, Dudley (Ga.) 221. It can not be issued to prevent an act which the court has legal power to exercise. Blackburn, *ex parte*, 5 Pike (Ark.) 21. Its office is to restrain an inferior tribunal from taking cognizance of a matter beyond its jurisdiction; and it is to this question, upon an application for the writ, that the court will direct its attention. The fact as to whether the court acted *rightly* or not, is not open to inquiry. If it has jurisdiction, the writ can not issue, however wrong or erroneous the action of the court may be. Clayton v. Heidelberg, 7 S. & M. (Miss.) 623; Bean v. Russell, 49 Barb. (N. Y.) 351; Norris v. Carrington, 16 C. B. (N. S.) 396. It lies to a court of criminal as well as civil jurisdiction; Queen v. Hereford, 3 El. & Bl. 113; and it can only operate to prevent a court or judicial body from *exceeding*, and not from exercising its lawful jurisdiction. Consolidated Stage Co. v. N. Y. Common Pleas, 43 Barb. (N. Y.) 278; Bronson v. Marine Court, 36 Barb. (N. Y.) 341; People v. Russell, 19 Abb. Pr. (N. Y.) 136; Greeley v. Ct. of Oyer and Terminer, 27 How. Pr. (N. Y.) 14; and it will not be issued where the question of jurisdiction is doubtful and the remedy would result in public inconvenience; Bank of Kingston v. Supervisors, 31 How. Pr. (N. Y.) 237; nor to correct mere errors or irregularities; People v. Marine Court, 36 Barb. (N. Y.) 341; Brownson v. Marine Court, *ante*; but it will lie when the court, although having jurisdiction, proceeds to do an unlawful and unauthorized act. Appo v. People, 20 N. Y. 531. And before the writ will lie, a plea to the jurisdiction must first be interposed and overruled; *Ex parte* Little Rock, 26 Ark. 53; and the party must be given an opportunity to show cause why it should not issue. *Ex parte* Tucker, 25 Ark. 567. When it appears that the case is no longer pending, the writ will not be granted, although the final disposition of it was made after the service of the rule to show cause why the writ should not issue; U. S. v. Hoffman, 4 Wall. (U. S.) 158; *Ex parte* Gordon, 1 Black (U. S.) 503; nor where there is another or adequate remedy, as by appeal, *certiorari*, &c. Law v. Crown Point, &c. Co., 2 Nev. 75; State v. La Crosse, 11 Wis. 50; Board of Commrs. v. Swetter, 14 Ind. 235.

Where a court has rendered a judgment in a cause over which it has no jurisdiction, and execution has issued thereon, but has not been collected, a prohibition will issue to prevent its collection. Ingersoll v. Buchanan, 1 W. Va. 181. But if the court had jurisdiction over the cause, the mere fact that it has exceeded its

that any court, temporal or ecclesiastical, doth hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same, as well after judgment and execution as before." (f) If goods seized in execution still remain in specie in the hands of the bailiffs, or the sheriff or officer of the court, the writ may command that they release the distress, and restore the goods to the party from whom they have taken them. (g)¹ But when goods seized under an execution no longer exist in specie in the hands of the officer, but have been sold, and the proceeds paid over to the execution creditor, the suit in the inferior court is at an end; everything has been done that can be done, and no prohibition can then be issued or enforced, for there is nothing left to prohibit. (h)²

"If it appears," observes Lord MANSFIELD, "upon the face of the proceedings, that the court below have no jurisdiction, a prohibition may be issued at any time, either before or after

(f) 2 Inst. 602. *Kimpton v. Willey*, Owen, 18 Law J., Q. B. 8.
 1 L. M. & P. 280. (h) *Denton v. Marshall*, 32 Law J.,
 (g) Fitz. Nat. Brev. 46 a. *Jones v. Exch.* 91. *Poe, In re*, 5 B. & Ad. 681.

authority in a portion of its judgment, will not warrant the issue of a writ of prohibition. *People v. Common Pleas*, 43 Barb. (N. Y.) 278. When the court usurps jurisdiction this is not only the *proper* but it is the *only* remedy. *State v. Third Dist. Ct.*, 16 La. Ann. 185. In order to authorize the issue of a writ of prohibition the petition should clearly show that the inferior court is about to proceed in a matter over which it has no jurisdiction, and this may be done by setting forth any acts or declarations of the court or officer indicative of such purpose; *Prignitz v. Fisher*, 4 Minn. 369; *State v. Judge*, 14 La. Ann. 504; and the mere fact that the opposing counsel has noticed a motion for a hearing before a court commissioner, which such commissioner has no authority to entertain, is not enough, unless it is also shown that he *intends* to entertain it. Nor can a writ of prohibition be issued in such form as will entitle the parties to join an issue before a jury. *Id.*; *State v. Judge*, 14 La. Ann. 504. A variance between the suggestion and the declaration is not fatal in bar, and, therefore, is not ground of demurrer. *Warwick v. Mayo*, 15 Gratt. (Va.) 528. But the affidavit (or suggestion) to a petition must set forth either that the affiant has knowledge or information concerning the matter stated in the petition, and if there is nothing before the court but the petition and answer thereto, the petition will be dismissed if the answer denies the allegations of the petition. The petitioner in such case should traverse the answer. *Cariage v. Dryden*, 30 Cal. 244. If the writ is issued and disobeyed, the remedy is by attachment for contempt, as in the case of a violation of an ordinary injunction order. *Howard v. Pierce*, 38 Mo. 296.

¹ A writ of prohibition is a proper proceeding by which to arrest the execution of an illegal judgment. *West v. Ferguson*, 16 Gratt. (Va.) 270; *State v. Judges of 5th Dist. Court*, 21 La. Ann. 113.

² *Dayton v. Payne*, 13 Minn. 493.

sentence, because all is nullity; it is *coram non judicè*. But where it does not appear upon the face of the proceedings, if the defendant below will lie by, and suffer that court to go on under an apparent jurisdiction, it would be unreasonable that this party who, when defendant below, has thus lain by, and concealed from the court below a collateral matter, should come hither after sentence against him there, and suggest that collateral matter as a cause of prohibition, and obtain a prohibition against it after all this acquiescence in the jurisdiction of the court below." (i)

1456. *Prohibition where appeal lies*.—It is no ground for refusing a writ of prohibition to show that a party applying for it has a power of appeal, or has appealed, against the decision of the court below, for "the power of prohibition is in no case taken away by the privilege of appeal." (k)

1457. *Prohibition to the ecclesiastical courts* to restrain their proceedings in a matter or cause before them will be granted whenever it is shown that the court has done, or is about to do, something contrary to the general law of the land, or manifestly beyond the jurisdiction of the court; but not to correct mere irregularities of practice, (l) or misconstruction of the canons of the church, in matters not affecting the rights and liberties of the subject at common law. (m)

The principle on which the writ goes to the spiritual court, as stated by BLACKSTONE, (n) is the danger of a different decision of the same rights, and even of the same identical interests by different courts, an impropriety, he observes, "which no wise government can, or ought to, endure, and which is, therefore, a ground of prohibition." (o) The writ is granted not only where a plain and manifest excess of jurisdiction has been claimed or exercised by the court, but also in cases where, although the subject-matter is of ecclesiastical cognizance, yet the party would receive some wrong or injury by the course of

(i) *Buggin v. Bennett*, 4 Burr. 2037. *Yates v. Palmer*, 1 D. & L. 288. *Ld. Abinger, Roberts v. Humby*, 3 M. & W. 122; *ante*.

(k) *Ld. Denman, C. J., Burder v. Veley*, 12 Ad. & E. 263. *Jackson v. Beaumont*, 11 Exch. 300; 24 Law J., Exch. 301.

(l) 2 Inst. 599-617. *Bull. N. P.* 218.

Gould v. Capper, 5 East, 365. *Burder v. Veley*, 12 Ad. & E. 261. *Story, Ex parte*, 8 Exch. 201; *Law J.*, 22 Exch. 33. *Richards v. Dyke*, 3 Q. B. 256. *Home v. Camden*, 2 H. Bl. 533, per *Eyre, C.J.* (m) *Titchmarsh v. Chapman*, 1 D. & L. 732.

(n) Vol. iii. pp. 112, 113.

(o) *Durder v. Veley*, 12 Ad. & E. 259.

proceeding in the ecclesiastical court, or be deprived of some benefit or advantage to which the common or statute law would have entitled him. One class of those cases is, where such court is proceeding to try a matter which is triable only by the common law, as a custom, prescription, or modus. Another, where, in a case of spiritual cognizance, a collateral question arises which is not properly of spiritual cognizance, in which case the courts of common law oblige the ecclesiastical court to admit such evidence as the common law would allow; (*p*) as when a lease is offered to be proved in an ecclesiastical court, and is rejected because by their law two witnesses are required. Another, where the spiritual court takes upon itself the construction of statute law, and decides contrary to the construction which is put upon the statute by the temporal courts. And many instances are found where the ecclesiastical courts have been prohibited from enforcing church-rates, although that was a matter within their jurisdiction. (*q*) But all compulsory proceedings for enforcing such rates are now abolished, as has been previously mentioned.

A prohibition will also go to the ecclesiastical courts to prevent them from taking cognizance of any suit or proceeding for defamation and slander, or for brawling in a church or churchyard; which were formerly matters of ecclesiastical cognizance, (*r*) but have now been removed from the jurisdiction of the spiritual courts. (*s*)

1458. *Notwithstanding an appeal entered* in a superior court of ecclesiastical jurisdiction, the writ of prohibition will go to the inferior spiritual court to stop the appeal, and all further proceeding in the matter; for "there is no reason," observes LORD DENMAN, "for driving the subject to the expensive process of appealing from one spiritual court to another, to abide the chance of a repetition of the error, which, if committed, can at last be rectified only by prohibition, and may be so committed as to be placed beyond the reach even of

(*p*) *Breedon v. Gill*, 1 Ld. Raym. 219, 222.

(*q*) *Jeffrye's Case*, 5 Rep. 67 b. 17 Vin. Abr., PROHIBITION, H. pl. 4. 2 Roll. Abr. ib. pl. 5; ib. K. pl. 1, 10. *Blank v. Newcomb*, 12 Mod. 327. *Rogers v. Davenant*, 1 Mod. 194; 2

Mod. 8. *Anon*, 12 Mod. 416. *Veley v. Burder*, 12 Ad. & E. 311.

(*r*) *Evans, Ex parte*, 2 Dowl. N. S. 726.

(*s*) 18 & 19 Vict. c. 41; 23 & 24 Vict. c. 32; but brawling by persons in holy orders is still within the cognizance of the spiritual courts. *Ibid*.

that remedy." If the party has appealed, the superior court not only may, but must, prohibit, wherever the error involving the want of jurisdiction is apparent upon the face of the proceedings, "though repeated adjudications to the same effect have been made in the courts below, and even after the solemn sentence of a spiritual court on final appeal." (t)

1459. *The writ of prohibition to restrain a county-court judge* from further proceeding in a matter over which he has no jurisdiction, is a writ of right to which a person is entitled *ex debito justitiæ*. If the want of jurisdiction appears upon the face of the proceedings, "the courts of Westminster Hall have no discretion to award or refuse the writ, but are bound to award it." (u) And if the defect does not appear upon the face of the proceedings, the facts and circumstances depriving the court of jurisdiction may be brought before the superior court by affidavit; and the court is bound to issue the writ on fair and reasonable ground being shown for it. (v) The writ lies only where the county court has assumed to act without or beyond its jurisdiction. It does not lie where the county court is the tribunal to decide in the first instance upon some preliminary matter and there has been no hearing nor decision at all upon it, (y) nor does it lie to protect an injured party from the consequences of a mistake made by the judge upon a question of fact, (z) or in point of law. (a) A mistake in the latter respect would, ordinarily speaking, be matter of error; but the Act creating the county courts has taken away that form of remedy. Therefore, where the defendant, having been summoned to the county-court in an action for goods sold and delivered, set up as a defense that the plaintiff had already recovered judgment against him for the same debt in another court, and the plaintiff admitted that it was so, and the county-court judge nevertheless overruled the defense, and gave judgment for the plaintiff, the court refused a rule

(t) *Burder v. Veley*, 12 Ad. & E. 260, 263. *White v. Steel*, 12 C. B., N. S. 283; 31 Law J., C. P. 268.

(u) *Burder v. Veley*, 12 Ad. & E. 256.

(v) *Jackson v. Beaumont*, 11 Exch. 302.

(y) *Re Skipton Industrial, &c., Society*

v. Prince, 33 Law J., C. B. 323.

(z) *Robinson v. Lenaghan*, 2 Exch. 337.

(a) *Lexden Union (Guardians of) v. Southgate*, 23 Law J., Exch. 316. See *Farrow v. Hague*, 33 Law J., Exch. 258.

for a prohibition, saying that the decision of the judge was final, whether it was right or wrong. (*b*)

We have seen that every judge of an inferior court must have some cause of action, charge, or complaint before him, into which he has authority to inquire, or his proceedings will be extra-judicial; (*c*) but if a county-court judge having a plaint before him for a cause of action within his jurisdiction, finds a verdict for the plaintiff without a particle of evidence to support it, this is, it seems, no ground for a prohibition. (*d*) It would be desirable, however, that there should be some means of preventing a verdict or judgment from being enforced under such circumstances.

If the claim in the county court is substantially for a matter excluded from its jurisdiction, but the plaint and particulars are framed so as to show a cause of action within its jurisdiction, the superior court will look beyond the record in the county court to ascertain the real nature of the claim; (*e*) and if that appears to be not within the cognizance of the court, a prohibition will be granted. Thus, where a plaintiff in his plaint and particulars sued for a debt of £18, for money paid and for loss of time in attending before magistrates for, and on behalf of, the defendant, and it appeared that the action was brought to recover expenses incurred by the plaintiff by reason of his having been wrongfully summoned before certain magistrates at the instance of the defendant, it was held that the cause of action, if any existed, was for a malicious prosecution, over which the county court had no jurisdiction, and the plaintiff could not, by putting down the items of his expenses and pecuniary loss, concoct a debt for the purpose of giving an apparent colorable authority to the county-court judge to take cognizance of the matter. (*f*)

If, under color of proceeding upon a plaint for a trespass by false imprisonment, the complainant and the court proceed to try what is in substance and effect an action for a malicious prosecution, a prohibition will issue to prevent any proceeding being taken upon the judgment. Thus, if the defendant, upon a suspicion of felony, has made a complaint and charge to the

(*b*) *Toft v. Rayner*, 5 C. B. 162. *Smith v. Mayor of London*, 6 Mod. 78. Law J., Exch. 316.

(*c*) *Hopper, In re, ante*; and see *ante*.

(*d*) *Lexden Union v. Southgate*, 23

(*e*) *Ante*.

(*f*) *Hunt v. North Staff. Rail. Co.*, 2 H. & N. 451; 26 Law J., Exch. 374.

police, upon which they have themselves acted, and taken the plaintiff into custody, then, as trespass for false imprisonment is not maintainable for that, but an action on the case, a prohibition will go to the county court, if it proceeds to try and give judgment. But where the defendant has expressly directed the constable to take the plaintiff into custody, and has thereby rendered himself amenable to an action of trespass for an assault and false imprisonment, and the plaintiff brings his plaint for that act of trespass only, the county court has jurisdiction to try it, though the other circumstances in the case would properly be the subject of an action for a malicious prosecution. (*g*) So, previous to the late Act conferring an equitable jurisdiction on county courts, plaints in such courts for legacies or shares of a residuary estate bequeathed by will have been prohibited. (*h*)

If a plaintiff, having one entire cause of action for an amount exceeding what the county court is entitled to take cognizance of, splits his cause of action into divers causes of action, and founds thereon divers suits in the county court, a prohibition will be granted to stop the unlawful proceedings. (*i*) But it is competent for a plaintiff to abandon the excess of his claim above £50, in order to give the county court jurisdiction, by giving notice of abandonment to the defendant on or before the hearing of the cause; (*k*) but the abandonment must be made either by the plaintiff himself, or by some person authorized on his behalf. The judge has no power to make the abandonment at the trial as an act of his own, and if he does so all proceeding upon the judgment may be arrested by prohibition. (*l*)

We have seen that, in certain cases, a plaintiff in the county court may, by leave of the judge, sue in the district where the cause of action or part of it arose. If, therefore, an action is brought in the county court of any other district, the progress of the suit may be arrested by prohibition, unless the defend-

(*g*) *Chivers v. Savage*, 5 Ell. & Bl. 701. *Guest v. Warren*, *ante*.

(*h*) *Beard v. Hine*, 10 W. R. 45. *Hewston v. Phillipps*, 11 Exch. 699; 25 Law J., Exch. 133. *Longbottom v. Longbottom*, 8 Exch. 208; 22 Law J., Exch. 76. *Pears v. Wilson*, 6 Exch. 833.

(*i*) *Grimbly v. Ackroyd*, 17 Law J.,

Exch. 157. *Catchmade's case*, 6 Mod. 91. *Kimpton v. Willey*, 9 C. B. 719.

(*k*) *Isaac v. Wyld*, 7 Exch. 163. The county court rules require notice of the abandonment to be entered on the particulars of demand, R. 43. See *North v. Halroyd*, *post*.

(*l*) *Hill*, *In re*, 10 Exch. 726; 24 Law J., Exch. 137. *Hopper*, *In re*, *ante*.

ant dwells or carries on his business in the district, as previously mentioned. (*m*)

When a question of title to land, or to any incorporeal hereditament, beyond the value to which the jurisdiction of the county court is limited, is raised before such court, or any other inferior tribunal, having no power to adjudicate upon the question, it is the duty of the court, as we have seen, to inquire into the facts, so far as may be necessary to enable them to ascertain whether the title really does come in question, and whether the amount is beyond their jurisdiction; but if they come to a wrong conclusion, and proceed to hear and adjudicate when they ought not to have done so, all proceedings upon the judgment may be stayed by prohibition. (*n*)

A county-court judge can neither give himself jurisdiction where he has it not, nor deprive himself of jurisdiction where he has it, by an erroneous decision on a matter of fact. A writ of prohibition sometimes issues to a county-court judge to prohibit him from proceeding in one direction, in order to compel him to exercise his judicial functions in another direction, where he has declined jurisdiction, and was wrong in so doing. (*o*)

Where a county-court judge having heard, and adjudicated upon, a plaint before him, and given a verdict for the defendant, afterwards and after the judgment had been recorded, and the parties had left the court, rescinded his decision, and ordered the cause to be adjourned to the next court, and then gave judgment for the plaintiff, it was held that, having decided the case in the first instance, he was *functus officio*, and could not afterwards alter his judgment; that he had therefore exceeded his authority in giving the second judgment, and that a prohibition must go to restrain all proceedings thereon. But the judge may alter his judgment before it is recorded, and the record may be amended to correct a mistake, provided it be done the same day, and at the same court, in the presence of the parties. (*p*)

If a county-court judge has entertained an application for a

(*m*) *Ante*. Barnes v. Marshall, 18 Q. B. 785. Buckley v. Hann, 5 Exch. 43. Wilde v. Sheridan, 21 Law J., Q. B. 260; and see Newcombe v. De Roos, 29 Law J., Q. B. 4.

(*n*) Thompson v. Ingham, Chew v. Holroyd, *ante*. Knowles v. Holden, 24

Law J., Exch. 223. Lawford v. Partridge, *ante*.

(*o*) Hardy v. Walker, 23 Law J., Exch. 57.

(*p*) Jones v. Jones, 17 Law J., Q. B. 170.

new trial, and pronounced his decision upon it, and entered his judgment of record, he cannot rescind his judgment and entertain a fresh application. (*q*)

A prohibition can not be issued to the county court after execution, and a levy and a payment of the amount thereof to the execution-creditor; for the action is then at an end, and, there being no further proceeding to be taken in the matter, there is nothing to prohibit. (*r*)¹

Whenever objection is taken to the jurisdiction of a county-court judge, it is his duty to set out the facts upon the record, so that the superior courts may see the grounds upon which he proceeded, and the subject may not be left without the redress to which he is by law entitled. (*s*) He ought to assist parties in obtaining their right to a decision of the superior court. (*t*)

1460. *Prohibition to the Lord Mayor's Court* can not be issued when the question of jurisdiction depends upon a matter of fact proper for the determination of that court, and the want of jurisdiction does not appear upon the face of the proceedings; for by the Mayor's Court of London Procedure Act (*u*) it is enacted, that "no defendant shall be permitted to object to the jurisdiction of the court, in or by any proceeding whatever, except by plea." Where, therefore, a person was sued for a debt in the Lord Mayor's Court, and it appeared that no part of the cause of action arose within the locality over which the court had jurisdiction, it was held that the defendant must raise the objection to the jurisdiction by plea, and that the court must decide upon it, and that a prohibition to prevent it from so doing could not be granted. (*v*) But this does not apply to a garnishee who is sued in the Lord Mayor's Court, who may apply for a prohibition in the first instance accordingly. (*w*)

(*q*) *Mossop v. Gt. Northern Rail. Co.*, 16 C. B. 580; 17 Id. 130.

(*r*) *Denton v. Marshall*, 32 Law J., Exch. 91; 1 H. & C. 654. *Poe, In re*, 5 B. & Ad. 681. *Robinson v. Lenaghan*, 2 Exch. 333.

(*s*) *Parke, B., Pears v. Wilson*, 6 Exch. 838.

(*t*) *Martin, B., Mungean v. Wheatley*,

6 Exch. 102. *Jackson v. Beaumont*, 11 Id. 303.

(*u*) 20 & 21 Vict. c. clvii. s. 15.

(*v*) *Manning v. Farquharson*, 30 Law J., Q. B. 22.

(*w*) *Cox v. Mayor, &c., of London*, 1 H. & C. 338; 32 Law J., Exch. 285; L. R., 2 H. of L. Ca. 239. See *Banque de Credi Commercial v. De Gas*, L. R., 6 C. P. 142.

¹ *U. S. v. Hoffmann*, 4 Wall. (U. S.) 158.

1461. *Proceedings in Prohibition.*—By 1 Wm. 4, c. 21, s. 1, it is enacted, that an application for a prohibition may be made on affidavits only, and in case the party applying shall be directed to declare in prohibition, the declaration shall be expressed to be on behalf of such party only, and not on his behalf and that of the Crown, and shall set forth in a concise manner so much only of the proceeding in the court below as may be necessary to show the ground of the application, and shall conclude by praying a writ of prohibition; to which declaration the defendant may demur or plead such matters as may be proper, to show that the writ ought not to issue, and the party in whose favor judgment shall be given shall be entitled to costs, &c.; (*v*) and in case a verdict shall be given for the party plaintiff, it shall be lawful for the jury to assess damages. “The legislature,” observes ERLE, C. J., “has not given us the slightest intimation what kind of damages is here meant. Perhaps what was intended was to give damages in case execution had issued in the court below, and the goods of the plaintiff in prohibition had been taken by a proceeding which afterwards turns out to be contrary to law. I am, however, clearly of opinion that the legislature did not intend that the plaintiff, who declares in prohibition, should recover as damages the costs of the proceedings in the ecclesiastical court, upon a verdict on the prohibition in his favor.” (*y*)

1462. *The application for a prohibition* may be made to either of the superior courts, or to a judge at chambers; but, except under special circumstances, it should be made to the latter in the first instance. During vacation the application may be made to the Court of Chancery. (*z*) The affidavit used in moving for the rule should set forth the facts necessary to support the application, and should be entitled in the court to which the judge before whom the application is made belongs, but should not be entitled in any cause. (*a*) But after a rule has been granted, the affidavits used in showing cause may be entitled in the cause. (*b*) The judge's

(*v*) Where, therefore, the rule for a prohibition is made absolute without pleadings, there is no “judgment” within the meaning of the section, and the applicant is not entitled to his costs: *Ex parte* Overseers of Everton, L. R., 6 C. P. 245.

(*y*) *White v. Steele*, 32 Law J., C. P. 2; 13 C. B., N. S. 325.

(*z*) *Re Bateman*, L. R., 9 Eq. Ca. 660.

(*a*) *Evans, ex parte*, 2 D., N. S. 410; 12 Law J., Q. B. 68.

(*b*) *Breedon v. Capp*, 9 Jur. 781. *Corner's Crown Pr.*, PROHIBITION.

decision, if he refuses a rule, may be reviewed as in ordinary cases. (c)

1463. *The rule or summons to show cause why a writ of prohibition should not issue to county court* operates as a stay of proceedings in the cause, if the superior court or judge so directs, until the determination of the rule or summons, or until the superior court or judge thereof otherwise orders; and the judge of the county court is required to adjourn the hearing of the cause until the matter is determined. When the writ is issued to the judge of the county court, the matter is now finally disposed of by rule or order, and no declaration or further proceedings in prohibition are allowed. (d)

1464. *Notice of the issue of the writ* must be given to the opposite party, and the writ lodged with the registrar of the county court, when the writ is issued to that court, two clear days before the day fixed for the hearing of the cause, or the judge may order the party obtaining the writ to pay the costs of the day, unless some order respecting costs has been made by the judge or court above. (e)¹

1465. *Refusal of writ, when final.*—When a superior court, or a judge thereof, has refused to grant a writ of prohibition to the county court, no other superior court or judge can grant the writ. But the party going before a judge in the first instance, may appeal from his decision to the court, and a second application may be made to the same court or judge, on grounds different from those on which the first application was founded. (f)

1466. *Of the setting aside writs of prohibition issuing out of chancery.*—By the 12 & 13 Vict. c. 109, it is enacted (s. 39), that in every action, suit, and proceeding on the common-law side of the court of chancery, it shall be lawful for the superior courts of common-law, and the judges thereof, and they are thereby required, to hear and determine all matters and applications incident to such actions, &c.; and it has been held that the superior courts have jurisdiction under this statute to set

(c) 13 & 14 Vict. c. 61, s. 22, Chitt. Arch. Pr., 11th edit., 1725, PROHIBITION.

(d) 19 & 20 Vict. c. 108, ss. 40, 42. As to costs in the county court, *Id.* ss.

40, 41. As to prohibition in copyright cases in the county court, 21 & 22 Vict. c. 70, s. 9.

(e) 19 & 20 Vict. c. 108, s. 41.

(f) *Id.* s. 44.

¹ *Ex parte* Tucker, 25 Ark. 457.

aside a writ of prohibition improperly issued out of the court of chancery to a county court. (*g*)

SECTION III.

OF THE REMEDY BY CERTIORARI.

1467. *The writ of certiorari* is a writ issued out of chancery, (*h*) or out of the court of Queen's bench, or some one or other of the Queen's courts at Westminster, for the purpose of removing some cause, suit, or proceeding from an inferior to the superior court, either for the purpose of examining into the legality of the proceedings, or annulling or quashing an order or judgment of such inferior court given in a matter over which the court had no jurisdiction, or for the purpose of giving a defendant, sued in such inferior court, surer and more certain justice before a higher tribunal.

1468. *Where the inferior court has jurisdiction* to try the cause, but it is sought to remove it on the ground that it is a fit matter for the decision of a superior court, the writ must be obtained and served before issue has been joined in the inferior court, and before the first juryman has been sworn, (*i*) except in those cases where the writ is applied for with the view of enforcing in the superior court the judgment of an inferior tribunal. (*j*)

1469. *Where the inferior court has no jurisdiction*, on the other hand, over the cause or matter brought before it, the writ may be applied for after judgment and execution, if the want of jurisdiction appears upon the face of the proceedings, or exception to the jurisdiction was taken at the trial, and the circumstances depriving the court of authority in the matter were brought to the knowledge of the judge, and the objection was improperly overruled, and judgment wrongfully given against the defendant; but where the want of jurisdiction does

(*g*) *Baddeley v. Denton*, 4 Exch. 508; Chitt. Arch. Pr., 11th edit., part xii.

(*h*) See *Davies v. McHenry*, L. R., 5 Eq. Ca. 200; 6 Id. 462.

(*i*) 43 Eliz. c. 5, s. 2; 21 Jac. 1, c. 23, s. 2. *Laverack v. Bean*, 3 M. & W. 62. *Holroyd, J., Walker v. Gann*, 7 D. & R.

772. *Williams, J., Kemp v. Balne*, 1 D. & L. 885.

(*j*) Chitt. Arch. Pr., 11th edit., CERTIORARI. A county court judgment is not removable for the purpose of having execution thereon; *Moreton v. Holt*, 10 Exch. 707; 24 Law J., Exch. 169.

not appear upon the face of the proceedings, and no objection to the jurisdiction was raised by the defendant in the court below, until after the matter had been decided against him, or the defendant has failed to draw the attention of the judge to the facts and circumstances depriving him of jurisdiction, the court will not, as we have seen, grant the writ, or interfere in the matter. Thus, where an application was made for a certiorari to bring up an order of sessions for payment of costs, for the purpose of quashing it, on the ground that the costs were taxed after the sessions had expired, and the authority of the court had ceased, (*k*) but it appeared that the applicant had attended the taxation, and made no objection thereto whilst it was going on, it was held that he had waived his right to object, and had no claim to the writ; (*l*) for wherever a party makes no objection to the jurisdiction of the court whilst the case is proceeding, but apparently acquiesces, and suffers the court to act without protest or objection, as if it had jurisdiction, down to actual judgment, it is then too late to apply for a certiorari, unless the defect appears upon the face of the proceedings. (*m*)

1470. *Limitation of time for issuing the writ.*—By 13 Geo. 2, c. 18, no writ of certiorari is to be granted to remove any conviction, &c., before a justice of the peace, unless such certiorari be applied for within six calendar months next after the conviction shall be made: (*n*). But there is no general rule of practice, except in those cases, which requires the application for the certiorari to be made within that time. (*o*)

1471. *Grounds for the issue of the writ* may be established either by showing that the inferior court had no power to adjudicate upon the matter brought before it, or that it has exceeded its authority in adjudicating upon it, and that objection was taken to the jurisdiction before the court gave judgment in the matter, (*p*) or that difficult and important questions of law will arise, and have to be decided, or that a fair trial can not be had, or an impartial jury be obtained, or that the judge or magistrate who has adjudicated had some personal interest in

(*k*) Reg. v. Long, 1 Q. B. 740.

(*l*) Watkins, *ex parte*, 10 W. R. 249; Freeman v. Read, *ante*.

(*m*) Yates v. Palmer, 1 D. & L. 288.

(*n*) As to the casual absence of the judge on the last day for making the ap-

plication, Reg. v. Allen, 33 Law J., M. C. 98.

(*o*) Reg. v. Mayor of Sheffield, L. R. 6 Q. B. 652.

(*p*) Rees v. Williams, 7 Exch. 51.

the subject-matter of the suit or proceeding. (*q*) A certiorari is never granted where a procedendo can not be awarded. Where, therefore, a magistrate gives notice that he objects to be sued in the county court, and by so doing puts an end to the proceedings there, he can not afterwards remove them into the superior court. (*r*) Nor will it be granted to remove a provisional order of a secretary of state, under 21 & 21 Vict. c. 98, empowering a local board to put in force the Lands Clauses Act, with respect to the purchase of land, such an order having no validity till confirmed by Act of Parliament. (*s*)

The writ lies at common law, as we have seen, for the purpose of removing convictions and orders of magistrates made without jurisdiction, although the writ is expressly taken away by statute, for a legislative prohibition of removal by certiorari applies only to cases which the inferior court has authority to try, and not to causes which are not within the cognizance of the inferior tribunal. (*t*) A writ of certiorari is not granted as of course, either when applied for on behalf of the Crown, or where the applicant applies as one of the public, but where the applicant has, by reason of his local situation or otherwise a peculiar grievance of his own, the writ is grantable *ex debito justitiæ*. (*u*)

1472. Certiorari to remove causes from the county court.—

When the claim in the county court exceeds £5, and the court has jurisdiction over the subject-matter of the action, the issue of the writ is discretionary with the judge of the superior court to whom the application is made, and is not a matter of right. It is to be granted upon such terms as to payment of costs, and giving security for debt or costs, or such other terms as the judge shall think fit; 9 & 10 Vict. c. 95, s. 90.

The 13 & 14 Vict. c. 61, s. 14, giving a right of appeal to some one or other of the superior courts, from the decision of the county court judge, in cases where the amount claimed exceeds £20 (*infra*), and enacting (s. 16) that no judgment, order, or determination of any judge of a county court, nor any cause or matter brought before him, or pending in his

(*q*) Reg. v. Suffolk, 18 Q. B. 146.

(*r*) Weston v. Sneyd, 1 H. & N. 703.

(*s*) Frewen v. Hastings Local Board,
34 Law J., Q. B. 159. And see Reg. v.

Newborough, L. R., 4 Q. B. 585; 38
L. J., M. C. 129.

(*t*) Reg. v. Badger, 6 Ell. & Bl. 137.

(*u*) Reg. v. Justices of Surrey, L. R., 5
Q. B. 466.

court, shall be removed by appeal, motion, writ of error, certiorari, or otherwise, into any other court whatever, save and except in the manner and according to the provision therein-before mentioned, does not affect the right of removal by certiorari, where the damages claimed exceed £5; for by s. 2 of that statute it is declared, that that Act, and the 9 & 10 Vict. c. 95, shall be read and construed as one Act, just the same as if the several provisions of the former statute, not inconsistent with the provisions of the later statute, were repeated and re-enacted therein. "The provision of the Act of 9 & 10 Vict. c. 95, is by no means inconsistent," observes PARKE, B., "with the right of appeal given by 13 & 14 Vict. c. 61, ss. 14, 15. They may both well stand together, and, therefore, the last-named statute is to be read as if that clause were in it." (v) The writ of certiorari, therefore, for the removal of a cause from the county court, where the damages claimed exceed £5, is untouched by the 13 & 14 Vict. c. 61, s. 16. (y)

Where the claim does not exceed £5, and the court has jurisdiction to try the cause, a certiorari can only be obtained in cases which the court, or a judge, deem fit to be tried in the superior court, and where the party applying for the writ gives security, to be approved of by one of the masters, for the amount of the claim and the costs of the trial, not exceeding in all £100; and assents to such terms as the court or judge may think fit to impose; 19 & 20 Vict. c. 108, s. 38. (z)

When the writ is sought for on the ground that the county court has no jurisdiction in the matter, it is grantable *ex debito justitiæ*, and as a matter of right, on fair ground being shown for contending that the court has no jurisdiction. (a)

1473. *Of the concurrent remedy by appeal and by certiorari—County court appeals.*—By 13 & 14 Vict. c. 61, s. 14, a right of appeal against the decision of the county court judge is given whenever the amount recoverable by action in the county court exceeds £20, and the defendant is "dissatisfied with the determination of the court in point of law, or upon the admission or rejection of any evidence;" but notice must be

(v) *Parker v. Brist. and Ex. Rail Co.*, 6 Exch. 184; 20 Law J., Exch. 112. *Brookman v. Wenham*, 20 Law J., Q. B. 278; 2 L. M. & P. 233.

(y) *Box v. Green*, 9 Exch. 503.

(z) As to the mode of giving security see ss. 70, 71.

(a) *Jackson v. Beaumont*, 11 Exch. 300; *ante*.

given within ten days to the opposite party, or his attorney, and security must also be given for costs, or the appeal can not be heard. (*b*) The right to have such security given may, however, be waived. (*c*) It is not the amount for which the action is brought that determines the right of appeal, but "the amount recoverable," or the sum that may reasonably be expected to be recovered. (*d*) The plaintiff can not abandon part of his claim at the trial by permission of the judge so as to deprive the defendant of his right of appeal. (*e*) By 30 & 31 Vict. c. 142, s. 13, an appeal may be brought in actions of ejectment, or in which title comes in question, and by leave of the judge in actions "in which an appeal is not now allowed," if the judge thinks fit.

The statutory power of appeal does not, as we have seen, in anywise abridge the common-law right of a party to a certiorari; (*f*) and if an appeal has been actually entered, a certiorari may, nevertheless, be obtained for the purpose of annulling an order or judgment on the ground of want of jurisdiction, or excess of jurisdiction. (*g*).

1474. *The application for the writ* should be made to a judge at chambers in the first instance, and not to the court; (*h*) and an appeal lies from his decision to the full court. A certiorari to remove a plaint from the county court may issue on an ex parte application, without notice to the opposite party; (*i*) but when it is sought for to remove an order of justices, or an order of sessions, six days' notice of the application must be given in the manner previously mentioned to the justice, or justices making the order, or to two justices present at the sessions when the order was made. (*k*) The application must be made by, or in the name of, the party aggrieved by the order or proceeding, and not by any other person not being his attorney or agent duly authorized to act on his behalf. (*l*)

1475. *Affidavits, when necessary.*—When the application for

(*b*) *Stone v. Dean*, E. B. & E. 504; 27 L. J. Q. B. 319.

(*c*) *Park Gate Iron Co. v. Coates*, L. R., 5 C. P. 634.

(*d*) *Mayer v. Burgess*, 4 Ell. & Bl. 655.

(*e*) See *North v. Holroyd*, L. R., 3 Exch. 69.

(*f*) *Ante*.

(*g*) *Jackson v. Beaumont*, 11 Exch.

300; *ante*.

(*h*) *Robertson v. Womack*, 19 Law J. Q. B. 367. *Bowen v. Evans*, 3 Exch. 111. *Staples v. Accid. Death Ins. Co* 10 W. R. 59; and see *Corner's Crown Pr., CERTIORARI*.

(*i*) *Symonds v. Dimsdale*, 2 Exch. 533.

(*k*) *Reg. v. Suffolk*, 18 Q. B. 416.

(*l*) *Reg. v. Riall*, 11 Ir. C. L. R. 280.

the writ is founded on the want of jurisdiction, and the defect appears upon the face of the proceedings, an affidavit is not necessary for the support of the application; but every suggestion that does not appear upon the face of the proceedings, but is collateral and out of the proceedings, ought to be verified by affidavit. (*m*) All the material facts of the case should be stated by affidavit, that the judge may be able to impose such terms upon the parties as he, in the exercise of his discretion, may think requisite. (*n*) The rule for the writ is absolute in the first instance. (*o*)

1476. *Notice of the issue of the writ* must be given, and the writ itself lodged with the registrar, as in the case of the issue of a writ of prohibition. (*p*)

1477. *The effect of the issue of the writ* is to stay all proceedings in the inferior court, if the superior court or judge thereof so directs, as in the case of the issue of a prohibition. (*q*) It is the duty of a county-court judge to receive and yield obedience to the writ, and do all that is necessary to be done for the removal of the cause; and if he fails to do so, the court will issue an attachment against him. (*r*)

1478. *The effect of the refusal of a writ of certiorari*, and the power of making a second application, is the same as in the case of the application for a writ of prohibition. (*s*)

1479. *Proceedings after removal*.—After the cause has been removed by certiorari, the plaintiff may proceed or not, as he thinks fit. (*t*)

1480. *Quashing of the writ—Procedendo*.—If the writ of certiorari has been improvidently issued in a case where it did not lie; (*u*) or if it has been misdirected, or is otherwise bad in law; or if it appears from the admission of the party suing it out, that he issued it merely for the purposes of delay; (*v*) or if it is shown that the rules and practice of the court have not been complied with, the writ may be quashed, and a procedendo awarded, which is a writ sending the case back for trial to the

(*m*) *Buggin v. Bennett*, 4 Burr. 2037; *ante*. Corner's Crown Pr., AFFIDAVITS.

(*n*) *Parker v. Brist. and Ex. Rail. Co.*, 6 Exch. 184.

(*o*) *Pawsey v. Gooday*, 3 Dowl. 605. *Dowding v. Gt. West. Rail. Co.*, 3 Jur. N. S. 1130.

(*p*) 19 & 20 Vict. c. 108, s. 41, *ante*.

(*q*) Id. s. 40, *ante*.

(*r*) *Munegan v. Wheatley*, 6 Exch. 88.

(*s*) 19 & 20 Vict. c. 108, s. 44, *ante*.

(*t*) *Garton v. Gt. West. Rail. Co.*, *ante*.

(*u*) *Rees v. Williams*, 21 Law J., Exch 24.

(*v*) *Landens v. Shiel*, 3 Dowl. 90.

inferior court. The writ of procedendo may be granted ex parte by a single judge at chambers; and it is in his discretion whether the order for the issue of the writ shall be made upon a summons to show cause, or immediately. (y) The writ of procedendo may, in its turn, be quashed, and the cause again remanded to the superior court, on the ground that the procedendo itself has been improvidently awarded. (z)

(y) Reg. v. Scaife, 18 Q. B. 773; 21 Law J., M. C. 221. Corner's Crown Pr., **PROCEDENDO**.
(z) Chitt. Arch. Pr., 11th edit., **CERTIORARI**.

CHAPTER XXIV.

OF THE REMEDY BY MANDAMUS.

SECTION I.—*Of the remedy by mandamus for the vindication of rights, and the enforcement of the performance of public duties.*

- 1481. The prerogative writ of mandamus.
- 1482. Mandamus to enforce statutory, corporate, and public duties and obligations.
- 1483. Mandamus to judges, magistrates, and judicial officers, commanding them to hear and adjudicate.
- 1484. Mandamus to ministerial officers.
- 1485. Mandamus to overseers or clergymen to bury the dead body of a pauper.
- 1486. Of the granting of the writ where there is another remedy.
- 1487. Mandamus to compel the surrender of public documents.
- 1488. A mandamus to restore a public officer to a freehold office from which he has been wrongfully dismissed.
- 1489. How a freehold office may be forfeited and vacated.
- 1490. Offices held at will.
- 1491. Visitation power excluding the proceeding by mandamus.
- 1492. Mandamus to restore the name of a medical practitioner to the Medical Register.
- 1493. Mandamus to test the validity of an election.
- 1494. Mandamus to elect corporate and public officers.
- 1495. Mandamus to enforce an appointment to a public or corporate office.
- 1496. Mandamus to chartered companies and corporations.
- 1497. Mandamus to make calls.
- 1498. Mandamus to local boards, commissioners, trustees, and public officers to levy rates and satisfy and discharge a judgment-debt, or a pecuniary obligation.
- 1499. Mandamus to railway companies, corporate bodies, and local boards to make compensation for lands taken, or injuries inflicted upon private persons.
- 1500. Mandamus to boards of health to make compensation.
- 1501. Effects of laches or delay in applying for the writ.
- 1502. The proceedings upon a mandamus.
- 1503. Proceedings by mandamus in respect of corporate offices in boroughs.
- 1504. Conditions precedent to the issue of the writ.
- 1505. Requisites of the writ.
- 1506. Parties to whom the writ is to be directed.
- 1507. Service of the writ.
- 1508. Return to the writ.
- 1509. The return to a mandamus to restore a dismissed public officer to his office.
- 1510. Return setting up inability or impossibility of performance—Expiration of statutory power.
- 1511. Pleas to the return—Traversal of material allegations.
- 1512. Statutory protection to certain public officers.

1513. Time for taking objections to the writ.
 1514. Review of proceedings in mandamus by writ of error.
 1515. Damages and costs.
 1516. Judgment non obstante verdicto.
 1517. Action or information for a false return.
 1518. Attachment for disobedience of peremptory writ of mandamus.
- SECTION II.—*Of the claim to a writ of mandamus in an action at common law.*
1519. Of the union of an action in respect of a private injury with an application for a mandamus.
 1520. Actions in which a claim for a mandamus may be sustained.
 1521. Actions in which a claim for a mandamus can not be sustained.
 1522. Declaration in an action for a mandamus.
 1523. The pleadings in the action.
 1524. Orders for the rectification of the register of shareholders in joint-stock companies.

SECTION I.

OF THE REMEDY BY MANDAMUS FOR THE VINDICATION OF RIGHTS, AND THE ENFORCEMENT OF THE PERFORMANCE OF PUBLIC DUTIES.

1481. *The prerogative writ of mandamus* is a writ issuing in the Queen's name from the Court of Queen's Bench, directed to some chartered, corporate, or public body, or official, or other person, commanding the performance of some public act, or duty, therein specified, in the performance of which the party claiming the writ is interested, or by the non-performance of which he is aggrieved or injured. (a) It was termed a prerogative writ because the power to award it rested with the justices of the Court of Queen's Bench, in which court the sovereign is supposed to be personally present. (b) Through the medium of this writ the Court of Queen's Bench exercises control over all public officers, corporations, chartered companies, and persons intrusted with extensive powers for public purposes, and enforces the exercise of such powers within reasonable limits, more especially where there is no other efficient or convenient remedy. (c) The issue of the writ is in the discretion of the court, and will not be ordered, if the effect of it will be to enable

(a) Reg. v. Chichester, Bishop of, 29 Law J. Q. B., 23. Briggs, *ex parte*, 28 Id. 272.

(b) Com. Dig. MANDAMUS, A.
 (c) Ld. Denman, C. J., Reg. v. East. Co. Rail. Co., 10 Ad. & E. 551.

some persons to avoid the performance of some duty which they ought in equity to perform. (d)¹

1482. *Mandamus to enforce statutory, corporate, and public duties and obligations.*—Whenever the law requires a thing to be done, and the public at large are interested in the doing of it, a mandamus will go to order it to be done by the person upon whom the obligation of doing it is imposed. If he is to act according to his discretion, and he will not act or even consider the matter, the court may compel him to put himself

(d) Reg. v. Garland, L. R., 5 Q. B. 269.

¹ In modern practice a writ of mandamus is nothing more than an ordinary action at law in cases where it is the appropriate remedy, and does not issue in virtue of any prerogative power. *Kentucky v. Dennison*, 24 How. (U. S.) 66; *Ex parte Conway*, 4 Ark. 302. Its issue is a matter resting, in a measure, in the discretion of the court; but if a party shows himself legally entitled thereto, it is error to deny it. But, in order to entitle a party to its issue, it must appear that he has a legal right to it; and the fact that the parties consent thereto is not a good cause for its issue; and unless there is a clear legal right to have it issue, it can not form the basis of a valid judgment. Nor should it ever be granted where there is reason to suspect that there is collusion between the parties. *State v. Burbank*, 22 La. Ann. 379; *Parker v. Anderson*, 2 P. & H. (Va.) 38; *People v. Supervisors of Greene*, 12 Barb. (N. Y.) 217; *Trustees v. State*, 11 Ind. 205. And it only lies from a superior to an inferior tribunal to compel action; never to direct how it shall act, or to interfere with the exercise of a discretionary power; *Appling v. Bailey*, 44 Ala. 333; *Livingston v. Dargenois*, 7 Cr. (U. S.) 577; *Ex parte Crane*, 5 Peters (U. S.) 190; *Matter of Nobor*, 7 Ala. 459; *Dixon v. Fields*, 10 Ark. 243; *Manor v. McCall*, 5 Ga. 522; and when the party has no other specific or adequate legal remedy. *Arrington v. Van Houton*, 44 Ala. 284; *Reading v. Com.*, 11 Penn. St. 196; *People v. Thompson*, 25 Barb. (N. Y.) 73; *Fitch v. Diarmid*, 26 Ark. 482. But in the case of corporations and ministerial officers, they may be compelled to exercise their functions even though there is another remedy, where the duty is plain and its performance possible; *Mansfield v. Fuller*, 50 Mo. 338; *State v. Bridgman*, 8 Kan. 458; *Buck v. Lockport*, 6 Lans. (N. Y.) 253; nor if proceedings have been commenced in equity, although the fact that a party may have relief in a court of equity is no reason why the writ should be denied. *People v. Chicago*, 53 Ill. 424; *Hardcastle v. Maryland, &c.*, R. R. Co., 32 Md. 32. Nor will it issue where the officer or tribunal against whom it is claimed has not the means to do the act required, or to compel the doing of an act, the doing or not doing of which rests in the discretion of the officer or tribunal against whom it is sought; *State v. Burbank*, 32 La. Ann. 318; *Ex parte South, &c.*, R. R. Co., 44 Ala. 64; *Ex parte Farrington*; *Black v. Auditor*, 26 Ark. 237; *State v. Warmouth*, 23 La. Ann. 76; *Swan v. Gray*, 44 Miss. 493; *People v. Easton*, 13 Abb. Pr. (N. Y.) N. S. 159; *Seymour v. Ely*, 37 Conn. 103; nor when the doing of the act is legally impossible, or when the power to perform it is not complete, but depends upon the action or approval of some other authority; *Ball v. Loppins*, 3 Oregon, 33; *Silverthorne v. R. R. Co.*, 33 N. J. 173; *Ackerman v. Disher Co.*, 27 Ark. 457; or will involve the officer in litigation, the result of which is doubtful. *State v. Perrine*, 34 N

in motion to do the thing, though it can not control his discretion. (e)¹ Permissive words, authorizing a thing to be done, are often held to be directory and compulsory, when the

(e) Best, J., *Rex v. North Riding, &c.*, Justices, 14 East, 395. *Rex v. Cumberland Justices*, 2 B. & C. 291. *Rex v. Kent land Justices*, 1 M. & S. 194.

¹ Courts will not interfere with the exercise of a discretionary power; *Wells v. Stackhouse*, 17 N. J. 355; *People v. Russell*, 1 Abb. Pr. (N. Y.) N. S. 230; *Sinnickson v. Corwin*, 26 N. J. 311; *Ex parte Carter*, 6 Cow. (N. Y.) 59; *People v. Jameson*, 40 Ill. 93; *St. Louis v. Kean*, 18 B. Monr. (Ky.) 9; *Glasscock v. Commrs., &c.*, 3 Texas, 51; *Gray v. Bridge*, 11 Pick. (Mass.) 189; *State v. Washington Co.*, 2 Chand. (Wis.) 247; unless it appears that such discretion has been abused. *Commrs. v. Lynch*, 2 McCord (S. C.) 170. But where an officer or tribunal *refuses* to exercise its discretion, a writ of mandamus will issue to compel them to *act*, but will not direct the manner of their action or interfere with their discretion. *McDiarmid v. Fitch*, 27 Ark. 106; *McMullin v. State*, 26 Ark. 613; *State v. Warmouth*, 32 La. Ann. 76; *East Boston Ferry Co. v. Boston*, 101 Mass. 488; *Commrs. v. Philadelphia*, 3 Brews. (Penn.) 596; *Ex parte South, &c.*, R. R. Co., 44 Ala. 654; *Appling v. Bailey*, 44 Id. 333. To compel a municipal corporation to levy a tax to pay a judgment against it; *United States v. Keokuk*, 6 Wall. (U. S.) 514; *Walkley v. Muscatine*, 6 Id. 481; to compel assessors to correct an erroneous assessment; *People v. Olmstead*, 45 Barb. (N. Y.) 644; to compel a railroad company to build and keep in repair bridges where the road crosses a highway; *People v. Troy, &c.*, R. R. Co., 37 How. Pr. (N. Y.) 427; or to pursue the mode prescribed in their charter as to crossing rivers or other watercourses, or the performance of any acts in the construction of their road affecting either public or individual rights; *State v. N. Eastern R. R. Co.*, 9 Rich. (S. C.) 247; to restore a public officer to his office when the facts to justify his removal therefrom are not clearly established; *Dan v. Judges*, 3 H. & M. (Va.) 1; *People v. Board of Police*, 35 Barb. (N. Y.) 531; *State v. Common Council*, 9 Wis. 254; and to restore a member of any society to his membership from which he has been wrongfully expelled. *Barrows v. Mass. Medical Society*, 12 Cush. (Mass.) 402; *Roehler v. Aid Society*, 22 Mich. 86. To compel the sheriff to keep his office at the place designated by law; *State v. Saxton*, 4 Wis. 27; to compel any officer, who by law is required at the close of his duties to return his books to a certain officer, to discharge that duty; *McDiarmid v. Fitch*, 27 Ark. 106; to compel the incumbent of an office to deliver up the papers, property, or insignia of his office to his successor, when the right of such successor is clear; *Walter v. Belding*, 24 Vt. 658; *Church v. Slack*, 7 Cush. (Mass.) 226; *Tudbury v. Stearns*, 21 Pick. (Mass.) 148; to compel any public officer to discharge a ministerial duty imposed upon him by law; *Ney v. Richards*, 15 La. Ann. 603; *Page v. Hardin*, 8 B. Monr. (Ky.) 648; *U. S. v. Co. Commrs.*, 1 Morr. (Iowa) 31; as a register of deeds, to record a deed required to be recorded in his office. *Strong's case*, Kirby (Conn.). 345. To compel a town committee to pay the land-damages to landowners whose land is taken for a highway. *Minninnah v. Haines*, 29 N. J. 388. Thus a writ of mandamus will issue to compel commissioners appointed to assess a tax for a specific purpose, to discharge their duty; *People v. Williams*, 51 Ill. 57; to compel a city council to appropriate money to pay certain expenses which it is empowered to by the legislature; *Commrs. v. Philadelphia*, 3 Brews. (Penn.) 596; to compel the mayor and aldermen or other board clothed with the power, to carry out specific purposes and perform specific duties imposed upon them by law; *East Boston Ferry Co. v. Bos-*

power or authority has been given in order that it may be exercised for the public benefit, and the public interests manifestly require the authority to be acted upon. (*f*)¹

Thus, where the charter of incorporation of an ancient town, conferring various municipal privileges on the town, provided "that the mayor and jurats may, for the future, hereafter have and hold, and have power to hold, a court of record, to hear and determine all pleas, actions, complaints, &c.," it was held that the words were compulsory, and that they were bound to hold the court for the benefit of the inhabitants. (*g*) So a mandamus will go to the mayor and assessors of a borough, commanding them to hold a court to revise the list of burghesses. (*h*)²

(*f*) Com. Dig. PARLIAMENT, R. 22. Avering Atte Bower, Id. 691. Rex v. Wells, Mayor of, 4 Dowl. P. C. 562.
(*g*) Rex v. Mayor of Hastings, 1 D. & R. 148; 5 B. & Ald. 692, n. Rex v. (h) Reg. v. Mayor, &c., of Monmouth, L. R., 5 Q. B. 251.

ton, 101 Mass. 488; to compel trustees to admit children entitled to do so, to attend the public schools; State v. Duffy, 7 Nev. 342; to compel a board of canvassers to meet and make a complete canvass of all returns received by them; Florida v. Gibbs, 13 Fla. 55; to compel a judge of an inferior court to sign a bill of exceptions in a case tried there; Porter v. Harris, 4 Coll. (Va.) 485; People v. Judges, &c., 1 Cai. (N. Y.) 511; State v. Hull, 3 Cold. (Tenn.) 255; People v. Pearson, 3 Ill. 189; *Ex parte* Crane, 5 Peters (U. S.) 190; or to make up a record and give a judgment thereon, so that a writ of error may be brought; *Ex parte* Bradstreet, 7 Id. 634; to compel a judge to sign a judgment rendered by his predecessor; Life Ins. Co. v. Wilson, 8 Id. 291; to compel a judge to enter judgment on the report of a referee; Russell v. Elliott, 2 Cal. 245; to compel the clerk of a court to issue execution on a judgment; People v. Loucks, 28 Cal. 68; and generally to compel all officers, corporations, or inferior tribunals to perform all ministerial duties imposed upon them by law. Nelson v. Justices, 1 Cold. (Tenn.) 207; Chase v. Blackstone Canal Co., 10 Pick. (Mass.) 244; Strong v. Petitioner, 20 Pick. (Mass.) 484; People v. Judge of Wayne Co. Ct., 1 Mich. 359; Prescott v. Ganser, 34 Iowa, 175; Boynton v. Newton, 34 Id. 510; People v. McClay, 2 Neb. 7. But, in order to entitle a person to the writ, two things must concur: 1st. A clear legal right to have the act done to compel the doing of which the writ is sought; and, 2d, that there is no other adequate legal remedy by which the specific performance of the duty can be enforced, and that the discharge of the duty is not discretionary. State v. Nicholson Pavement Co., 35 N. J. 396; People v. Easton, 13 Abb. Pr. N. S. (N. Y.) 159; People v. Supervisors of Greene, 12 Barb. (N. Y.) 217; R. R. Co. v. Clinton, 1 Ohio St. 77.

¹ Galena v. Amy, 5 Wall. (U. S.) 715; People v. State Ins. Co., 19 Mich. 392; Winters v. Burford, 6 Cold. (Tenn.) 398.

² Florida v. Gibbs, 13 Fla. 55; East Boston Ferry Co. v. Boston, 101 Mass. 488; Smith v. Mayor, &c., of Boston, 1 Gray (Mass.), 72; Chase v. Blackstone Canal Co., 10 Pick. (Mass.) 244; Lamb v. Lynd, 44 Penn. St. 336; People v. Brennan, 39 Barb. (N. Y.) 651.

But permissive words will receive their natural meaning, and will not be made obligatory, unless it plainly appears from the general context of the instrument in which they are found that they were intended to be obligatory, or unless it be shown that the public interests manifestly require such a construction to be put upon them. Railway Acts, incorporating railway companies, and authorizing the construction of a railway, are, in general, merely permissive. They confer extensive powers for the compulsory purchase of land, and the construction of works for the benefit of the public, but it is, in general, discretionary with the companies whether they will exercise the whole or a portion of these powers, or refrain altogether from using them. (i) And when the words of a statute or charter are imperative, and command the thing to be done, it is, nevertheless, a good excuse to show that circumstances have arisen rendering the exercise of the statutory power and command impracticable; (j)¹ or, in cases of private

(i) York and North Mid. Rail. Co. v. The Queen, 1 Ell. & Bl. 861; 22 Law J., Q. B. 225. Gt. West. Rail Co. v. The Queen, 1 Ell. & Bl. 874. Erl. J., Reg. v. North Mid. Rail. Co., 1 Ell. & Bl.

203. Rex v. Birm. Can. Nav., 2 W. Bl. 708. See *post*.

(j) Reg. v. Lond. and North West. Rail Co., 16 Q. B. 884. Reg. v. Ambergate, &c., 1 Ell. & Bl. 381; 22 Law J., Q. B. 191; *post*.

¹ A writ of mandamus will not generally be issued when the act commanded is impracticable or legally impossible; *Silverthorne v. Warren R. R. Co.*, 33 N. J. 173; *State v. Perrine*, 34 Id. 254; *State v. Police Jury of Jefferson*, 22 La. Ann. 611; *Ackerman v. Desha Co.*, 27 Ark. 457; *Ball v. Lappins*, 3 Oregon, 55; *People v. Solomon*, 54 Ill. 39; *Com. v. Baroux*, 36 Penn. St. 362; *People v. Supervisors of Westchester*, 15 Barb. (N. Y.) 607; *Com. v. Supervisors*, 29 Penn. St. 129; *People v. Tremain*, 29 Barb. (N. Y.) 96; *Hall v. Supervisors*, 20 Cal. 591; *People v. Comrs., &c., of Sewers*, 27 Barb. (N. Y.) 94; *People v. Mayor of N. Y.*, 10 Wend. (N. Y.) 393. Thus, a mandamus will not issue to compel the doing of an act which is prohibited by injunction; *R. R. Co. v. Wyandotte Co.*, 7 Ohio St. 278; *Ex parte Fleming*, 4 Hill (N. Y.), 481; or where it would be unavailable for want of power in the defendant to perform the act required by it; *People v. Supervisors of Westchester, ante*; or fruitless or ineffectual; *Com. v. Supervisors*, 29 Penn. St. 121; or to perform an act which is not required by law as incident to the defendant's duties; *State v. Co. Judge*, 7 Iowa, 425; *Pickett v. White*, 22 Tex. 559; or to enforce a mere contract obligation where there is no trust; *State v. Zanesville, &c. Co.*, 16 Ohio St. 278; or to compel the doing of an unlawful act; *Gillespie v. Wood*, 4 Humph. (Tenn.) 437; *Johnson v. Lucas*, 11 Id. 306; *Ross v. Lane*, 11 Miss. 695; or where there is a good reason on the part of the defendant for not doing the act, as for refusing to record a discharge of a mortgage, where the certificate is insufficient; *People v. Minor*, 32 Barb. (N. Y.) 612; or to record a deed not properly acknowledged or attested, or for any cause not entitled to go upon the records; or for refusing to admit a person to a society—in this case a medical society—where

Acts of Parliament, not imposing a duty relating to the public interests, that a previous agreement had been made by the person applying for the performance of the duty, not to exact its performance. (*k*) With reference to the inferential repeal of a previous statute by a subsequent one, the principle is, that a general Act is not to be construed to repeal a previous particular Act unless there is some express reference to the previous legislation on the subject, or the two Acts are necessarily inconsistent. (*l*)

1483. *Mandamus to judges, magistrates, and judicial officers, commanding them to hear and adjudicate.*—We have seen that, by 11 & 12 Vict. c. 44, more simple means (by rule to show cause) than the ordinary remedy by mandamus have been devised for compelling justices of the peace to exercise the duties of their office, where the legality of their proceedings is likely to be called in question, and they refuse to act by reason of doubts entertained by them as to the extent of their authority and jurisdiction; or make an arbitrary and illegal use of their discretion, &c. (*m*) The proceeding established by this statute is cumulative upon the ordinary common-law remedy by mandamus, which still goes to courts of quarter session (*n*), recorders of boroughs, justices of the peace, and judges of inferior courts of record (other than county court judges), to compel them to fulfill the duties of their several offices, and receive, hear, and adjudicate upon an information, claim, or

(*k*) *Savin v. Hoylake Rail. Co.*, L. R., 1 Exch. 9.

(*l*) *Thorpe v. Adams*, L. R., 6 C. P. 125.

(*m*) *Reg. v. Boteler*, 33 Law J., M. C. 101.

(*n*) As to the costs of the application, see *Reg. v. Kent Justices*, 36 Law J., M. C. 130.

he would be immediately liable to expulsion; *Ex parte Paine*, 1 Hill (N. Y.), 665, nor generally, when the right of the relator depends upon holding an act of the legislature unconstitutional; *Hall v. Supervisors*, 20 Cal. 591; *People v. Stephens*, 2 Abb. Pr. (N. Y.) N. S. 548; nor to try the *title* to an office; *People v. Stephens*, 5 Hill (N. Y.), 615; *People v. Detroit*, 18 Mich. 338; *Banner v. State*, 7 Ga. 473; nor to compel the payment of liquidated damages; *Ganeron v. Justices, &c.*, 19 Ga. 97; nor to prevent an anticipated error or defect of duty; *Commrs. v. Allegheny*, 20 Md. 449; and generally, it may be said that a mandamus will not be issued unless the duty it is sought to enforce is a *legal* duty, clear and free from doubt, and the right of the party seeking redress through this summary remedy is equally clear, nor unless the remedy will be effectual, and the result sought to be obtained is of more than merely trifling consequence or importance; *Hall v. Crossman*, 27 Vt. 297; *People v. Tremain, ante*.

dispute brought before them, and which they have refused to hear and adjudicate upon, from some erroneous view of the law, or of the extent of their powers and jurisdiction; (*o*) but where they have entered upon the matter and given the parties a hearing, and have decided, the court will not, by mandamus, review their decision, or compel them to re-hear the case on the ground that they have come to a wrong conclusion in point of law. (*p*) That must be done on appeal, where an appeal is given, or on a case stated for the opinion of the court; (*q*) for "the Court of Queen's Bench has never, in cases of applications for a mandamus to judges, or courts of a judicial character, assumed a power to do more than to direct them to hear and decide; it has never dictated to them in what manner they are to decide." (*r*) Where justices or judicial officers have begun to hear a complaint within their jurisdiction, they are bound to hear the whole of the evidence offered, and have no right to stop a complainant and prevent him from bringing his whole cause of complaint before them. (*s*)

The writ of mandamus formerly lay against a county-court judge to compel him to hear and adjudicate upon a claim, and give judgment upon a verdict. (*t*)¹ But, by the County Court

(*o*) Reg. v. Richards, *ante*. Reg. v. Richmond Recorder, Ell. Bl. & Ell. 253. Reg. v. Newport Guardians, 33 Law J., M. C. 155.

(*p*) Reg. v. Leicester Deputies, 15 Q. B. 674. Reg. v. Goodrich, 19 Law J., Q. B. 413. Reg. v. Blanshard, 13 Q. B. 325. Reg. v. Liverpool Recorder, 20 Law J., M. C. 37. Buller, *ex parte*, 1 Jur. N. S. 709. Reg. v. East Riding Just., 13 Jur. 447.

(*q*) Reg. v. West Riding Just. 1 New Sess. Cas. 247.

(*r*) Cockburn, C. J., Cook, *ex parte*, 29 Law J., Q. B. 68. Bird, *ex parte*, 28 Id. Q. B. 223.

(*s*) Rex v. Cumberland Justices, 4 Ad. & E. 695.

(*t*) Reg. v. Richards, 20 Law J., Q. B. 352. Brooke v. Ewers, 1 Str. 113. Milner, *ex parte*, 15 Jur. 1037.

¹ Livingston v. Dargenais, 7 Cr. (U. S.) 577; where a court refuses to carry out the mandate of a superior tribunal; Jared v. Hill, 1 Blackf. (Ind.) 155; to compel a circuit court to sign a bill of exceptions; *Ex parte* Crane, 5 Peters (U. S.), 190; to hear an application for an attachment for violating an injunction; Merced Mining Co. v. Fremont, 7 Cal. 130; to reinstate a cause improperly abated by order of court; Matter of Nabor, 7 Ala. 459; to compel an inferior court to make up a record and render judgment thereon, so that a writ of error may be brought; *Ex parte* Bradstreet, 7 Peters (U. S.) 634; to compel a court to issue process to carry a decree into effect where an appeal has been taken but no supersedeas obtained; Cowan v. Doddridge, 22 Gratt. (Va.) 458; Stafford v. Bank, 17 How. (U. S.) 275; Same v. New Orleans Banking Co., 17 Id. 283; to compel entry of judgment on the report of a referee; Russell v. Elliott, 2 Cal. 245; to compel the restoration of a cause improperly stricken from the docket; *Ex parte* Lowe, 20 Ala. 330; to set aside an order dismissing a cross bill, and its restoration to the docket to abide the

Acts, the remedy by mandamus against a county-court judge, or any officer of the county court, for refusing to do an act relating to the duties of his office, is taken away, and a different remedy, by rule to show cause and order of court, is substituted in its place. (*u*)

A mandamus will go to the lord of a manor to compel him to hold a court baron, and to the homage to present conveyances of burgage tenure; (*v*) also to hold a court leet to swear in a constable, or to admit persons entitled to a franchise; (*x*) also to a corporation, to permit a court leet and court baron to be held, according to immemorial custom, in the town hall; (*y*) also to justices of the peace, to hear and determine a complaint against overseers for not properly accounting, (*z*) to examine and allow overseers' accounts, (*a*) and to swear them to their accounts; (*b*) to summon parties for not paying, (*c*) and to issue distress-warrants for levying poor-rates. (*d*)

(*u*) 19 & 20 Vict. c. 108, s. 43; 21 & 22 Vict. c. 74, s. 4. *Furber, ex parte*, 27 Law J., Exch. 453. *Jardine v. Smith*, 8 W. R. 464. *Reg. v. Harwood*, 22 Law J., Q. B. 127. *Churchward v. Coleman*, L. R., 2 Q. B. 18.

(*v*) *Rex v. Montacute, Ltd.*, 1 W. Bl. 60. *Rex v. Midhurst*, 1 Wils. 283.

(*x*) *Rex v. Colebrooke*, 2 Kenyon, 163. *Rex v. Milverton, Ltd.*, 3 Ad. & E. 284.

(*y*) *Rex v. Grantham*, 2 W. Bl. 716.

Rex v. Ilchester Bailiffs, &c., 2 B. & C. 764; 4 D. & R. 324.

(*z*) *Rex v. Worcestershire Justices*, 3 D. & R. 299.

(*a*) *Rex v. Cambridge Justices*, 8 Dowl. P. C. 89.

(*b*) *Rex v. Middlesex Justices*, 1 Wils. 125.

(*c*) *Anon.*, 2 Chitt. 257.

(*d*) *St. Luke v. Middlesex Justices*, 1 Wils. 133. *Reg. v. Cheek*, 11 Jur. 86, n. *Rex v. Middlesex Justices*, 2 Kenyon, 163. *Rex v. Benn*, 6 T. R. 198.

final determination of the cause; *Ex parte Thornton*, 46 Ala. 384; to compel a judge to receive a verdict which he has improperly refused to receive; *State v. Knight*, 46 Mo. 83; and generally an inferior tribunal can be compelled by mandamus to do its duty, but the courts will never interfere, nor, indeed, have they the power to interfere, by mandamus with the exercise of strictly discretionary powers of an inferior court or tribunal of any kind; *Mason County v. Minturn*, 4 W. Va. 300; *Ex parte South R. R. Co.*, 44 Ala. 654; *Appling v. Bailey*, 44 Ala. 333; *Ex parte Newman*, 14 Wall. (U. S.) 152; *People v. Judge of Calhoun Circuit*, 24 Mich. 408; *Mayor, &c., v. Rainwater*, 47 Miss. 547; *Weeden v. Town Council*, 9 R. I. 128. The rule is, that a mandamus will issue to an inferior court to compel the performance of an official duty to which a party is clearly entitled, and which is refused to him, when no other effectual remedy exists, and to compel a judicial officer to perform an act which it is his imperative duty to perform, and with reference to the manner of the performance of which he has no reasonable discretion; and even where the right to exercise a discretion exists, and the court improperly refuses to exercise it, its exercise may be compelled, but the particular mode of its exercise must be left free from coercion or restraint; *Seymour v. Ely*, 37 Com. 103; *McMillan v. Smith*, 26 Ark. 613; *People v. Judge of Wayne Co.*, 1 Mich. 359.

The court never grants a mandamus except it indisputably appears that the party to whom it is directed has, by law, power to do what he is enjoined to do, and will not compel any person to exercise a doubtful jurisdiction. (*e*)¹

1484. *Mandamus to ministerial officers.*—The writ of mandamus lies also against all ministerial officers, to compel them to execute the duties of their several offices, and discharge the functions delegated to them for the public benefit, although there be a penalty for their neglect. (*f*) It will go to a jailer to compel him to give up the body of a deceased prisoner for debt to his executors, (*g*) or to receive a prisoner; (*h*) to the trustees of a public charity, whose duty it is to furnish a churchwarden with the keys of a chest, enjoining them to deliver the keys; (*i*) to justices and clerks of the peace of a borough, to permit a ratepayer to inspect and take copies of a rate; (*j*) also to a corporation, commanding them to permit a member of the body corporate to inspect the minute-books, bye-laws, and records of the corporation, for the purpose of determining a matter in controversy between the corporation and the individual member, respecting the rights and privileges of the latter under the charter. (*k*)² But the court will not by mandamus compel the justices and the clerk of the peace of a county to allow ratepayers an inspection of the accounts and bills of charges of county officers settled and ordered to be paid at the sessions and deposited by the clerk of the peace amongst the county records, the ratepayers having no right to examine such accounts; (*l*) nor will the court interfere by mandamus

(*e*) *Rex v. Bishop of Ely*, 1 W. Bl. 58.
Rex v. Sillifant, 4 Ad. & E. 361. Reg.
v. Lond. and North West. Rail. Co., 6
Rail. Cas. 634. *Lee, Ex parte*, Ell. Bl.
 & Ell. 863.

(*f*) *Com. Dig. MANDAMUS*, 31 B. R.
 H. 261.

(*g*) *Reg. v. Fox*, 2 Q. B. 216.

(*h*) *R. v. Colvill*, 34 Law J., M.C. 137.

R. v. Governors of Whitecross St. Prison,
 Id. 193.

(*i*) *Reg. v. Abrahams*, 4 Q. B. 161.

(*j*) *Reg. v. Leicester Justices*, 4 B. &
 C. 891.

(*k*) *Burton, In re*, 31 Law J., Q. B. 62.

(*l*) *Rex v. Staff. Justices*, 6 Ad. & E.
 84.

¹ *Ex parte Davenport*, 6 Pet. (U. S.) 661; *State v. Judge of Second Dist. Court*, 15 La. Ann. 89; *Ellicott v. Levy Court*, 1 H. & J. (Md.) 359; *Chew v. Justices*, 2 Va. Cas. 208; nor where the amount involved is insignificant and would not benefit the petitioner; *Hall v. Crossman*, 27 Vt. 297; nor to compel the payment of a sum claimed to be due under a contract that has not been done according to the contract; *Dameron v. Cleaveland*, 1 Jones (N. C.) 484; nor to compel a person to amend the records after his term of office has expired; *Mason v. School District No. 14*, 20 Vt. 487.

² *People v. Throop*, 12 Wend. (N. Y.) 183.

with the administration of the funds of charities, (*m*) nor compel trustees of turnpike roads to repair and keep in repair a turnpike road ; (*n*) nor will a mandamus lie to the king's officer to compel him to deliver up property which he holds in his hands on behalf of the Crown ; for a mandamus to the officer in such a case would be like a mandamus to the Crown, which the court can not grant. (*o*)

The court will by mandamus compel the performance of a public duty by public officers, although the time prescribed by statute for the performance of the duty has passed ; (*p*) and if the public officer to whom the performance of the duty belongs has in the meantime quitted his office, and been succeeded by another, it is the duty of the successor to obey the writ, and to do the acts, when required, which his predecessor has omitted to perform. (*q*)¹

In certain cases, however, where a public officer, occupying a subordinate position, has received an order from his superiors, or any competent authority, and is liable to an indictment for disobeying the order, the court has refused to proceed by mandamus, and has left the parties to the ordinary remedies. (*r*) Thus, in the ordinary case of disobedience, by surveyors, treasurers, and ministerial officers, of an order of sessions, the proper remedy is by indictment, or by removal of the order into the Court of Queen's Bench, (*s*) and not by mandamus. (*t*) "The court," observes Lord KENYON, C. J., "grants a mandamus to justices to make an order when they refuse to do their duty. But it would be descending too low to grant a mandamus to inferior officers to obey that order ; we might as well issue a writ to a constable, or other ministerial officer, to compel him to execute a warrant directed to him." (*u*) So a mandamus will not go to a clerk of justices to return a record of all summary convictions pursuant to the 11 & 12 Vict. c. 43, s.

(*m*) *Rugby Charity, Ex parte*, 9 D. & R. 214.

(*n*) *Reg. v. Oxford, &c., Roads*, 12 Ad. & E. 427.

(*o*) *Rex v. Commissioners of Customs*, 5 Ad. & E. 380.

(*p*) *Reg. v. Mayor, &c., of Monmouth*, ante.

(*q*) *Rochester (Mayor, &c., of) v. Reg.*, 27 Law J., Q. B. 436.

(*r*) *Coleridge, J., Rex v. Payn*, 6 Ad. & E. 401.

(*s*) 12 & 13 Vict. c. 45, s. 18.

(*t*) *Rex v. Bristow*, 6 T. R. 168. *Rex v. Jeyes*, 3 Ad. & E. 416. *Downton Overseers, Ex parte*, 8 Ell. & Bl. 856.

(*u*) *Rex v. Bristow*, 6 T. R. 170.

¹ *Hamilton v. State*, 3 Ind. 452 ; provided the act can lawfully be done ; *People v. Olmstead*, 45 Barb. (N. Y.) 454 ; *Strong's case*, Kirby (Conn.) 345.

14, although such return ought to be made, and proceedings by rule or indictment might be taken against the justices to enforce it. (v) But where a ministerial officer is put forward as the nominal party, and a chartered company or corporation is in the background, disputing the liability, and is the party really to be acted upon by the mandamus, the court will direct the writ to issue. (w)

1485. *Mandamus to overseers or clergymen to bury the dead body of a pauper.*—It should seem that the individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial; he can not keep it unburied, nor do anything which prevents Christian burial; he can not, therefore, cast it out, so as to expose the body, or offend the feelings, or endanger the health, of the living; and for the same reason he can not carry it uncovered to the grave. It will probably be found, therefore, that where a pauper dies in any parish-house, poor-house, or union-house, of the parish or union, the overseers of the parish, or the guardians of the union, may be compelled by mandamus to bury the body; but the court will not grant a mandamus to overseers to bury the body of a pauper who has died in a private house in the parish, or in a hospital not belonging to the parish authorities. (x)

A mandamus to a rector to bury a corpse will be granted if it be shown that the rector has refused altogether to bury it; but there is no common-law right of burial in any particular part of the churchyard, and the court will not, by mandamus, enforce private rights of burial in any particular vault, (y) or in any unusual or extraordinary manner. (z)

1486. *Of the granting of the writ where there is another remedy.*—It is no answer to an application for a mandamus to enforce the performance of a public duty, to show that the party claiming the writ has another remedy, unless it is also shown that the other remedy would be more suitable and effectual than the proceeding by mandamus. (a) Where there is another remedy equally convenient, beneficial, and effectual, a mandamus will not be granted. “This is not a rule of law,

(v) Hayward, *In re*, 3 B. & S. 546; 32 L. J., M. C. 89.

(w) Reg. v. Wood Ditton Surveyors, &c., 18 Law J., M. C. 218.

(x) Reg. v. Stewart, 12 Ad. & E. 773.

(y) Blackmore, *Ex parte*, 1 B. & Ad. 122.

(z) Rex v. Coleridge, 2 B. & Ald. 809.

(a) Clarke v. Bishop of Sarum, 2 Str. 1082.

but a rule regulating the discretion of the court in granting writs of mandamus." (b)¹ Thus, where the duty sought to be enforced is the payment of a sum of money, and an action

(b) Hill, J., Barlow, *In re*, 30 Law J., Q. B. 271.

¹ In order to entitle a person to relief by writ of mandamus, it must appear that he has a clear legal right to the relief demanded against the person to whom he seeks to have the writ directed, and that it is the duty of such person to do the act, the doing of which the writ is sought to enforce. *People v. Booth*, 42 Barb. (N. Y.) 41; *Trustees v. State*, 11 Ind. 205; *People v. Supervisors of Greene*, 12 Barb. (N. Y.) 217; *People v. Thompson*, 25 Barb. (N. Y.) 73; *Ex parte Conway*, 4 Ark. 302; *Ex parte Stickney*, 48 Ala. 160. Thus, where, by law, certain instruments are required to be recorded, and it is the duty of certain officers to record them, if such officer refuses to enter upon the record an instrument entitled to record, he will be compelled to discharge the duty by peremptory mandamus. *Ex parte Goodell*, 14 Johns. (N. Y.) 325; *Strong's case*, Kirby (Conn.) 345. So where it is the duty of a board of canvassers to canvass the votes cast for a certain officer at an election, and give a certificate to the person receiving the largest vote—as for senator—the board will be compelled, by peremptory mandamus, to give their certificate to such person, irrespective of the question of his right, otherwise, thereto. They are not to pass upon questions of fraud or other irregularities, but simply to canvass the votes and give their certificate to the one to whom by law they are required to give it. Their duties are purely ministerial, and being plain, simple, and unquestionable, they will be compelled to perform them. *O'Farrell v. Colby*, 2 Minn. 180; *People v. Hilliard*, 29 Ill. 413. So, where a judgment is obtained against a municipal corporation, and there is no other method to enforce its payment, a mandamus lies to compel its payment. *City of Olney v. Harvey*, 50 Ill. 453. So, to compel the payment of land damages for land taken for a street or highway; *Minhinnah v. Haines*, 29 N. J. 388; and so in *all* cases where the duty of the person, officer, board, or corporation against whom the writ is sought, and the right of the person seeking it is clear, and there is no other *adequate specific* remedy, the remedy by mandamus exists. *Draper v. Noteware*, 7 Cal. 276.

The mere fact that the party has another remedy, is not of itself sufficient to warrant a denial of the writ. There must be some other equally *adequate specific* legal remedy, which will place the party in the situation to which his rights entitle him, and in which it is the duty of the officer, board, or corporation, or person against whom the writ is sought, to place him. *Etheridge v. Hall*, 7 Port. (Ala.) 47; *Gaings v. Mills*, 1 Pike (Ark.), 11; *The State v. Justices of Moore*, 2 Ired. 430; *The State v. Justices, Dudley* (Ga.), 37; *People v. Taylor*, 30 How. Pr. (N. Y.) 78. Thus, the fact that a person who has a right to have an instrument recorded, has a remedy against the officer whose duty it is to record it, for refusing to record it, in damages, does not deprive him of his remedy by mandamus, for the remedy by action is not the *specific* relief to which he is entitled; nor does it even tend to place him in the situation in which by law he is entitled to stand. The failure to record may defeat his title to property, and the remedy in damages is not *adequate* within the meaning of the term. But where a party holding a judgment against a municipal corporation is entitled to an execution, and there is an ample remedy for the collection of the money due thereon by levy upon municipal property, then *mandamus* will not lie, for the party has an *adequate* remedy for the specific relief to which he is entitled, to wit, the liquidation of his judgment; and

of debt is maintainable for the money, and affords as convenient and effectual a remedy as a writ of mandamus, the court will leave the party to the ordinary remedy by action, and will refuse a mandamus. (c) So it is no answer to an application for a mandamus to show that the defendant may be proceeded against by indictment, (d) unless it is also shown that an indictment would be a more effectual and suitable

(c) Reg. v. Hull and Selby Rail. Co., 6 Q. B. 70; 13 Law J., Q. B. 257. Reg. v. Brist. and Exeter Rail. Co., 3 Rail. Cas. 777.

(d) Rex v. Severn and Wye Rail. Co., 2 B. & Ald. 650. Reg. v. Brist. Dock Co., 2 Q. B. 70. Reg. v. Vict. Park Co., 1 Q. B. 291.

thus in *all* cases where there is no adequate legal remedy by action, equivalent to a *specific* remedy, and the right on the one hand and the duty on the other is clear; U. S. v. Bank of Alexandria, 1 Cr. C. C. (U. S.) 7; Williams v. Judges, &c., 27 Mo. 225; and the writ will be effectual to secure the right; Woodbury v. Co. Commrs., 40 Me. 404; People v. Tremain, 29 Barb. (N. Y.) 96; Com. v. Supervisors, 29 Penn. St. 121; and the amount or interest involved is not insignificant; Hull v. Crossman, 27 Vt. 297; and the act sought to be enforced is not unlawful; Johnson v. Lucas, 11 Humph. (Tenn.) 301; or discretionary; Gray v. Bridge, 11 Pick. (Mass.) 189; Respublica v. Clarkson, 1 Yeates (Penn.) 46; and there is no sufficient excuse for a refusal to do the act; People v. Minor, 32 Barb. (N. Y.) 612; a mandamus will generally be granted; but it must be remembered that the writ is not purely a matter of right, but, like the granting of an injunction, rests in the sound discretion of the court, in view of all the facts set forth in the petition, affidavits, or proved upon the hearing. Woodman v. Somerset, 29 Me. 151; People v. Commissioners of Sewers, 22 Barb. (N. Y.) 114; *Ex parte* Stickney, 48 Ala. 160; *Ex parte* Conway, 4 Ark. 302; Woodbury v. Co. Commrs., 40 Me. 304.

A mandamus properly issues from a court of general jurisdiction, or from a court of the highest jurisdiction to an inferior court, when the act sought to be enforced is on the part of a judicial tribunal. United States v. Co. Commrs., 1 Morris (Iowa), 31. There are two classes of writs, one called *alternative*, and the other *peremptory*.

The usual course in applying for a mandamus, is to present a petition to the court by law clothed with the power to issue it, by petition, setting forth the relief desired, the right of the relator thereto, and the duty of the defendant on the premises, properly verified by affidavit of the party. Upon this petition a rule to show cause why a mandamus should not issue is granted. If the cause is found insufficient, then a *mandamus* in the *alternative* issues, to which a return must be made, and if, upon the return a sufficient excuse for not doing the act is shown, a *peremptory* mandamus issues; but except in cases entirely free from doubt, a *peremptory* mandamus will not be granted in the first instance. Upon petition and answer, where a peremptory mandamus is prayed for, the truth of the answer is admitted; and the same is also the case on a motion on a showing against a rule to show cause why a mandamus should not issue; the truth of the showing is admitted. By the common-law, the return to an alternative mandamus is taken to be true, and the party is left to his remedy for a false return. Hoxie v. Co. Commrs., 25 Me. 333; Board of Police v. Grant, 9 S. & M. (Miss.) 77; Shepper v. Franklin Lyceum, 7 R. I. 523; Com. v. Commrs., 37 Penn. St. 277; People v. Barrows 27 Barb. (N. Y.) 89; People v. Delaware, 2 Wend. (N. Y.) 255.

course of proceeding. And the writ is never granted as a remedy for a mere private wrong, where there is a clear cause of action, and compensation in damages would be an effectual or appropriate remedy. (*e*)¹

A party applying for a mandamus must make out a legal right and a legal obligation, (*f*) and if he show such legal right it is sufficient, although there be also a remedy in equity, for when the court refuses to grant a mandamus because there is another specific remedy, they mean only a specific remedy at law. (*g*)² A legal obligation, which is the proper foundation for a mandamus, can only arise from common law, from statute, or from contract. An officer in the Queen's army, therefore, has no claim for a mandamus against the Paymaster of the Forces, to compel the payment of pay improperly withheld from him, as the obligation, though binding in equity and conscience, wants the *vinculum juris*, and is not a legal obligation. (*h*) But where public officers had actually received a specific sum of money for the use of the prosecutor, and wrote and informed him that he might receive it on application at their office, and then refused to pay it except on conditions which they had no right to impose, the court granted a mandamus, enjoining them to pay the money. (*i*) But the

(*e*) Com. Dig. MANDAMUS, A. Rex v. Clear, 4 B. & C. 901. Reg. v. Ponsford, 1 D. & L. 116; 12 Law J., Q. B., 313.

(*f*) Reg. v. Balby, &c., Turnpike Trust, 22 Law J., Q. B. 164. Reg. v. Abrahams, 4 Q. B. 161. Reg. v. Orton Trustees, 14 Q. B. 146. Bassett, *Ex*

parte, 7 Ell. & Bl. 280.

(*g*) Buller, J., Rex v. Stafford (Marquis of), 3 T. R. 651.

(*h*) Napier, *Ex parte*, 18 Q. B. 695; 21 Law J., Q. B. 332.

(*i*) Rex v. Treasury (Lords of), 4 Ad. & E. 286. But see Reg. v. Commissioners of Treasury, L. R., 7 Q. B. 387.

¹ Wilkinson v. Providence Bank, 3 R. T. 22; but the mere fact that right of action for damages exists, will not exclude a mandamus, where such remedy does not go to the specific relief sought. People v. Taylor, 3 How. Pr. (N. Y.) 78; People v. Thompson, 25 Barb. (N. Y.) 27; Spraggins v. Co. Ct., Cooke (Tenn.) 160; State v. McCrillis, 4 Kan. 250; Morgan v. Monmouth, &c., Co., 26 N. J. 99; Matter of White River Bank, 23 Vt. 478; Goldsby's Case, 2 Gratt. (Va.) 575; Comm'rs v. Lynch, 2 McCord (S. C.) 170; State v. Judges, 12 La. Ann. 342; Trustees v. State, 11 Ind. 205.

² The fact that a person may have the specific relief sought for in equity, is no good ground for refusing a writ of mandamus. The application for the writ being addressed to the discretion of the court, it may consider all the *equities*, as well as the facts, and should be guided by the legal rights and *equities* of the case; Hardcastle v. Maryland, &c., R. R. Co., 32 Md. 32; People v. Chicago, 53 Ill. 424; but if proceedings for the particular relief have been brought, and are pending in a court of equity, the party will generally be left to pursue his remedy there. Ib.

mere receipt of a lump sum of money by public officers, to be distributed or administered by them, does not render them liable to a mandamus for not paying the money. (*k*)

Where an annuity has been granted by Act of Parliament, and charged upon the consolidated fund, and the annuity is in arrear, and payment can only be obtained by warrant of the Lords of the Treasury, and the duty of granting the warrant is imposed upon them by statute, and they refuse to fulfil this duty, and to do what is necessary to be done to enable the prosecutor to obtain payment, there is a case for a mandamus; (*l*) but if the prosecutor fails in establishing a clear statutory duty, the court will decline to interfere. (*m*) And as against the servants of the Crown, as such, and merely to enforce the satisfaction of claims upon the Crown, it is an established rule that a mandamus will not lie. (*n*)

1487. *Mandamus to compel the surrender of public documents*.—The court has refused to grant a mandamus to compel a private individual to give up documents of a public nature, where the party claiming the possession of them had a remedy by action for the conversion or detention of the documents; (*o*) but the remedy by action is not an effectual remedy for the recovery of the documents themselves; and wherever a private individual, who has quitted office, keeps back public documents of which he obtained custody whilst acting in an official character or capacity, and by color of his office, the court will by mandamus compel the production of the documents, and if private and public documents have been so mixed up together that they can not be severed, the whole must be produced. (*p*) Thus, a mandamus will be granted to a person who has previously served the office of town-clerk in a borough, directing him to deliver up records and books connected with the administration of public justice in the borough, which came into his custody as town-clerk, and to hand them over to his successor in the office; (*q*) also

(*k*) *Walmsley, Ex parte*, 1 B. & S. 81.

(*l*) *Reg. v. Treasury (Lords of)*, 16 Q. B. 361. *Reg. v. Ambergate, &c., Rail. Co.*, 17 Q. B. 967. But see *Reg. v. Commissioners of Treasury, supra*.

(*m*) *Rex v. Treasury (Lords of)*, 4 Ad. & E. 981. And see *R. v. Receiver of Metrop. Police*, 33 Law J., Q. B. 52.

(*n*) *Bode (Baron de), In re*, 6 Dowl. P. C. 792. *Hand, In re*, 4 Ad. & E. 984. *Smith, In re*, ib. 976. *Ricketts, Ex parte*, ib. 999.

(*o*) *Reg. v. Hopkins*, 1 Q. B. 169.

(*p*) *Rex v. Payn*, 6 Ad. & E. 399.

(*q*) *Nottingham Town Clerk's Case*, 1 Sid. 31. *Rex v. Ingram*, 1 W. Bl. 49.

to a retired overseer of the poor, to compel him to deliver over the parish books to the new overseer; (r) also to a dismissed clerk of a chartered company, requiring him to deliver up to the company all books, papers, &c., which he had in his custody by virtue of being their clerk. (s) But where a vestry clerk moved for a mandamus to certain churchwardens to give up to him the custody of the vestry-book, which had been taken from him at a vestry meeting, the court refused the application, as the vestry clerk had no certain tenure of office, and was the mere servant of the vestry, and could be dismissed, and the book taken away from him at their will. (t) ¹

1488. *A mandamus to restore a public officer to a freehold office from which he has been wrongfully dismissed*, may be obtained on due proof of the wrongful dismissal. (u) ² A public officer appointed for life, or during good behaviour, can not lawfully be removed from his office for misconduct without being called upon to make, and being afforded an opportunity of making, his defense, for "Nullus liber homo disseisietur de

(r) *Rex v. Clapham*, 1 Wils. 305. Reg. v. Fox, W. W. & H. 4.

(s) *Rex v. Wildman*, 2 Str. 879.

(t) *Anon.* 2 Chitt. 255. *Rex v. Croydon*, 5 T. R. 714.

(u) *Rex v. Morpeth Ballivos*, 1 Str. 58.

¹ Mandamus is the proper remedy to compel the incumbent of an office to deliver the books, papers, property, and insignia of his office to his successor; *Kimball v. Lamprey*, 19 N. H. 215; *Church v. Slack*, 7 Cush. (Mass.) 226; as to compel a person whose term of office as mayor has expired, to deliver up to his successor the seal, books, papers, muniments, &c., the property of the city, properly belonging in the custody of the mayor; *People v. Kelduff*, 15 Ill. 492; *People v. Head*, 25 Id. 325; so to compel the delivery to the selectmen of the town, the books, papers and property belonging to an office, in the hands of persons who have usurped it; *Kimball v. Lamprey*, *ante*; to compel a town clerk to deliver the records of the town to his successor; *Taylor v. Henry*, 2 Pick. (Mass.) 397; to compel ex-officers of a church or other corporation to deliver up the books and property pertaining to his office, to his successor; *St. Luke's Church v. Slack*, *et al*, 7 Cuch. (Mass.) 226.

² Mandamus was held a proper remedy to restore an inspector of tobacco to the office from which he had been irregularly removed; *Singleton v. Commrs.*, 2 Bay. (S. C.) 105; see also, *Den v. Judges*, 3 H. & M. (Va.) 1; *State v. Common Council*, 9 Wis. 254; *Lindsey v. Luckett*, 20 Tex. 516; *Felts v. Memphis*, 2 Head. (Tenn.) 650; *Board of Police, &c.*, 35 Barb. (N. Y.) 535; but the *title* to an office can not be tried under this remedy; *People v. Stephens*, 5 Hill (N. Y.) 615; *People v. Detroit*, 18 Mich. 338; *Bonner v. State*, 7 Ga. 473. It has been held a proper remedy to restore an attorney to the rolls, who had been improperly disbarred by an inferior tribunal; *People v. Justices*, 1 Johns. Cas. (N. Y.) 181; *Ex parte Bradley*, 7 Wall. (U. S.) 364; *Withers v. State*, 36 Ala. 252.

libero tenemento suo nisi per legale iudicium parium suorum vel per legem terræ." (*w*) If he has committed felony, or a misdemeanor, he must be tried and convicted by a jury before the offense can work a forfeiture of his office, and if he has been guilty of misconduct in the discharge of his official duties, he must have an opportunity given him of answering the charge, or have been heard in his own defense before he can lawfully be removed. Where a vicar removed a parish clerk for acts of misconduct alleged to have been committed in the vicar's own view, the court granted a mandamus to compel the vicar to restore the clerk to his office. For the vicar it was contended, that as he acted on his own view of the prosecutor's misconduct, any kind of process for enabling him to disprove or explain it must be superfluous, and that the law invested the vicar with the functions of accuser, witness, and judge, in respect of indecent conduct publicly exhibited in his presence; that the court held that sentence of removal from a freehold office ought to be preceded by some mode of inquiry, in which the accused should have an opportunity of being heard, and of explaining his behaviour. "The important principle that every man ought to be heard before he is condemned, so strenuously asserted by Lord KENYON, (*y*) is not excluded," observe the court, "because the charge rests on the minister's personal observation, inasmuch as that is not inconsistent with the disproof of criminal motives and intentions, with the mitigation to which other facts might possibly entitle the accused, or with condonation of the offense. This principle appears to us valuable to the judge, whom it tends to secure against yielding too hastily to his own first impressions, while we think it indispensable, for the sake of the party charged, in all cases, to the due execution of every judicial power." (*z*)

Even although the officer, having been duly elected, has procured himself to be admitted to the office by means of fraudulent misrepresentation and deceit, he must be called upon to come in and defend himself before he can lawfully be removed. (*a*) Where, however, the election itself was

(*w*) *MAGNA CHARTA*, c. 29.

(*y*) In *Rex v. Gaskin*, 8 T. R. 209. And see per *Ld. Ellenborough*, *C. J.*, in *Buchanan v. Rucker*, 1 *Campb.* 65.

(*z*) *Reg. v. Smith*, 5 Q. B. 623; 14 *Law J.*, Q. B. 166. *Doe v. Gartham*, 1

Bing. 357. *Cooper v. Wandsworth Board, &c.*, 32 *Law J.*, C. P. 186.

(*a*) *Reg. v. Sadlers' Co.*, 30 *Law J.*, Q. C. 186; 32 *ib.* 337; 10 *H. L. C.* 404.

void *ab initio*, on the ground of fraud, so that the party has never become a member, his admission may, it seems, be cancelled without a hearing. (*b*)

There seems to be a great deal of difference between a mandamus to admit, and a mandamus to restore, to a freehold office. The former is granted merely to enable the party to try his right, without which he would be left without any legal remedy. But the court have always looked much more strictly to the right of the party applying for a mandamus to be restored. In these cases he must show a *prima facie* title; for if he has been before regularly admitted, he may try his right by bringing an action for money had and received for the profits. Therefore, in order to entitle himself to this extraordinary remedy, he must lay such facts before the court as will warrant them in presuming that the right is in him. (*c*)¹

1489. *How a freehold office may be forfeited and vacated.*—

If a man grant an office to another for term of his life, the freehold estate which the grantee hath in the office is upon condition in law that he shall well and faithfully do that which to such office belongeth to do, or otherwise it shall be lawful to the grantor and his heirs to oust him, and grant the office to another. (*d*) There are, says Lord COKE, three causes of forfeiture, or seizure of offices: 1, by abuser; 2, non-user; 3, refusal. (*e*) If the officer is removed by reason of the forfeiture of his freehold office, through breach of the implied trust upon which it was granted, that will be a removal “*per legem terræ*.” If he is not so removed, he ought to be convicted, “*per judicium parium suorum*,” of some public crime before he can lawfully be dispossessed of his freehold. (*f*) And the

(*b*) Reg. v. Sadlers' Co., *ut sup.* Reg. v. Gen. Council Med., &c., 30 Law J., Q. C. 201.

(*c*) Rex v. Jotham, 3 T. R. 575.

(*d*) Litt. Sect. 378. The grantee may be ousted “*s'il non attend sur son office, s'il fait contrariant chose à son office, ou misfeseance de son office*,” 11 Edw. 4, fol. 1. As to the duties annexed to the

freehold office of clerk of the peace, see Harding v. Pollock, 6 Bing. 50.

(*e*) Earl of Shrewsbury's Case, 9 Rep. 46 b. See Wildes v. Russell, L. R., 1 C. P. 722.

(*f*) Bagg's Case, 11 Co. 99. Harcourt v. Fox, 1 Show. 431, 506; 4 Mod. 169.

¹ The title to the office will not be tried. People v. Stephens, 5 Hill (N. Y.), 616; People v. Detroit, 18 Mich. 338; People v. Corporation, 3 John's Cas. (N. Y.) 79. It can only be resorted to to restore one to an office from which he has been improperly removed, and not to put another *into* an office which is already filled. People v. Hilliard, 29 Ill. 219.

crime must be of such a nature as to render the officer publicly infamous, and unfit to hold any public office; for if he has been convicted of an assault, or any other offense which does not carry such infamy with it, the conviction will be no ground of disfranchisement. (*g*)

"There are," observes Lord MANSFIELD, "three sorts of offenses for which an officer or corporator may be discharged: first, such as have no immediate relation to his office, but are in themselves of so infamous a nature as to render the offender unfit to execute any public franchise; secondly, such as are only against his oath and the duty of his office as a corporator, and amount to breaches of the tacit condition annexed to his franchise or office; thirdly, such as are of a mixed nature, as being an offense not only against the duty of his office, but also a matter indictable at common law. For the first sort of offenses there must be an indictment and conviction before removal; but in respect of the second class of offenses the party must be tried by the corporation." (*h*) And there cannot, it seems, be any cause to disfranchise a member of a corporation unless it be for a thing done which tends to the destruction of the body corporate, or to the destruction of the liberties and privileges thereof. Any mere personal offense of one member thereof affords no cause for disfranchisement. (*i*) Mere misapplication of the money of the corporation is not a good ground for the disfranchisement of a corporator; the corporation must have an action for the money. (*j*)

1490. *Offices held at will*, or during the good pleasure, or at the discretion, of the parties appointing to them, may be taken away without any reason assigned, or any summons or hearing of the party removed. (*k*) This is the case with the office of a vestry-clerk, clerk to justices, (*l*) clerks and treasurers of guardians of the poor, (*m*) and the minister of a dissenting congregation, who is elected by the majority of the members of the congregation, and who may be removed by

(*g*) *Rex v. Richardson*, 1 Burr. 538; Buller's N. P. 7th ed. 206. *Reg. v. Clerk of the Peace of Cumberland*, 11 Mod. 81; 1 Roll. Abr., OFFICE, 155. Cruise's Digest, FRANCHISE.

(*h*) *Rex v. Richardson*, 1 Burr. 537. *Rex v. Mayor of Liverpool*, 2 Burr. 733. *Reg. v. Baines*, 6 Mod. 192; 2 Salk. 68c.

(*i*) *Earle's Case*, Carth. 176.

(*j*) *Rex v. Chalke*, 1 Ld. Raym. 225. *Rex v. Wilton* (Mayor, &c.), 5 Mod. 257. (*k*) *Rex v. Stratford* (Mayor, &c.), 1 Lev. 291.

(*l*) *Sandys, Ex parte*, 4 B. & Ad. 863.

(*m*) *Rex v. St. Nicholas, &c.*, 4 M. & S. 324.

such majority, and be turned out of his house, premises, and chapel, if they are dissatisfied with his doctrines and religious teaching, (n) or restrained by injunction from further officiating. (o)

Where the charter by which a charity was founded conferred on the governors full power to appoint the schoolmaster, and to remove him and appoint another according to their sound discretion, and a schoolmaster was appointed and afterwards dismissed, it was held that the court could not interfere with the discretion of the governors, or review their reasons for the dismissal. (p)

1491. *Visitatorial power excluding the proceeding by mandamus.*—Where corporate offices are held in private or eleemosynary corporations, on the terms that, if any dispute should arise respecting the right to the office, or the validity of a discharge, or a motion from it, such dispute should be settled or determined by a visitor or judge whom the founder has nominated, the court will not interfere by mandamus. (q) But one branch of a corporation has no visitatorial power over another. The visitatorial power emanates from the founder. In royal foundations of a private or eleemosynary character, if no special visitor has been appointed, the king exercises the power by his chancellor. In corporations established for the government of cities and towns, the king may be said to exercise the power by mandamus through the Court of Queen's Bench. (r)

1492. *Mandamus to restore the name of medical practitioner to the Medical Register.*—By 21 & 22 Vict. c. 90, s. 28, it is enacted, that if any medical practitioner shall be convicted of any felony or misdemeanor, or shall, after due inquiry, be judged by the general council of medical education and registration (s) to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register. The decisions of the council under

(n) Doe v. Jones, 10 B. & C. 718.
Doe v. McKaeg, ib. 721.

(o) Cooper v. Gordon, L. R., 8 Eq. Ca. 249; 38 L. J., Ch. 489.

(p) Reg. v. Darlington School Governors, 6 Q. B. 696, 715.

(q) Reg. v. Dean and Chap. of Chester,

15 Q. B. 513. Reg. v. Dean and Chap. of Rochester, 17 Q. B. 1.

(r) Rex v. London (Mayor of), 4 M. & R. 62.

(s) See 25 & 26 Vict. c. 91; 31 & 32 Vict. c. 29.

this section, made after due inquiry, are final, and can not be reviewed by the superior court. Where, therefore, the medical council, after communicating to a medical practitioner certain charges made against him of infamous conduct in his profession, and having heard and considered his answers and explanations, directed the registrar to remove his name from the medical register, the court refused a mandamus to restore him. (*t*)¹

1493. *Mandamus to test the validity of an election.*—The mere rejection of votes at an election of corporate officers furnishes no ground for interference by mandamus, where it does not appear that the election has been thereby vitiated. It must be shown that the rejection of the votes led to the declaration of a candidate as duly elected who would have failed if the votes had been received. (*u*) The validity of an election by parishioners of churchwardens may, under certain circumstances, be tried by mandamus. (*w*) And where it is the custom for the parishioners to elect one churchwarden and for the rector to nominate the other, the validity of the rector's nomination may be tested by mandamus. (*y*)

1494. *Mandamus to elect corporate and public officers.*—A mandamus lies also to the inhabitants of a parish, directing them to meet together and elect churchwardens, (*z*) but not to churchwardens, to call a vestry to elect a sexton, where the office is full by the appointment of the rector, and there is a remedy by refusing the sexton his fees, or bringing an action if they are taken; (*a*) or to elect an organist. (*b*)²

1495. *Mandamus to enforce an appointment to a public or corporate office.*—It is the duty, also, of the Court of Queen's Bench to see that the functions appertaining to public offices are discharged by persons duly elected to the office. When,

(*t*) *La Mert, Ex parte*, 33 Law J., Q. B. 69.

(*u*) *Mawby, Ex parte*, 3 Ell. & Bl. 718.

(*w*) *Rex v. Birmingham (Rector of)*, 7 Ad. & E. 254.

(*y*) *Barlow, In re*, 39 Law J., Q. B. 271.

(*z*) *Rex v. Wix*, 2 B. & Ad. 197.

(*a*) *Rex v. Stoke Damerel*, 5 Ad. & E. 584.

(*b*) *Reg. v. St. Stephens, &c.*, 14 Law J., Q. B. 34.

¹ *Bartlett v. Medical Society*, 32 N. Y., 187; but not if he would be liable to expulsion immediately upon being restored; *Ex parte*, *Paine*, 1 Hill (N. Y.), 665.

² *People v. Fairbury*, 51 Ill. 149; *People v. Logan Co.*, 45 Ill. 162; *People v. Solomon*, 46 Ill. 415.

therefore, a public office is vacant, and a party has been elected to serve the office, the court will by mandamus enforce the right to the office; but where the office has been created by charter, or by statute, and is not vacant, but has been usurped by an intruder, and the right to the office is disputed between two rival claimants, the right must in general be tried by *quo warranto*, and not by *mandamus*. (*c*) If, however, there is only a colorable election, it is void, and a *mandamus* to hold an election will be granted. (*d*) And there are occasions where a *quo warranto* will lie, and yet the remedy by *mandamus* may be deemed a more appropriate remedy. (*e*)¹

Wherever a person has been properly appointed to a corporate office, having a salary annexed to it, or has been duly elected to serve the office, and the corporation refuses to institute him in the office, a *mandamus* lies to compel them to do so; (*f*) but the court will not interfere where it will have to unravel the rights of voters who are alleged to have been themselves unduly elected, and to have had no right to vote. (*g*)

The writ of *mandamus* lies also against a rector or a parson, to compel him to receive and swear in a person who has been duly appointed to the office of churchwarden, sexton, parish-clerk, &c.; (*h*) to a dean and chapter, to admit a prebendary to his stall and voice; (*i*) to the lord of a manor, to admit a copyholder to a copyhold estate, (*k*), or to permit him to inspect the court-rolls of the manor; (*l*) to the trustees of a meeting-house, to compel them to admit to the pulpit thereof a dissenting minister duly elected. (*m*) But a *mandamus* does not

(*c*) *Rex v. Colchester (Mayor of)*, 2 T. R. 259. *Reg. v. St. Martins, &c.*, 20 Law J., Q. B. 423. *Darley v. The Queen*, 12 Cl. & Fin. 520. *Hill v. Reg.*, 8 Moore, P. C. C. 139. *Rex v. Winchester (Mayor of)*, 7 Ad. & E. 222. *Reg. v. Derby*, ib. 419.

(*d*) *Rex v. Cambridge*, 4 Burr. 2010. *Reg. v. Oxford (Mayor of)*, 6 Ad. & E. 353. *Reg. v. Leeds (Mayor of)*, 11 Ad. & E. 517.

(*e*) *Lawrence, J., Rex v. Bedford Level*, 6 East, 367.

(*f*) *Rex v. Cambridge University*, 1

W. Bl. 551. *Rex v. Windham*, 1 Cowp. 377.

(*g*) *Reg. v. Dolgelley Guardians, &c.*, 8 Ad. & E. 564.

(*h*) *Barlow, In re*, 30 Law J., Q. B. 271; *March*, 101.

(*i*) *Rex v. Dean, &c., of Norwich*, 1 Str. 159. *Clarke v. Bishop of Sarum*, 2 ib. 1082.

(*k*) *Rex v. Hendon (Lord of the Manor, &c.)*, 2 T. R. 484. See *Reg. v. Garland, L. R.*, 5 Q. B. 269.

(*l*) *Rex v. Tower*, 4 M. & S. 162.

(*m*) *Rex v. Barker*, 3 Burr. 1265. *Rex v. Jotham*, 3 T. R. 577.

¹ *Lamb v. Lynd*, 41 Penn. St. 336; *Motter v. Primrose*, 23 Md. 482; *State v. Board of Trustees*, 4 Nev. 400.

lie to compel the admission of a person to any mere private appointment, situation, or employment, (*n*) such as that of clerk or secretary to a joint-stock company, (*o*) vestry-clerk or toll-gate keeper, (*p*) nor to restore to an office a person who is admitted to have been rightly removed, (*q*) or who is removable at will. (*r*)

The writ of mandamus will not lie to compel the institution of a clergyman to a presentative benefice, as the appropriate remedy by *quare impedit* is open to those who present him, and he has himself no legal right whatever. (*s*)¹

1496. *Mandamus to chartered companies and corporations.*—The writ of mandamus lies also against all chartered companies and corporations, to compel them to conform to the provisions of their charter or act of incorporation, and to discharge the functions vested in them. Wherever a company, incorporated by royal charter or by Act of Parliament, has imposed upon it the duty of keeping a register, and inserting therein the names of the shareholders, the court will by mandamus compel the performance of the duty. (*t*) The writ lies also against the directors of a chartered company, enjoining them to admit, or to swear, in as a director of the company, a person who has been duly elected to the office; (*u*) or to admit the prosecutor of the writ a member of the company. (*v*) It is available, also, against the steward of a corporation, for the purpose of compelling him to produce the public books at corporate meetings; (*y*) also against the master of a hospital incorporated for charitable purposes, for the purpose of compelling him to put the common seal of the corporation to an instrument of presentation; (*z*) against the warden of a college, to compel him to

(*n*) *Ile's Case*, 1 Ventr. 143.

(*o*) *White's Case*, 6 Mod. 18.

(*p*) *Rex v. Croydon Churchwardens, &c.*, 5 T. R. 713.

(*q*) *Rex v. Mayor, &c., of Axbridge*, 2 Cowp. 523.

(*r*) *Le Roy v. Campion*, 1 Sid. 14.

(*s*) *Reg. v. Orton (Trustees of)*, 14 Q. B. 146.

(*t*) *Norris v. Irish Land Co.*, 8 Ell. & Bl. 525. *Swan v. North Brit. Austral. Co.*, 31 Law J., Exch. 425.

(*u*) *Anon.*, 2 Str. 696.

(*v*) *Dacosta v. The Russia Co.*, 2 Str. 783. *Rex v. March*, 2 Burr. 1000. *Reg. v. Sadlers' Co.*, Bail Court Cas. 183. As to the replacement of stock sold out and transferred on the authority of a forged signature, see *Mid. Rail. Co. v. Taylor*, 31 Law J. Ch. 336.

(*y*) *Borough of Calne's Case*, 2 Str. 948.

(*z*) *Reg. v. Kendal*, 1 Q. B. 366. But see *Reg. v. Orton Trustees*, 14 Q. B. 146.

¹ But it lies to put a minister of any religious sect in possession of a pulpit of which he is unjustly deprived. *Runkle v. Winemeller*, 4 H. & J. (Md.) 429; *Peor v. Steele*, 2 Barb. (N. Y.) 377; *Clayton v. Carey*, 4 Mo. 26.

affix the common seal of the college to an answer of the subwarden, bursars, dean, and principal officers of the college, to a bill in Chancery. (a)

The court will by mandamus entertain the question whether a corporation, not having affixed its seal, is bound to do so; but not the question whether, when they have affixed it, they were right in so doing. The writ is granted when that has not been done which a statute orders to be done, but not for the purpose of undoing what has been done. (b)¹

The writ is available, also, for the purpose of enforcing performance of the duties imposed by charter, custom, or contract, on the body corporate in favor of particular members thereof. Where there is a dispute and matter of controversy between the corporation on the one hand, and one of its members on the other, respecting the corporate rights and privileges of the latter, a mandamus may be obtained at his instance against the corporation, commanding them to allow him to inspect the corporate records, by-laws, minute-books, and other documents relating to the matter in controversy, to see whether he can make out a case in his favor, and initiate proceedings against the corporation with a prospect of success. (c) But the court will not grant a mandamus for a general inspection of all records, muniments, &c., but only of such as relate to the particular matter in controversy; for the mem-

(a) *Rex v. Windham*, 1 Cowp. 377.

(c) *Burton*, *In re*, 31 Law J., Q. B.

(b) *Nash*, *Ex parte*, 15 Q. B. 95; 19 Law J., Q. B. 296.

¹ Mandamus lies to compel a railroad or canal company to build and repair bridges which by law they are bound to build; *People v. Troy, &c.*, R. R. Co., 57 How. Pr. (N. Y.) 327; *Halersham v. Canal Co.*, 26 Ga. 665. And to pursue the course prescribed in their charter, in crossing streams and water courses, so as not to impede navigation; *State v. Northern R. R. Co.*, 9 Rich. (S. C.) 247; to compel the president of a corporation to do any act imposed upon him by the charter which affects the public interest; *Ins. Co. v. Baltimore*, 23 Md. 296; to compel the cashier of a bank to allow a bank director to examine the discount book; *People v. Throop*, 12 Wend. (N. Y.) 183; *People v. Mott*, 1 How. Pr. (N. Y.) 247; and generally to discharge any duty imposed upon it by law; *Chicago, &c., R. R. Co. v. People*, 56 Ill. 365; *Indianapolis, &c., R. R. Co. v. State*, 37 Ind. 489; *State v. Southern Minn. R. R. Co.*, 18 Minn. 40. As to deliver at a particular elevator on its line, whatever grain in bulk may be consigned to it; *Chicago, &c., R. R. Co. v. People*, *ante*. To so grade its track in passing through streets or alleys as to render the streets, alleys, and crossings easy and convenient of access; *Indianapolis, &c., R. R. Co. v. State*, *ante*; to complete its railroad when bound to do so by law; *State v. So. Minn. R. R. Co.*, *ante*.

bers of a corporation have no right, on speculative grounds, to call for an examination of the books and muniments, to see if they can fish out of them some complaint or charge against the corporate body. It is necessary that there should be some particular matter in dispute between the members, or between the corporation and individuals in it, in which the applicant is interested, and in respect of which the examination becomes necessary. (*d*)

The writ goes also to a corporation or chartered company, to compel it to fulfil the duties it has contracted towards strangers, where there is no other suitable or effectual remedy. A judgment creditor, therefore, of a trading corporation may obtain a mandamus enjoining the corporation to give him inspection of the register of shareholders, if he has no other or effectual means of obtaining such inspection. (*e*)

There is no practical distinction in this respect between companies existing by statute and companies created by charter. A mandamus, therefore, lies against a company incorporated by statute, commanding them by the hand of their secretary to enter on their books, or to register, the probate of the will of a deceased shareholder; (*f*) also transfers, or memorial of transfers, of shares. (*g*)

But if the prosecutor of the writ of mandamus is not proceeding bona fide for the purpose of enforcing his rights as a shareholder, and has no interest himself as one of the public in the performance of the thing which he seeks to have done, he is not entitled to the writ. (*h*) Nor will the court grant the writ at the instance of one of several partners in a trading corporation, who seeks merely to compel the directors to produce their accounts and divide profits, the Court of Chancery being the proper tribunal for that purpose. (*i*)

1497. *Mandamus to make calls*.—Where a public board or corporate body is clothed with certain defined statutory powers, and is authorized to enter into contracts, and has the

(*d*) *Rex v. Merchant Tailors' Co.*, 2 B. & Ad. 115. *Rex v. Hostmen of Newcastle*, 2 Str. 1223.

(*e*) *Reg. v. Derbyshire, &c., Rail. Co.*, 3 Ell. & Bl. 784.

(*f*) *Rex v. Worcester Canal Co.*, 1 M. & Ry. 529.

(*g*) *Reg. v. Lond. and Coleraine Rail. Co.*, 13 Q. B. 998. *Reg. v. Wing*, 17 ib.

645. *Reg. v. Gen. Cem. Co.*, 6 Ell. & Bl. 415. *Norris v. Ir. Land. Co.*, 8 Ell. & Bl. 512. *Reg. v. Mid. &c., Rail. Co.*, 15 Ir. C. L. Rep. 525.

(*h*) *Reg. v. Liverpool, Manchester, &c., Rail. Co.*, 21 Law J., Q. B. 284. *Briggs, Ex parte*, 28 Law J., Q. B. 272.

(*i*) *Rex v. Bank of England*, 2 B. & Ald. 622.

power of creating, by calls on shareholders, a future corporate property, from time to time, out of the private assets of its individual members, and contracts are made with the corporation on the faith that an honest exercise will be made of these powers, and it is clearly established that the corporation is evading the payment of its just debts, and the due satisfaction of a judgment recovered against them, on the ground that they have no corporate assets in hand wherewith to pay, the court will, by mandamus, compel them to exercise the powers vested in them for raising funds, and answer the demands of their creditors. (*j*) But where an action has been brought against a corporation for a debt claimed to be due, and judgment has been recovered, and the plaintiff has the ordinary legal remedy of an execution, the court will not issue a mandamus merely because the execution may produce no fruits. (*k*)

1498. *Mandamus to local boards, commissioners, trustees, and public officers to levy rates and satisfy and discharge a judgment-debt, or a pecuniary obligation.*—Whenever judgment has been recovered in an action against the clerk of a local board, or of commissioners or trustees, in respect of something done by such commissioners or trustees in the execution of statutory powers, exempting them from personal liability, the judgment-creditor, when he fails to obtain satisfaction of his judgment-debt from the corporate estate and effects of the board, is, in general, entitled to a mandamus to compel the board or other public body to levy a rate, and discharge the judgment-debt. Wherever public officers have borrowed money upon the security of rates they are authorized to impose, and have not themselves contracted any personal liability to pay, a mandamus will go to compel them to make a rate and repay the money. (*l*) If an Act of Parliament authorizes parish officers, commissioners of public works, or boards of health, to enter into contracts for public works, to employ subordinate salaried officers, and to charge the costs and expenses they incur upon rates they are authorized to impose, and contracts are made by them, and officers appointed, and expenses incurred, and there is no personal liability to pay, and the ordi-

(*j*) *Rex v. St. Cath. Dock Co.*, 4 B. & 292.
Ad. 360.

(*k*) *Reg. v. Victoria Park Co.*, 1 Q. B.

(*l*) *Reg. v. Brancaster Churchwardens*
7 Ad. & E. 458.

nary remedy by way of action is not available, the court will, by mandamus, compel them to make a rate, and provide themselves with funds, and pay such expenses. (*m*)

Under s. 89 of the Local Board of Health Act, 11 & 12 Vict. c. 63, a local board of health may be compelled by mandamus to make a rate for the purpose of satisfying a judgment within six months after the judgment has been obtained against them. (*n*) And the remedy is not, generally speaking, available after the six months have expired. (*o*) But a rate may be ordered in aid of a judgment within six months after the judgment is obtained, although the action on which the judgment was obtained was commenced more than six months after the claim accrued, if the delay is excused and shown not to have been undue. (*p*)

1499. *Mandamus to railway companies, corporate bodies, and local boards to make compensation for lands taken, or injuries inflicted upon private persons.*—Whenever any public body, executing public works under statutory powers, is required by act of parliament to make compensation to all persons who may sustain injury from the exercise of the powers intrusted to it, and machinery is provided for ascertaining and determining the amount by arbitration, and the board refuses to make compensation, or denies its liability, the court will, by mandamus, compel it to make compensation, and put the necessary machinery in motion for ascertaining and settling the amount; (*q*) and it is no bar to the prosecutor's right to a mandamus that he has not claimed a specific sum, or taken steps to have the amount ascertained and settled pursuant to the act. (*r*) So a mandamus will lie to compel a railway company to restore a highway which they have diverted without statutable authority for so doing. (*s*)

(*m*) Reg. v. Hurstbourne Tarrant, &c., 27 Law J., M. C. 214; Ell. Bl. & Ell. 246. Reg. v. Norfolk Commissioners of Sewers, 20 Law J., Q. B. 121. Bogg v. Pearse, 10 C. B. 542; 20 Law J., C. P. 99.

(*n*) Reg. v. Rotherham, 8 Ell. & Bl. 906; 27 Law J., Q. B. 156.

(*o*) Burland v. Kingston-upon-Hull Local Board, 32 Law J., Q. B. 17. In other cases the plaintiff is not concluded by delay: Ward v. Lowndes, 17 C. B. 840. Reg. v. Churchwardens, &c., 27

Law J., M. C. 215. See Bush v. Martin, 2 H. & C. 311.

(*p*) Worthington v. Hulton, L. R., 1 Q. B. 63. See Ringland v. Lowndes, 33 Law J., C. P. 25.

(*q*) Rex v. Nottingham Old Water Works Co., 6 Ad. & E. 370.

(*r*) Reg. v. Burslem Local Board, &c., 29 Law J., Q. B. 242; 28 ib. 345.

(*s*) Reg. v. High Wycombe Rail. Co. L. R., 2 Q. B. 310, decided under s. 16 of the Railway Clauses Act 8 & 9 Vict. c. 20.

A mandamus will go also against railway companies who have given notice to a landowner under the compulsory powers intrusted to them that they require to purchase his land, and are willing to treat, &c., to compel them to summon a jury and take the necessary steps for settling the amount of purchase-money and compensation. (*t*) But commissioners acting in behalf of the public, and giving notice that the lands are wanted for public purposes, may revoke the notice before it has been acted upon, and can not be compelled by mandamus to take and pay for the land. (*u*)

A mandamus will go to an arbitrator, commanding him to give compensation in respect of lands being injuriously affected by the formation of a railway, or the construction of public works, executed under statutory authority; (*w*) and if, after a railway has been made, and compensation given, fresh damage has been sustained from the execution of the railway works, the question whether the railway company is bound to make compensation in respect of this subsequent damage may be determined on a claim for a mandamus. (*y*)¹

1500. Mandamus to boards of health to make compensation.—

Where a mandamus was issued to a local board of health, enjoining them to make compensation to the prosecutor for damage sustained by him by reason of the exercise by the board of certain powers conferred upon them by the Public Health Act, and the defendants returned that they had not

(*t*) Reg. v. Birm. &c., Rail. Co., 15 Q. B. 647. South Yorkshire, &c., *In re*, 14 Jur. 1093; see *post*, Morgan v. Metrop. Rail. Co. Forests, 15 Q. B. 774. (*w*) Reg. v. Rynd, 9 L. T. R., N. S. 27. (*y*) Reg. v. Aire and Calder Nav. Co. Rex v. Leeds and Selby Rail. Co., *ante*.

(*u*) Reg. v. Com. of Woods and
¹ Minninnah v. Haines, 26 N. J. 388; Himmelman v. Caffrau, 36 Cal. 411; Carroll v. Board of Police, 28 Miss. 38; People v. Supervisors, 5 How. (N. Y.) 292; People v. Edmonds, 19 Barb. (N. Y.) 468. Mandamus is the proper remedy to compel a municipal corporation to levy a tax to pay a judgment against it, where levy can not be made under the execution; United States v. Bd. Supervisors, 2 Biss. (U. S.) 77; so to compel the state auditor to issue his warrant to pay money due from the state for property *delivered* to it under a contract; People v. Secretary of State, 58 Ill. 90; so to compel supervisors to raise money to meet a claim against the county, even before the amount has been judicially determined; People v. Supervisors of N. Y., 3 Abb. App. (N. Y.) 566; but a comptroller of a state or city can not be compelled to pay a debt against the state or city where there are no moneys in his hands appropriated for such purposes; State v. Dubuclet, 24 La. Ann. 16; People v. Burrows, 27 Barb. (N. Y.) 89; People v. Connolly, 2 Abb. Pr. (N. Y.) N. S. 315.

denied their liability to make compensation, but were ready to make it so soon as it had been duly ascertained, but that the prosecutor had taken no steps to have it ascertained, nor given the defendants notice of his claim, or of the cause or amount thereof, and had not appointed an arbitrator, or given notice of his intention to do so, pursuant to the statute, and the return was traversed generally, and on the trial it was found that the defendants had denied all liability, it was held that the prosecutor was entitled to a verdict on the whole return, and to a peremptory mandamus. "It is said," observes WILLIAMS, J., "that, looking at the provisions of the Public Health Act, 1848, (s) and construing them by analogy to those of the Lands Clauses Consolidation Act, the proper course would have been for the applicant himself to have taken steps pursuant to s. 144, and to have got the amount of the compensation fixed by means of the course there prescribed, and then to have brought his action to recover the amount, in which action the question of liability might have been decided; but that involves the necessity, in all cases where there is a doubt whether the party be entitled to compensation, of an expensive inquiry in the first instance, which in the result may prove entirely futile, and we think the question of liability should be first settled by mandamus. Secondly, it is said that the applicant ought to have claimed a particular amount. We are of opinion that there is no necessity for taking such a step. It would not regulate the frame of the mandamus, or the future rights of the parties." (a)

1501. *Effects of laches or delay in app'ying for the writ.*—A party who is entitled to a mandamus to a public board, to compel the making of a rate for the payment of a debt, should apply to the court within a reasonable time after default made. And if there is a prima facie case of laches or delay, the onus is thrown on the applicant of showing that he has not been guilty of such negligence as disentitles him to his remedy. (b) ¹

(s) 11 & 12 Vict. c. 63, s. 144.

(a) Reg. v. Burslem, &c., *ante*.

(b) Reg. v. Hurstbourne Tarrant, 27 Law J., M. C. 214. Reg. v. Halifax

Road Trustees, 12 Q. B. 448. See Worthington v. Hulton, Ringland v. Lowndes, *ante*; and *ib. n. (o)*.

¹ Where parties have acquiesced a year in the proceedings sought to be set aside, the writ will be denied in the absence of a sufficient reason for delay.

The application for a mandamus to a court of quarter-sessions, to compel the hearing of an appeal, must be made in the term next after the hearing of the appeal has been refused, unless special circumstances appear by affidavit to account for the delay to the satisfaction of the court. (c)

1502. *The proceedings upon a mandamus* were first given by the 9 Anne, c. 20, and are the creature of that Act, but they have been further extended by later statutes. (d) The first step to be taken by a party desirous of obtaining a mandamus, is to move the Court of Queen's Bench for a rule to show cause why the writ should not issue, or for a rule absolute in the first instance. (e) By the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 76, it is enacted, that upon application by motion for any writ in the Court of Queen's Bench, the rule may be absolute in the first instance, if the court shall think fit; and the writ may bear teste on the day of its issuing, and may be made returnable forthwith, whether in term or in vacation; but time may be allowed to return it by the court or a judge, with or without terms. It is further enacted, s. 75, that no writ of mandamus issued out of the Court of Queen's Bench shall be invalid by reason of the right of the prosecutor to proceed by action for mandamus under that statute; also (s. 77), that the provisions of the Common Law Procedure Acts, 1852 and 1854, shall, so far as they are applicable, apply to the pleadings and proceedings upon a prerogative writ of mandamus.

1503. *Proceedings by mandamus in respect of corporate offices in boroughs* have been expedited by 6 & 7 Vict. c. 89, s. 5, which enacts, that in all cases of intended application for a mandamus, to proceed to an election of corporate officers, or for a quo warranto against any person claiming to be a corporate officer, the party intending to make the application may give notice in writing, and deliver a copy of the affidavits, and cause may be shown in the first instance; and, if

(c) Reg. v. Richmond (Recorder of), c. 125, s. 68; *post*.
Ell. Bl. & Ell. 255.

(d) 1 Wm. 4, c. 21, s. 3; 17 & 18 Vict. (e) Corner's Crown Practice (MANDAMUS).

People v. Seneca, 2 Wend. (N. Y.) 264; four years; True v. Melwaine, 43 N. H. 503; Wavel v. Lasher, 1 John's Case (N. Y.), 241; People v. Supervisors of Westchester, 12 Barb. (N. Y.) 446; People v. Del. Common Pleas, 2 Wend. (N. Y.) 256
People v. Supervisors of Ulster, 16 Johns. (N. Y.) 59.

no sufficient cause be shown, the rule may be made absolute, and a peremptory writ of mandamus issued, as therein provided.

1504. *Conditions precedent to the issue of the writ.*—To entitle a person to a mandamus, enjoining the performance of some particular act or duty, it must be shown that there has been a distinct demand of that which the person moving for the writ desires to enforce (*f*), and a refusal or withholding of compliance on the part of the defendant; (*g*)¹ but the objection that no sufficient demand and refusal appear must be taken before the merits are discussed. (*h*)

Where a party applies for a mandamus to compel churchwardens to allow the applicant to inspect parish accounts, he must state some special reasons on public grounds for the desired inspection; his right as a parishioner being a mere private right, in respect of which a mandamus will not be granted. (*i*)

1505. *Requisites of the writ.*—If a writ of mandamus command the defendant to do more than he is under a legal obligation to perform, the writ is invalid, and will be quashed. (*k*) And where a mandamus orders several things to be done, and is bad in respect of one of the things commanded, it is bad in toto. (*l*)² If the writ omits a necessary fact, it can not be cured

(*f*) Reg. v. Brist. and Ex. Rail. Co., 4 Q. B. 162; 12 Law J., Q. B. 106.

(*g*) Rex v. Brecknock, &c., Canal Co., 3 Ad. & E. 222. Reg. v. Trustees of Cheadle Highway, 7 Jur. 373. Reg. v. Norwich and Brandon Rail. Co., 3 D. & L. 385.

(*h*) Reg. v. East Co. Rail. Co., 10 Ad. & E. 531.

(*i*) Rex v. Clear, 4 B. & L. 901; Rex v. Smallpiece, 2 Chitt. 288.

(*k*) York and North Mid. Rail. Co. v. Milner, 15 Law J., Q. B. 379. Reg. v. Lond. and South-West. Rail. Co., 17 Law J., Q. B. 326. Reg. v. Ledgard, 1 Q. B. 623. Reg. v. Caledonian Rail. Co., 16 Q. B. 19.

(*l*) Reg. v. Tithe Com., 19 Law J., Q. B. 177.

¹ Leonard v. House, 15 Ga. 473; People v. Minor, 37 Barb. (N. Y.) 466; Com. v. Pittsburgh, 34 Penn. St. 277; State v. Governor, 25 N. J. 331. As a general rule an applicant for a mandamus must show a demand; Alexander v. McDowell, 67 N. C. 330; but where the duty is imperatively imposed by law, as to levy a tax, a mere neglect to perform the duty is sufficient; Columbia Co. v. King, 13 Fla. 451; State v. Hull, 17 Minn. 429; State v. Sabine, 7 Rich. (S. C.) 224.

² If the relator is not entitled to what he demands in the alternative writ, his motion for a peremptory writ should be denied, although it appears that he is entitled to a *portion* of the reliefs demanded. The peremptory writ must follow the alternative. People v. N. Y. Supervisors, 18 How. Pr. (N. Y.) 52; People v. Baker, 35 Barb. (N. Y.) 105. State v. Hastings, 10 Wis. 518.

by the return. (*m*)¹ But a defective statement of a valid claim, if that statement renders it necessary to establish facts, which being established would support the claim to the writ, is cured by verdict, although it might be fatal on demurrer. (*n*)

A writ of mandamus may be questioned by showing that the title set out does not warrant the mandatory part of the writ. Thus, if there is any discretion to be exercised as to the time when a thing is to be done, or if the time or mode of performance is conditional, or dependent upon a contingency, a writ commanding the doing of the thing at once, without giving any discretion, or providing for the contingency, will be defective. (*o*) So where an act of parliament directs one or other of two things to be done, the party who is to do the act has the option of doing which thing he pleases. A writ of mandamus, therefore, founded on the statute, and failing to give the election, is invalid, unless it assigns some sufficient reason why the party is no longer to have his election. (*p*)

The writ may be very general in its terms, showing what ought to be done by the defendants, and what is required to be done by them, but the return to the writ must be particular and minute. (*q*)

A writ of mandamus to a corporation or chartered company, to compel the payment of a sum of money, should show on the face of it that the remedy by way of action or distress, for the recovery of the money, is not available. (*r*)²

(*m*) Reg. v. South-East. Rail. Co., 4 H. L. Ca. 471; 20 Law J., Q. B. 428.

(*n*) Delamere (Lord, v. The Queen, L. R., 2 H. of L. 419.

(*o*) Reg. v. St. Luke's, Chelsea, 31 Law J., Q. B. 50.

(*p*) Reg. v. South-Eastern Rail. Co.,

supra.

(*q*) Reg. v. Southampton Port Commissioners, 1 B. & S. 5; 30 Law J., Q. B. 224; L. R., 4 Eng. & Ir. App. 449.

(*r*) Rex v. Margate Pier Co., 3 B. & Ald. 24. Reg. v. Hull and Selby Rail. Co., *ante*.

¹ No amendment is allowed to cure a defect in an alternative mandamus after the return day; People v. Metropolitan Police Commis., 5 Abb. Pr. (N. Y.) N. S. 241; But see State v. Gibbs, 13 Fla. 55, where it was held that an *alter navive* mandamus may be amended, and Columbia Co. v. King, 13 Fla. 451, where it was held that a *peremptory* mandamus *can not* be amended. In State v. Alderman, 1 Sc. 30, it was held that an alternative mandamus might be amended where the peremptory writ could not issue in the exact terms of the alternative, by striking out immaterial matter.

² In all cases the proceedings, on their face, should show a clear right to the relief demanded, and set forth all the *material* facts, so that they may be admitted or traversed; State v. Hustings, 10 Wis. 518; State v. Elwood, 11 Id. 17; Trustees

1506. Parties to whom the writ is to be directed.—Writs of mandamus must be directed to those, and those only, who are to obey the writ. Therefore, "if the writ be directed to the coroner and sheriff, where it ought to be to one only, it is¹ naught." (*s*) And so it is if it be directed to a corporation in a wrong name; (*t*) but it may be directed either to the corporation in its corporate name or to those who by the constitution of the corporation ought to do the act. (*u*) A mandamus to compel the admission to customary or copyhold estates must be directed to the lord and steward jointly, and not to the steward alone, in order that the interests of the lord may be effectually protected. (*w*) It is at the peril of the person who desires the writ to have it properly directed. (*y*)

1507. Service of the writ may be effected by delivery of a copy of the writ, but the original writ ought to be shown to each party served at the time of the delivery of the copy. (*z*)

1508. Return to the writ.—The first writ of mandamus always concludes with a command of obedience, or cause to be shown to the contrary; (*a*) and the 9 Anne, c. 20, (*b*) requires a return to be made to the first writ. The return is generally

(*s*) Reg. v. Hereford (Mayor, &c., of), 2 Salk. 701.

(*t*) Rex v. Ripon (Mayor of), ib. 433. Rex v. Norwich (Mayor, &c.), 1 Str. 55.

(*u*) Rex v. Abingdon (Mayor, &c.), 1 Ld. Raym. 559.

(*w*) Reg. v. Powell, 1 Q. B. 360.

(*y*) Rex v. Curghey, 2 Burr. 782.

(*z*) Reg. v. Birm. &c. Rail. Co. 1 Ell. & Bl. 293; 22 Law J., Q. B. 195. Corner's Crown Pr., p. 227.

(*a*) Corner's Crown Pr., MANDAMUS.

(*b*) Extended by 1 Wm. 4, c. 21, s. 3, to all writs of mandamus.

v. People, 12 Ill. 248; People v. Hatch, 33 Id. 9. Thus a petition for a mandamus to county commissioners to compel them to declare a person a commissioner of deeds, should aver *affirmatively* that a vacancy existed when the alleged election took place; Rose v. Co. Commrs, 50 Me. 243. In order to warrant the issue of a mandamus, the petition should not only aver that the defendant has omitted a manifest duty, and contain all necessary affirmative allegations, but should also contain an averment that other facts, which would constitute an excuse, do not exist; Hoxie v. Co. Commissioners, 25 Me. 333; State v. Board of Trustees, 4 Nev. 400; People v. Township Board, 14 Mich. 28; Commonwealth Bank v. Canal Commissioners, 10 Wend. (N. Y.) 25.

¹ People v. Judges of Westchester, 4 Cow. (N. Y.) 93; People v. Richey, 19 Ill. 415; People v. Herkimer Common Pleas, 7 Wend. (N. Y.) 536; People v. Essex Common Pleas, 1 How. Pr. (N. Y.) 114. The writ should be served by giving the original writ to the defendant, and if there is more than one defendant, copies should be given to the others, as a part of the command is that the writ shall be returned; State v. Brady, 6 Phil. (Penn.) 121; but it may be served by copy, although the proper way is to deliver the original writ; Hempstead v. Underhill, 20 Ark. 337.

indorsed on the original writ, and professes to be the answer of the parties to whom the writ is directed, who humbly certify, and return to their sovereign lady, the Queen, at the time and place in the writ mentioned, either that they have done what by the said writ they are commanded to do, using generally the very words of the mandatory part of the writ, (*c*) or, if they have not yielded strict or substantial obedience, setting forth the grounds and reasons for their disobedience, which reasons must be fully and carefully specified, and shown to be sufficient in law to excuse or justify such disobedience.

When the writ has been issued to a judge, magistrate, or judicial officer, commanding him to receive, hear, and determine the merits of an information or complaint which he has wrongfully refused to hear, it is a sufficient return, that he has received, heard, and determined, or that he has received, heard, and dismissed, the information or complaint. The court can not, as we have seen, interfere with the decision, however erroneous it may be. (*d*)

The return, being matter of record, need not, when made by a corporation, be under the corporate seal. (*e*)

It is not necessary, in order to support the return, that every part of it should be good; it is sufficient if enough appear to show a good justification, or a good legal reason, why the mandamus should not be obeyed. (*f*) If, therefore, a return is good in part, and bad in part, the good part may be separated from that which is bad. (*g*)¹

(*c*) *Corner's Crown Pr.*, MANDAMUS, T. R. 493. *Rex v. Griffith*, 5 B. & Ald. Appendix. 735. *Rex v. London (Mayor, &c., of)*, 3 B. & Ad. 268.

(*d*) *Reg. v. Mainwaring*, Ell. Bl. & Ell. 474; *ante*.

(*e*) *Rex v. Exeter (Bishop, &c.)*, 1 Ld. Raym. 223.

(*f*) *Rex v. York (Archbishop of)*, 6

(*g*) *Reg. v. New Windsor (Mayor of)*, 7 Q. B. 917. Com. Dig. MANDAMUS.

¹ The answer to a mandamus must respond to all the allegations of the writ; *Gorgas v. Blackburn*, 14 Ohio, 252; and must set forth distinctly all facts essential to excuse the defendant from a performance of the acts sought to be enforced; *Society, &c., v. Com.*, 52 Penn. St. 125; *State v. Avery*, 14 Wis. 122; *People v. White*, 11 Abb. Pr. (N. Y.) 168; if the answer is evasive; *State v. Cincinnati*, 19 Ohio, 252; or not responsive to all the material allegations of the writ, and does not set up a legal excuse, a peremptory mandamus will issue; *Gorgas v. Blackburn*, 14 Ohio, 252; *People v. Collins*, 7 Johns. (N. Y.) 549; *People v. Burrows*, 27 Barb. (N. Y.) 89. All the allegations in the return unless denied by the relator, are taken to be true, but if denied, they must be proved; *People v. Supervisors of Delaware*, 1 How. Pr. (N. Y.) 50. If the defendant moves to quash the writ, the motion is

1509. *The return to a mandamus to restore a dismissed public officer to his office*, must set out all the necessary facts precisely, to show that the party has been removed in a legal and proper manner, and for a legal cause; and, where he has been discharged for misconduct, that he was previously heard in his own defense, or that he was summoned to answer the charge and made default, and that the charge was proved against him. (h)

1510. *Return setting up inability or impossibility of performance—Expiration of statutory power.*—A writ of mandamus supposes the required act to be possible, and to be obligatory when the writ issues. Generally speaking, the writ suggests facts showing the obligation and the possibility of fulfilling it, and a return pursuing this suggestion, and traversing it, is good. Where the alleged obligation is founded on public Acts of Parliament recited in the writ and return, and it appears that the statutory power has expired, the writ of mandamus is bad, and will be quashed. (i) It is, however, no objection to an application for a mandamus to levy a rate, that there are funds to pay the amount required, and therefore that a fresh rate may not be necessary. (k)¹

1511. *Pleas to the return—Traverse of material allegations.*—By 9 Anne, c. 20, s. 2, it is enacted, that every person prosecuting a writ of mandamus may plead to, or traverse, all or any of the material facts contained in the return, to which the person making the return shall apply, take issue, or demur, and such further proceedings shall be had for the determination thereof as might have been had if the person suing the writ had brought his action on the case for a false return; and if any issue be joined on such proceedings, the person suing the writ may try the same as an issue joined in such action on the

(h) *Rex v. Liverpool (Mayor of)*, 2 Burr. 733. *Rex v. Faversham Fish Co.*, 8 T. R. 352. *Rex v. Lyme Regis (Mayor, &c.)*, 1 Doug. 149.

(i) *Reg. v. Lond. and North-West.*

Rail. Co., 16 Q. B. 884. *Reg. v. Ambergate, &c.*, 1 Ell. & Bl. 381.

(k) *Ringland v. Lowndes*, 33 Law J., C. P. 25.

treated as a demurrer and admits the truth of its allegations; *People v. College, &c.*, 7 How. Pr. (N. Y.) 290.

¹ *People v. Commrs. of Fort Edward*, 11 How. Pr. (N. Y.) 29; *People v. Tremain*, 17 Id. 142; *People v. Burrows*, 27 Barb. (N. Y.), 89; *People v. City of Chicago*, 51 Ill. 58; *People v. Stout*, 23 Barb. (N. Y.) 349. A peremptory mandamus may be quashed if it was prematurely, improperly, or unnecessarily issued, or if bad in substance, or if it be impossible or illegal to obey it, and these questions may be raised on a motion to attach for contempt; *Weber v. Zimmermann*, 23 Md. 45.

case would be tried ; and in case a verdict shall be found for the person suing the writ, or judgment be given for him upon demurrer, or by *nil dicit*, or for want of a replication or other pleading, he shall recover his damages and costs in such manner as he might have done in such action on the case, and a peremptory writ of mandamus shall be granted without delay for him for whom judgment shall be given, as might have been done if the return had been adjudged insufficient. And in case judgment shall be given for the person making the return, he shall recover his costs of suit. But it is provided (s. 3), that if any damages shall be recovered by virtue of that act against any persons making such return, they shall not be liable to be sued in any other action for making such return. And the courts are to allow (s. 3) to persons to whom any writ of mandamus may be directed, or to persons who shall sue or prosecute the same, such convenient time to make a return, plead, reply, rejoin, or demur, as shall seem just and reasonable. And the 4 Anne, c. 16, and all statutes of jeofails, are thereby (s. 7) extended to all writs of mandamus and proceedings thereon ; and by 1 Wm. 4, c. 21, s. 3, the several enactments contained in the 9 Anne, c. 20, relating to the return, and the proceedings on such return, and to the recovery of damages and costs, are extended to all writs of mandamus and the proceedings thereon. (l)

When the real object of a proceeding by mandamus is the recovery or enforcement of a civil right, the mandamus is in effect a civil action. Several matters, therefore, may be pleaded to the return, and orders for the inspection of documents will be made, as in any ordinary action. (m)¹

(l) See *Reg. v. Fall*, 1 Q. B. 636. (m) *Reg. v. Ambergate, &c.*, 17 Q. B. 957.

¹ A return that is insufficient because it does not answer the allegations of the writ, or properly meet or avoid them, should not be traversed, because the matter of return should not be put in issue ; *Com. v. Justices*, 2 Va. Cas. 9 ; and such a plea taking issue on an immaterial return is bad ; *State v. Eaton*, 11 Wis. 29 ; if the return is insufficient, the relator may demur ; *Silverthorne v. Warren R. R. Co.*, 33 N. J. 173 ; *Com. v. Commrs. of Allegheny*, 32 Penn. St. 218 ; *People v. Beebe*, 1 Barb. (N. Y.) 379 ; or he may move for a supplementary return ; *People v. Common Pleas*, 9 Wend. (N. Y.) 427 ; and, if the return is evasive, and fails to meet the allegations of the writ, or set forth a legal excuse for not doing the act, a peremptory mandamus will issue ; *State v. Cincinnati*, 19 Ohio, 116. If the relator demurs to the return, he thereby admits its truth, and an issue of law is thus raised ; *People v. Cario*, 50 Ill. 154 ; *People v. Vermillion County*, 47 Ill. 256.

1512. *Statutory protection to certain public officers*, to whom writs of mandamus are directed, is given by 1 Wm. 4, c. 21, s. 4, which recites that writs of mandamus (other than such as relate to the offices and franchises mentioned in 9 Anne, c. 20), are sometimes issued to officers and other persons commanding them to admit to offices, and perform other matters in respect whereof the persons to whom the writs are directed claim no right or interest, or whose functions are merely ministerial in relation to such offices, and that it may be proper that such officers should in certain cases be protected against the payment of damages or costs; wherefore it is enacted, that it shall be lawful for the court to which application is made for the writ of mandamus (other than such as relate to the offices and franchises mentioned in the statute of Anne), to make rules and orders calling not only upon the person to whom the writ may be required to issue, but also upon every other person having or claiming any right or interest in or to the matter of the writ to show cause against the issuing of the writ and payment of the costs of the application, and upon the appearance of such other person in compliance with such rules, or in default of appearance, after service thereof, to exercise such powers and authorities, and make such rules and orders, as may be made under the Interpleader Act, 1 & 2 Wm. 4, c. 58, for giving relief against adverse claims made upon persons having no interest in the subject of such claims; (n) but it is provided, that the return to be made to the writ and issues joined in fact or law upon any traverse thereof, or upon any demurrer, shall be made and joined by, and in the name of, the person to whom the writ is directed; but the same may, if the court so direct, be expressed to be made and joined on behalf of such other person as may be mentioned in such rules; and, in that case, such other person may frame the return, and conduct the subsequent proceedings at his own expense; and, in such case, if any judgment shall be given for or against the party suing the writ, the judgment shall be given against or for the persons on whose behalf the return shall be expressed to be made, and who shall have the like remedy for the recovery of costs, and enforcing the judgment, as the person to whom the writ has been directed would otherwise have had.

(n) See 1 and 2 Wm. 4, c. 58, s. 8.

When the return is made on behalf of a third party under the authority of the statute, the proceedings are not to abate on the death, resignation, or removal from office of the person having made such return, but may be carried on in the name of such person; and if a peremptory writ is awarded, it may be directed to any successor in office or right to such person (s. 5).

After a demurrer to a return made by the party to whom the writ has been delivered, the court will, in the exercise of the powers of this statute, let in another party really interested in the matter to join in making an amended return; (*o*) but the party who seeks to come in must satisfy the court, or a judge at chambers, that there is reason for his claim, and that he is acting bona fide, and is not merely seeking to raise frivolous objections. (*p*)

1513. *Time for taking objections to the writ.*—There are cases where it has been held that, after a return to a mandamus, the court will not allow the validity of the writ to be questioned; but on a concilium, where the whole record is set down for argument, the defendant has a right to object to the writ in matters of substance, as much as a defendant has a right to object to a declaration where the whole record is set out upon demurrer or writ of error after plea, in civil proceedings. (*q*) The question whether the writ does, or does not, upon the face of it, disclose a good legal ground for the issue of it, may be raised at any stage of the proceedings; and the court will, at any time before a peremptory writ of mandamus issues, examine whether the writ is so framed as to give them jurisdiction. (*r*) But where the writ is good upon the face of it, and a return has been made, and an issue thereon tried, the court will not quash the writ on grounds which do not appear on the record, and which might have been shown against making the rule absolute. (*s*)¹

(*o*) Reg. v. Paynter, 14 Law J., M. C. 182.

(*p*) Reg. v. Cheek, 9 Q. B. 947; 16 Law J., M. C. 65.

(*q*) Reg. v. Powell, 1 Q. B. 360.

(*r*) Clarke v. Leicester, &c., Canal Co., 6 Q. B. 902. Rex v. Margate Pier Co., 3 B. & Ald. 224.

(*s*) Reg. v. Stamford (Mayor of), 6 Q. B. 441.

¹ People v. Cairo, 50 Ill. 154; State v. Sabine, 9 Rich. (S. C.) 234; Silver v. The People, 45 Ill. 224; but substantial defects in the writ may be taken advantage of at any time before the peremptory mandamus is awarded; People v. Supervisors of Fulton, 14 Barb. (N. Y.) 52.

1514. *Review of proceedings in mandamus by writ of error.*—By 6 & 7 Vict. c. 67, s. 1, it is enacted, that whenever the person prosecuting a writ of mandamus wishes to object to the validity of the return, he shall do so by way of demurrer to the same, and thereupon the writ and return and the demurrer shall be filed of record, and proceedings taken as upon demurrer to pleadings in personal actions; and the courts shall thereupon adjudge either that the return is valid in law, or that it is not valid; or that the writ of mandamus is not valid; and if they adjudge that the writ is valid, but that the return is not valid, then they shall also by their judgment award that a peremptory writ of mandamus shall issue, which writ may be sued out within four days; and the courts are required by their judgment to award costs to be paid to the party in whose favor they decide.

And whenever any such judgment has been given, or whenever issue in fact or in law has been joined upon the pleadings, and judgment given thereon, any party to the record who thinks himself aggrieved by the judgment may sue out a writ of error to reverse it, and proceedings thereon are to be taken, and costs awarded, as in ordinary cases of writs of error upon judgments. Provision is made for the issue of a peremptory writ of mandamus in case of the reversal of the judgment of the court below; and it is declared that no action shall be prosecuted against any person for anything done in obedience to a peremptory writ of mandamus.

1515. *Damages and costs.*—Wherever a party traversing a return obtains a verdict, he is now, since the passing of the 1 Wm. 4, c. 21, s. 3, entitled to some damages and costs; and if, at the trial of any issue raised on a traverse of any material allegation contained in the return, the jury omit to find damages, the judge who tried the cause may order, from his recollection, the verdict to be entered on the postea for nominal damages, to enable the successful party to recover his costs. (†)

The costs of the application for the writ, independently of the trial of issues of fact raised by traverse or the return, &c., are regulated by the 1 Wm. 4, c. 21, s. 6, which enacts that in all cases of application for a writ of mandamus, the costs of the application, whether the writ shall be granted or refused, and

(†) *Reg. v. Fall*, 1 Q. B. 636. As to costs in error, see *supra*.

also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the court; and the court is authorized to order and direct by whom and to whom the same shall be paid.

1516. *Judgment non obstante veredicto.*—Where the issues raised are altogether upon immaterial points, and the return is virtually and substantially a good return, the court will give judgment for the defendant, notwithstanding the finding of the jury on those immaterial issues for the plaintiff. (*u*)¹

1517. *Action or information for a false return.*—Actions for a false return are maintainable by the party injured or aggrieved thereby, (*w*) unless damages have been recovered by him, under the statute of Anne, against the person making the return, upon a traverse of the facts contained therein, and an issue thereupon raised under the statute. The action must be brought against the party or parties who caused the return to be made. (*y*) It is not maintainable against one who voted against the false return, and was consequently no party to it. (*z*)²

If the matter of the return concerns the public government, and no particular person is so concerned or interested as to be aggrieved or injured thereby, an information may be filed against the particular persons joining in and making the false return. (*a*)

1518. *Attachment for disobedience of peremptory writ of mandamus.*—Objections to the validity of a peremptory writ of mandamus may be taken on a motion for an attachment, and it may be shown that the writ either commands the defendant

(*u*) Reg. v. Darlington School Governors, 6 Q. B. 719.

Raym. 564.

(*w*) Green v. Pope, 1 Ld. Raym. 125.

(*z*) R. v. Pilkington, Carth. 172.

Vaughan v. Lewis, Carth. 227.

(*a*) Surgeons' Company's case, 1 Salk. 374. Rex v. Abingdon (Mayor of), 2

(*y*) Rex v. Ripon (Mayor of), 1 Ld.

Salk. 431.

¹ But where a relator in a mandamus has pleaded to an amended return to an alternative mandamus, he can not subsequently question its sufficiency in law, and if the verdict is against him, judgment *non obstante*, &c., can not be issued; People v. Board of Met. Police, 26 N. Y. 316.

² On motion for a mandamus, the return is taken as true by the court, and the party injured must proceed for a false return, and if it is found false by the jury, he recovers damages equivalent to the injury sustained, and thereupon a peremptory mandamus issues to the defendant to compel him to do his duty; Tallapoosa v. Turner, 21 Ala. 661.

to do more than he is bound to do, or that he is enjoined to do it in some particular mode, where the law gives him an option or discretion in the mode of performance. But no return will be admitted to a peremptory writ of mandamus other than a certificate of perfect obedience and due execution of the writ. (*b*)¹

SECTION II.

OF THE CLAIM TO A WRIT OF MANDAMUS IN AN ACTION AT COMMON LAW.

1519. *Of the union of an action in respect of a private injury with an application for a mandamus.*—By the Common Law Procedure Act, 17 & 18 Vict. c. 125, it is enacted (s. 68), that the plaintiff, in any action in any of the superior courts, except replevin and ejectment, may endorse upon the writ and copy to be served a notice that the plaintiff intends to claim a writ of mandamus, and the plaintiff may thereupon claim in the declaration, either together with any other demands which may now be enforced in any such action, or separately, (*c*) a writ of mandamus commanding the defendant to fulfill any duty in the fulfillment of which the plaintiff is personally interested. The declaration in such action (s. 69), is to set forth sufficient grounds upon which such claim is founded, and that the plaintiff is personally interested therein, and that he sustains, or may sustain, damage by the non-performance of such duty, and that performance thereof has been demanded by him, and refused or neglected. The pleadings and other proceedings in any action in which a writ of mandamus is claimed (s. 70) are to be the same, as nearly as may be, and costs are to be recoverable by either party, as in an ordinary action for the recovery of damages. In case judgment is given for the plaintiff that a mandamus do issue, the court in which such judg-

(*b*) Reg. v. Ledgard, 1 Q. B. 616.

(*c*) See Fotherby v. Metrop. Rail. Co., *post*.

¹ The remedy against a board of supervisors for disobedience of a mandamus is not by an attachment against the board, but against the individual members guilty of contempt. People v. Delaware, 9 Abb. Pr. (N. Y.) N. S. 408.

ment is given may (s. 71), if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, also issue a peremptory writ of mandamus to the defendant, commanding him forthwith to perform the duty to be enforced. The writ need not recite (s. 72) the declaration or other proceedings, or the matter therein stated, but may simply command the performance of the duty, and may, in other respects, be in the form of an ordinary writ of execution, except that it must be directed to the party, and not to the sheriff, and may be issued in term or vacation, and returnable forthwith; and no return thereto, except that of compliance, is to be allowed; but time to return it may, upon sufficient grounds, be allowed by the court or a judge, either with or without terms. An action for a mandamus may be maintained separately, *i. e.*, without the commencement of another action, and it lies whenever a public duty, in the fulfillment of which the plaintiff is interested, is created by statute, whether the plaintiff has sustained damage or not. (*d*)

The writ of mandamus so issued is to have (s. 73) the same force and effect as a peremptory writ of mandamus issued out of the Court of Queen's Bench, and, in case of disobedience, may be enforced by attachment. The court may (s. 74), upon application by the plaintiff, instead of proceeding against the disobedient party by attachment, direct that the act required to be done may be done by the plaintiff, or some other person appointed by the court, at the expense of the defendant; and, upon the act being done, the amount of such expense may be ascertained by the court, either by writ of inquiry or reference to a master, as the court or judge may order; and the court may order payment of the amount of such expenses and costs, and enforce payment thereof by execution.

We have seen that the prerogative writ of mandamus is never granted for the enforcement of a mere private duty, where there is a clear cause of action, and compensation in damages would be an effectual remedy. And the same rule has been held to apply to the action of mandamus; and that where the duty to be performed is nothing more than the ordinary duty springing out of a contract in respect of which an action for damages is the appropriate remedy, the action

(*d*) *Fotherby v. Metrop. Rail. Co., L. R., 2 C. P. 188.*

for a mandamus does not lie. A mandamus, therefore, can not be claimed to make a debtor pay a mere private debt, in respect of which the ordinary remedy by action is available. (e)

1520. *Actions in which a claim for a mandamus may be sustained.*—Wherever, by charter or Act of Parliament, a duty is imposed upon a corporate body or chartered company, in the fulfillment of which the plaintiff is interested, and in respect of the non-fulfilment of which the plaintiff is entitled to maintain an action for damages, he may in the same action claim a mandamus for the fulfillment of the duty. (f) Thus where the plaintiff, in an action for a mandamus against a trading company, set forth the incorporation of the company by letters patent, directing amongst other things that the capital of the company should be divided into shares, and provision made for the registration of the names of all the proprietors of such shares; and showed that a register of shareholders had been established, in conformity with the provisions of the charter; and that the plaintiff was entitled, as the executor of a deceased shareholder, to have his name inserted in such register; averring that he was personally interested, &c., and had sustained damage, and had made a demand on the company to have his name entered, and that they had refused, &c., it was held on demurrer that the plaintiff was entitled to the writ; for wherever there is a duty in the fulfillment of which the plaintiff is personally interested, and which ought to be fulfilled under royal charter, the non-performance being a grievance to an individual, that is a case for an action for a mandamus. (g) It is a case also, as we have seen, where a prerogative writ would be granted independently of the statute. (h)

So, where the plaintiff having set forth that the defendants were a joint-stock company, duly incorporated under the Joint-stock Companies Act, and that the plaintiff was duly entered on the register of shareholders as a holder and proprietor of certain shares, numbered, &c., and that the defendants

(e) *Bush v. Bevan*, 32 Law J., Exch. 54; 1 H. & C. 500. *Benson v. Paul*, 6 Ell. & Bl. 273; 25 Law J., Q. B. 274.

(f) See *Morgan v. Metrop. Rail. Co.*, L. R., 3 C. P. 553.

(g) *Ld. Campbell, Norris v. Ir. Land Co.*, 8 Ell. & Bl. 512; 27 Law J., Q. B.

116. But a company is not bound to register a transfer not in accordance with the statutable form, *Reg. v. Gen. Cem. Co.*, 6 Ell. & Bl. 415; 25 Law J., Q. B. 342. *Copeland v. North-East. Rail. Co.*, 6 Ell. & Bl. 277.

(h) *Ante.*

removed his name from the register, and refused, after demand, to restore it, &c., and claimed damages and a mandamus, it was held that the claim was properly made. (i)

Where the plaintiff, in his declaration against the clerk of a local board of health, set forth that certain improvement commissioners, appointed under a local Act, contracted to pay him a certain sum for certain services towards carrying into effect the purposes of the Act; that the services were rendered, but the commissioners neglected to pay, and that afterwards, by virtue of another Act of Parliament, the duties of the commissioners were transferred to the local board of health; and it was enacted that all debts payable by the commissioners should be satisfied by the local board out of rates they were authorized to levy; and the declaration went on to show that the debt remained unpaid; that the plaintiffs were personally interested in the levying a rate for payment thereof; that they had demanded and been refused payment and a rate, and sustained damage; and they then claimed a mandamus; and the cause went to trial, and the damages were assessed, it was held that the plaintiff was entitled to the mandamus claimed. "The provisions of the Common Law Procedure Act," observes HILL, J., "now enable a plaintiff, in an action for which he might recover judgment, but could not have execution, and would have had to apply for a mandamus, to combine a claim for a mandamus with his action, so that if he succeeds, a mandamus issues as part of the judgment. In such a case, I think the amount of the debt for which the mandamus is ultimately to issue may be ascertained in the action." (k)

Commissioners, or the members of a local board, appointed annually for executing the powers of a local Act of Parliament, are generally a fluctuating body in the nature of a corporation, represented by their clerk, who is the party, as we have seen, to be sued for services rendered them for purposes within the scope of the Act. (l) But for the statute, the commissioners who retain, or order the services to be rendered by, the plaintiff, would be personally liable; but as they are acting for public purposes under statutory authority, with

(i) *Swan v. Brit. Austr. Co.*, 7 H. & N. 604; 2 H. & C. 175. *Ward v. South-East. Rail. Co.*, 29 Law J., Q. B. 177.

(k) *Ward v. Lowndes*, 1 Ell. & Ell. 940; 28 Law J., Q. B. 265; 29 Id. 40.

(l) *Ante*. *Bush v. Martin*, 33 Law J., Exch. 17.

power over a public fund created by the statute, they are generally expressly exempted from personal liability, and the burthen of satisfying and discharging the debts they incur in the execution of the purposes of the Act is thrown upon the fund they are authorized to administer. An action to enforce payment of these debts must, as we have seen, be brought against them in the name of their clerk, and when judgment is obtained against the clerk, the public fund, or the rates, are to be resorted to for its satisfaction, and not the private property of the commissioners. (*m*) If, therefore, after judgment has been recovered against the clerk, a demand is made upon the commissioners for satisfaction and discharge of the judgment debt, and they neglect to provide themselves with funds, or to make the payment, an action for damages may be brought upon the judgment, and the claim for a mandamus conjoined therewith, to compel the levying of a rate and the satisfaction and discharge of the judgment debt. But, in these cases, the old prerogative writ of mandamus would seem to afford as convenient a remedy for enforcing satisfaction of the judgment debt (*n*) as the bringing of a second action for a mandamus. If a second action is brought it must, in many cases, be commenced within six months of the recovery of the judgment; (*o*) and it must appear that the judgment has been recovered against the clerk or secretary of the board in respect of some act or proceeding by the members of the board in the bona fide execution of the statutory powers entrusted to them, so as to exempt them, and their clerk or secretary, from a personal liability; (*p*) for if they have exceeded the powers conferred upon them, and are not protected from personal liability by the statute, they can not charge the debts they incur, or the consequences of their unauthorized proceedings, upon the rates, and a mandamus can not issue to compel them to do what they have no power or authority to do. (*q*)

1521. *Actions in which a claim for a mandamus can not be sustained.*—If, in an action for a mandamus, nothing more appears upon the record than that the action is brought for the

(*m*) Hall v. Taylor, Ell. Bl. & Ell. 107;

27 Law J., Q. B. 311. Kendall v. King,

17 C. B. 483.

(*n*) *Ante*.

(*o*) Burland v. Kingston, &c., Local

Board, *ante*.

(*p*) Southampton, &c., Bridge Co. v. Southampton Local Board, *ante*.

(*q*) Duncan v. Findlater, *ante*. Bush v. Beavan, 32 Law J., Exch. 58.

recovery of a debt incurred by the members of some local board, commissioners, or corporate body, acting in discharge of public duties, or in the exercise of statutory powers, and there is nothing to exclude the personal liability of the defendants, and to show that the ordinary remedy by action would not be available, a claim for a mandamus can not be sustained. Thus, where the plaintiffs in an action for a mandamus set forth that the defendant, as clerk to certain commissioners, for putting into execution a local improvement act, became indebted to the plaintiffs for certain salary due to them for services rendered to the commissioners under the provisions of the Act, upon the retainer and request of the commissioners, and also for work and labor, journeys and attendances, as solicitors for the commissioners upon their retainer, &c., and for fees, &c., money paid, &c., and on an account stated, and that these debts were a charge upon any moneys and funds which might be in the hands of the commissioners, if the commissioners had funds, and if not, then upon a rate leviable under the statute; that the plaintiffs were personally interested, &c.; that they demanded and were refused payment, and sustained damage, &c., and the plaintiffs then claimed a mandamus, it was held, on demurrer, that no right to a mandamus had been shown, for there were various ways in which the commissioners might retain the services of an attorney in matters relating to their official duties, and become personally liable in respect thereof; and there was nothing to show that the debt claimed could not be recovered by the ordinary remedy by way of action of debt. "The mandamus in this case," observes CHANNEL, B., "is to pay out of the rates, or to levy rates for the purpose; it is objected that the writ is bad from being in the alternative; but passing this by, both branches of the alternative assume and imply a legal duty, when the writ of mandamus issued, to pay these claims out of the rates, or levy rates for the purpose; and this without even alleging that the services were rendered to, or on the retainer or request of, the commissioners as such, or for business done in carrying out the purposes of the Act. Assuming the services not to have been in execution of the powers of the Act, then they would not be even payable out of the rates." (r)

(r) *Bush v. Beavan*, 32 Law J., Exch. 60. Some of the passages in the judg-

1522. *Declaration in an action for a mandamus.*—When the mandamus is claimed for the satisfaction and discharge of a pecuniary demand, it must be shown, as we have seen, that it does not constitute a mere private debt, in respect of which the ordinary action of debt would be an available remedy, but that the only mode of obtaining payment is by recourse to a rate, the duty of making and levying which is, by statute or royal charter, imposed upon the defendants. The declaration need not state the precise amount due, as in the case of the prerogative writ of mandamus, to enforce a judgment obtained against an officer of a corporation; but the plaintiff is at liberty to allege the existence of the debt generally, leaving it to the jury to find the precise amount for which the mandamus claimed is to issue, and when that amount is found by them, the mandamus forms part of the judgment in the action. (s)

1523. *The pleadings in the action* are, as previously mentioned, to be the same, as near as may be, as in an ordinary action for the recovery of damages.

1524. *Orders for the rectification of the register of shareholders in joint-stock companies.*—The 25 & 26 Vict. c. 89, s. 35, enables any of the superior courts of law or equity to make orders for the rectification of the register of shareholders of registered joint-stock companies, on the application of persons entered, or omitted to be entered, on the register, or if unnecessary delay takes place in entering on the register the fact of a person having ceased to be a member, (t) and to decide on the title of the applicant to have his name entered on, or erased from, the register; but when once a person has been put on the register, the company can not erase his name therefrom, except at the instance of a party having a better title, or by showing that the registration is a nullity, by reason of fraud, misrepresentation, or forgery. (u) The courts will not exercise

ment in this case do not appear to be reconcilable with the judgment of the Court of Queen's Bench, in narrowing the operation of ss. 69, 70, and 71 of the Common Law Procedure Act, 17 & 18 Vict. c. 125, *ante*. Ward v. Lowndes, 11 L. & Ell. 940; 28 Law J., Q. B. 265; *q.*

(s) Ward v. Lowndes, 1 Ell. & Ell. 940; see *ante*.

(t) See Lowe's case, L. R., 9 Eq. Ca. 589.

(u) Swan, *Ex parte*, 7 C. B., N. S. 400; 30 Law J., C. P. 131. Addison on Contracts, 6th ed., pp. 131-134.

the powers given by this section, except in cases which are clear and free from complication. (*v*)

Most of the applications for the rectification of the registers under the above section take place on the winding up of a company, (*y*) and in deciding them the court will take into consideration who is the applicant, whether the official liquidator, as the representative of the company, or the transferor of shares, the transfer of which was not registered before the commencement of the winding up. (*z*) The directors of a company have no discretionary power, independently of any power expressly given them by the articles of association, to refuse to register a transfer which has been bona fide made. Where, therefore, a transferee gave an address at which he was only an occasional visitor, it was held that the directors were bound to register the transfer, although the company was then in difficulties, the transferee a person of small means, and the shares were sold by the transferor in order to get rid of his liability. (*a*) Where, however, a discretion is given to the directors by the articles of association, a transferor can not claim to have his name removed from the register under the above section, on the ground of unnecessary delay, unless the transferee be a responsible person. (*b*) And there is no duty, it seems, on the part of a company to communicate a refusal to register to the transferor. (*c*)

"We must not," says KELLY, C. B., "exceed the powers conferred upon us by this section." An application, therefore, by a person to have his name removed from the register has been refused, as not coming within the terms of the section, although it has been decided in an action by the company against him, that he was not liable to calls, on the ground that the company could not lawfully commence business without having passed a certain resolution, which they had not passed. (*d*)

(*v*) *Re* Heaton Steel and Iron Co., Simpson's case, L. R., 9 Eq. Ca. 91.

(*y*) Musgrave's case, L. R., 5 Eq. Ca. 193. Sahlgreen's case, L. R., 3 Ch. App. 323. *Re* Bank of Hindustan, China, and Japan, *Ex parte* Kintrea, L. R., 5 Ch. App. 95. As to such applications by an infant, see Hart's case, L. R., 6 Eq. Ca. 512. Lumsden's case, L. R., 4 Ch. App. 31.

(*z*) Sichell's case, L. R., 3 Ch. App. 119.

(*a*) Weston's case, L. R., 4 Ch. App. 20; *Id*, 6 Eq. Ca. 238.

(*b*) Shipman's case, L. R., 5 Eq. Ca. 219. And see Holden's case, L. R., 8 Eq. Ca. 444.

(*c*) Gustard's case, L. R., 8 Eq. Ca. 438; 38 L. J., Ch. 610.

(*d*) *Ex parte* Ward, 37 Law J., Exch. 83.

Where shares belonging to a person have been transferred by a forged transfer, the real owner may under the above section obtain the restoration of his name to the register; (*e*) and the company which has registered the forged transfer, and which, by giving certificates to the forger, has thus enabled him to hold himself out to the world as the owner of the shares, is estopped from denying its liability to an innocent purchaser for value, who has, in reliance upon such certificate, purchased the shares from the forger, and will be liable to pay to such purchaser, as damages, the value of the shares at the time it first refused to recognize him as a shareholder, with interest at four per cent. (*f*)

(*e*) Or he may file a bill in Chancery; (*f*) *Re* Bahia and San Francisco Rail.
Johnson v. Renton, L. R., 9 Eq. Ca. 181. Co., *ante*.

INDEX OF CASES.

- Aaron v. Alexander, ii. 149, 563.
 Abbot v. Weekly, i. 157.
 Abbott v. Godoy, ii. 506.
 v. Macfie, i. 40, 609.
 Aberaman Iron Works v. Wickens, ii.
 417, 427.
 Aberdeen Arc. Co. v. Sutter, i. 514.
 Abernethy v. Hutchinson, i. 21, ii. 688.
 Aberystwith Pier Co. v. Cooper, ii. 570.
 Abington v. Lipscomb, i. 500.
 Abley v. Dale, ii. 155, 667.
 Abraham v. Reynolds, i. 608.
 Abrahams v. London (Lord Mayor, &c.,
 of), ii. 687.
 Absor v. French, i. 323, 441.
 Ackland v. Paynter, ii. 130.
 Ackroyd v. Smith, i. 151.
 Acton v. Blundell, i. 987, 109.
 Adam v. Bristol, ii. 536.
 Adams v. Adams, ii. 510.
 v. Andrews, i. 453.
 v. Bafeald, ii. 511.
 v. Broughton, i. 594.
 v. Cheverel, ii. 537.
 v. Crane, i. 796.
 v. Gt. West. Rail. Co., ii. 567.
 v. Lanc. and Yorks. Rail. i. 609,
 637.
 Adamson v. Jarvis, ii. 400, 410, 430, 471.
 Addison v. Overend, i. 548.
 Adlam v. Colthurst, i. 408.
 Aga Kurboolie Mahomed, ii. 120.
 Agra Bank, *Ex parte, Re Worcester*, i.
 554.
 Agra, The, and The Elizabeth Jenkins,
 i. 597.
- Ainsworth v. Walmsley, ii. 472.
 Aitkenhead v. Blades, i. 387.
 Albert (Prince) v. Strange, i. 21, ii. 688.
 Alderson v. Davenport, ii. 118.
 Aldred's case, i. 10, 235.
 Aldred v. Constable, i. 497.
 Aldridge v. Gt. West. Rail. Co., i. 368,
 374, 729, 738.
 Aldworth v. Stewart, ii. 49.
 Alexander v. Alexander, ii. 479.
 v. Gibson, ii. 453.
 v. Jones, ii. 570.
 v. N. E. Rail. Co., ii. 364,
 386.
 v. Southey, i. 502.
 Alford v. Vickery, i. 782.
 Alfred v. Farlow, ii. 343, 392.
 Allan v. Gomme, i. 455.
 Allardice v. Robertson, ii. 359.
 Allday v. Gt. West. Rail. Co., i. 731.
 Allen, *Ex parte*, i. 510.
 v. Allen, ii. 489.
 v. Bonnett, i. 527.
 v. Clark, i. 616.
 v. Darcy, ii. 489.
 v. Flicker, i. 813.
 v. Hayward, i. 303, ii. 261, 293.
 v. L. and S. W. Rail. ii. 42.
 v. Smith, i. 669, 733.
 v. Walker, i. 394, 433, ii. 9.
 v. Wright, ii. 18.
 Alleston v. Moor, ii. 350.
 Allison, *In re*, ii. 206, 220.
 Allsop v. Allsop, ii. 648.
 Allwood v. Heywood, i. 516.
 Alsager v. Close, i. 505, 559.

- Alston v. Grant, i. 239.
 v. Scales, i. 426, 473.
 Alton v. Mid. Rail. Co., ii. 512.
 Amalia, The, i. 596.
 Amann v. Damm, ii. 328, 357.
 Ambergate, &c., Rail. Co., v. Mid. Rail.
 Co., i. 819.
 Amies v. Stevens, i. 747.
 Amory v. Brown, i. 88.
 Amys v. Creed, i. 287.
 Ancaster v. Milling, i. 452, 461.
 Anderson, *Ex parte*, ii. 689.
 v. Buckton, i. 10, 471.
 v. Mid. Rail. Co., i. 781, 784.
 v. Passman, i. 702.
 v. Smith, i. 696.
 Andrew, *Re*, i. 681.
 v. Boughy, ii. 588.
 Andrews v. Askey, ii. 520.
 v. Buckton, i. 44.
 v. Chapman, ii. 335.
 v. Dixon, ii. 132, 157.
 v. Elliott, ii. 578.
 v. Marris, ii. 106, 111, 159.
 Anglo-Danubian Co. v. Rogerson, ii.
 68.
 Anichini v. Anichini, 190.
 Annapolis, The, i. 594.
 Anne and Mary, The, i. 622.
 Ann Elliott, In the goods of, ii. 476.
 Anon., 3 Atk. ii. 99.
 2 Chitt. ii. 732.
 2 Chitt. ii. 724.
 Cro. Eliz. i. 365.
 2 Dick. i. 680.
 Dyer, pl. i. 44.
 cited 16 East, ii. 606.
 Keilw. 98, pl. 4, i. 146.
 Lofft, 842, i. 121, ii. 415.
 6 Mod. ii. 25, 78,
 7 Mod. ii. 53, 121.
 11 Mod. i. 146.
 12 Mod. ii. 701.
 Poph., i. 511.
 2 Rolle's Rep., i. 418.
 1 Salk, ii. 180.
 2 Sim., N. S., ii. 495.
 Skin., i. 56.
 2 Str., ii. 739.
 2 Swanst., ii. 393.
 cited 4 Taunt., ii. 442.
 Anon. 3 Wils., i. 391.
 v. Moor, 823.
 v. Sabine, i. 52.
 Anquez v. Anquez, ii. 479.
 Ansett v. Marshall, ii. 680.
 Anthony v. Brecon Markets Co., i. 239,
 v. Haney, i. 456.
 Arbouin v. Anderson, i. 506.
 Arcedeckne v. Kelk, i. 226, 227.
 Archer v. Bennett, i. 135.
 v. James, ii. 677.
 v. Williams, i. 702, 704.
 Arden v. Goodacre, ii. 166.
 Argentina, The, i. 522.
 Aris v. Orchard, ii. 570.
 Arkwright v. Gell, i. 179, 184, 139.
 Arlett v. Ellis, i. 160.
 Armistead v. White or Wilde, i. 754,
 760.
 Armory v. Delamirie, i. 512, 560, 699.
 Armsworth v. S. E. Rail Co., i. 638.
 Armytage v. Haley, ii. 656.
 Arnison, *Ex parte*, i. 801, 813.
 Arnold v. Hamel, ii. 233.
 v. Blaker, i. 258.
 Arthington v. Fawkes, i. 229.
 Arthy v. Coleman, ii. 262.
 Arundell v. Tregono, ii. 87.
 v. White, ii. 88.
 Ash v. Dawnay, ii. 127.
 Ashbury, *Ex parte*, i. 363.
 Ashby v. Harris, i. 16.
 v. White, i. 15, 16, 50, 51, 58.
 Ashley v. Harrison, i. 13, 210, 592,
 ii. 384, 580.
 Ashley's case, ii. 413.
 Ashmore v. Hardy, i. 557.
 Ashton, *In re*, i. 537.
 v. Blackshaw, i. 535.
 Ashworth v. Heyworth, i. 26.
 v. Stanwix, i. 276, 605, 608.
 Aslin v. Parker, i. 474.
 Assop v. Yates, i. 604.
 Astley v. Younge, ii. 319.
 Aston v. Aston, i. 346.
 v. Heaven, i. 584, 631.
 v. Perkes, ii. 586.
 Atkins v. Kilby, ii. 224, 237.
 v. Owen, i. 505.
 Atkinson v. Marshall, i. 504.
 v. Matteson, ii. 606.

- Atkinson v. Newcastle and Gateshead**
 Waterworks, i. 68.
 v. Raleigh, ii. 87.
 v. Warne, ii. 55.
- Attack v. Bramwell**, i. 387, 481, 804, 815, 839, 840.
- Attersoll v. Stevens**, i. 363, 472.
- Att.-Gen. v. Birmingham (Borough of)**,
 i. 315, 317, ii. 267, 298.
 v. Bradford Canal, i. 315.
 v. Cambridge Gas Co., i. 318.
 v. Chambers, i. 172, 410.
 v. Cleaver, i. 243, 315.
 v. Colney Hatch Asylum, i. 316.
 v. Dakin, ii. 130.
 v. Doughty, io.
 v. Ely, &c., Rail. Co., ii. 299.
 v. Forbes, i. 318.
 v. Gee, i. 316.
 v. Hallett, i. 476.
 v. Hatton, ii. 653.
 v. Jones, i. 172, 410.
 v. Leeds (Corporation of), ii. 268.
 v. Lonsdale (Earl of), i. 412.
 v. Luton Local Board, ii. 267.
 v. Mathias, i. 157.
 v. Metrop. Board, &c., ii. 298.
 v. Mid. Kent. Rail. Co., ii. 300.
 v. Nichol, i. 119.
 v. Norwich (Mayor of), ii. 263.
 v. Rees, i. 414.
 v. Richmond, i. 315.
 v. Sheffield Gas. Co., i. 318.
 v. Southampton Corp., i. 318.
 v. Thames Conservators, ii. 686.
 v. United Kingdom Tel. Co., i. 121, 318, ii. 691.
 v. West Hartlepool Commissioners, ii. 300.
 of New South Wales v. Macpherson, ii. 104.
- Attwood v. Ernest**, i. 691.
- Attwood v. Monger**, ii. 80.
- Aubrey v. Fisher**, i. 343.
- Augustein v. Challis**, ii. 162, 163, 608.
- Austin v. Dowling**, ii. 571.
 v. Great Western Rail. Co., i. 576, ii. 528.
 v. Mills, ii. 594.
- Austria (Emperor of) v. Day**, ii. 470.
- Avanzo v. Mudie**, i. 69.
- Avery v. Cheslyn**, i. 359.
- Avila v. Avila**, ii. 485.
- Ayles v. S. East. Rail. Co.**, i. 578.
- Ayling v. Whicher**, ii. 533.
- Ayre v. Craven**, ii. 342, 350, 366.
- Baboneau v. Farrell**, ii. 379.
- Bach v. Meats**, i. 802.
- Back v. Stacey**, i. 221, 226.
- Backhouse v. Bonomi**, i. 101, 119, 217.
 v. Harrison, i. 506.
- Bacon v. Bacon**, ii. 494.
 v. Jones, ii. 687, 690.
 v. Smith, i. 372, ii. 535.
- Baddeley v. Denton**, ii. 709.
- Badger v. Ford**, i. 205.
 v. South York. Rail. Co., i. 417.
- Badkin v. Powell**, i. 821.
- Bagge v. Mawby**, i. 783, 807.
- Bagg's Case**, ii. 734.
- Baglehole v. Walters**, ii. 450.
- Bagnall v. London and N. W. Rail. Co.**,
 i. 145, ii. 240, 248, 282, 286, 643.
- Bagot v. Bagot**, i. 343, 345.
 (Lord) v. Williams, ii. 594.
- Bagshaw v. Seymour**.
- Bagueley v. Hawley**, ii. 430.
- Bahia and San Francisco Rail. Co.**, *Re*,
 ii. 624, 765.
- Bail v. Mellor**, i. 805, 827.
- Bailey's Case**, i. 200, ii. 219.
- Bailey, Ex parte**, ii. 495, 501.
 v. Appleyard, i. 192.
 v. Bidwell, i. 505, 506, 524.
 v. Birtles, ii. 559.
 v. Hobson, i. 351, 380.
 v. Merrell, i. 48.
 v. Stephens, i. 151, 163, 178, 439.
 v. Sweeting, i. 724.
- Baily v. Merrell**, ii. 415.
- Bain v. Fothergill**, i. 29.
- Baird v. Fortune**, i. 207.
- v. Neilson**, i. 88.

- Baird v. Williamson, i. 111.
 Baker v. ii. 533.
 v. Brown, ii. 653.
 v. Lond. and S. W. Rail. Co., ii. 588.
 v. Morfue, ii. 350.
 v. Pierce, ii. 343.
 v. Wait, ii. 575.
 v. Webberly, i. 44.
 Balch v. Symes, i. 680.
 Baldwin v. Cole, i. 496, 499.
 v. Elphinston, ii. 367.
 Baldwyn v. Girries, ii. 653.
 Ball v. Ball, ii. 498.
 v. Herbert, i. 140.
 Ballard v. Dyson, i. 220.
 Ballinger v. Ferris, ii. 34.
 Balls v. Metrop. Board of Works, ii. 679.
 Banfield v. Massey, ii. 523.
 Bamford v. Turnley, i. 240, 242.
 Bancroft v. Mitchell.
 Bank of Bengal v. Macleod, i. 524.
 v. Fagan, i. 524.
 Bank of Ireland v. Trustees of Evan's Charity, i. 41, 42.
 Bank of Hindustan, *Re*, i. 680, ii. 764.
 Bank of Upper Canada v. Bradshaw, i. 619.
 Bankar. v. Houghton, i. 317.
 v. Tennent, i. 224.
 Banks v. Allen, ii. 250.
 v. Bebbbeck, ii. 275.
 Bannister v. Hyde, i. 859.
 Banque de Credit Commercial v. de Gas, ii. 706.
 Barber v. Lesiter, i. 58, ii. 64.
 v. Nottingham and Grantham Rail. Co., ii. 244, 284.
 v. Rollinson, ii. 45, 234.
 v. Walduck, i. 80.
 v. Whiteley, i. 126, 390.
 Barclay, *Ex parte*, i. 532.
 Barker v. Braham, ii. 41, 150.
 v. Richardson, i. 195.
 Barley v. Walford, ii. 403, 465.
 Barlow, *In re*, ii. 728, 737, 738.
 v. Rhodes, i. 207.
 Barnabas v. Traunter, ii. 353.
 Barnardiston v. Chapman, i. 507.
 Barnes v. Barnes, ii. 486, 493, 494.
 Barnes v. Holloway, ii. 378.
 v. Hunt, i. 433, 453.
 v. Marshall, ii. 705.
 v. Prudlin, ii. 369.
 v. Ward, i. 257, 282.
 Barnett v. Allen, i. 12, ii. 343, 381.
 v. Brandao, i. 679.
 v. Crystal Palace Co., i. 500.
 v. Guildford (Earl), i. 423, 449, 475.
 Barnewell v. Williams, i. 697.
 Barraclough v. Johnson, i. 322, 324.
 Barratt v. Collins, ii. 392, 363, 546.
 Barrett v. Long, ii. 367, 373.
 Barrington v. Turner, i. 481, 554, 559.
 Barrington's Case, i. 153.
 Barrow v. Arnaud, i. 702, 703.
 v. Bell, i. 542.
 Barry v. Arnaud, i. 30.
 v. Bebbington, ii. 617.
 v. Croskey, ii. 398, 405, 411, 437, 454.
 Bartholomew v. Stephens, ii. 611, 680.
 Bartlett v. Baker, i. 264, 628.
 v. Wells, ii. 442.
 Barton v. Bricknell, ii. 228.
 v. Brown, i. 553.
 v. Gainer, i. 698.
 v. Gill, ii. 145.
 Barton Hill Coal Co., v. Reid, i. 279, 604, 608.
 Bartram v. Payne, i. 539.
 Barwell v. Adkins, ii. 382.
 v. Winterstoke, i. 422.
 Barwick v. Eng. Joint St. Bank, ii. 438.
 Basébé v. Mathews, ii. 87.
 Basham v. Lumley, ii. 592.
 Basset v. Maynard, i. 152.
 Bassett, *Ex parte*, ii. 730.
 v. Mitchell, i. 453.
 Basten v. Carew, ii. 186, 207.
 Bastow & Co., *Re*, ii. 131.
 Batchelor v. Vyse, ii. 136.
 Bate v. Hill, ii. 523.
 Bateman, *Re*, ii. 695, 707.
 v. Bluck, i. 292, 325, 326.
 v. Farnsworth, ii. 132.
 v. Hotchkin, i. 343.
 Baten's Case, i. 233.
 Bates v. Pilling, ii. 156, 555.
 v. Wingfield, ii. 136.

- Bateson v. Green**, i. 167.
Bather v. Day, i. 760.
Batson v. Donovan, i. 38, 719, ii. 449.
Batten v. Butter, i. 611.
Batterbury v. Vyse, ii. 456.
Battishill v. Reed, i. 193, 196, 204, 212, 224, 314.
Batty v. Hill, ii. 467.
Bawden v. Bawden, ii. 487.
Bax v. Jones, ii. 37.
Baxendale, In re, i. 776.
 v. **Gt. East. Rail. Co.**, i. 722, 728.
 v. **Gt. West. Rail. Co.**, i. 712, 745, 776.
 v. **Hart**, i. 723.
 v. **Lond. and S. W.**, i. 745, ii. 678.
 v. **McMurray**, i. 183.
 v. **North Devon Rail. Co.**, i. 776.
Baxter v. Taylor, i. 181, 427, 430.
Bayley v. Wolverhampton Water Works Co., ii. 256, 294.
Baylis v. Baylis, ii. 488.
 v. **Lawrence**, ii. 390, 391.
 v. **Le Gros**, ii. 693.
 v. **Usher**, i. 806, 836.
Bayliss v. Fisher, i. 559.
Baynes v. Brewster, ii. 22.
Bazeley v. Forder, ii. 501.
Beachey v. Sides, ii. 33, 290.
Beadel v. Perry, i. 227.
Beadell v. East Co. Rail. Co., i. 776.
Beal, Ex parte, i. 77.
 v. **South Devon Rail. Co.**, i. 731.
Bealey v. Shaw, i. 183, 248.
Beard v. Hine, ii. 704.
 v. **Knight**, ii. 148.
Beardmore v. Tredwell, i. 121, 242.
Beasley v. Clarke, i. 443.
Beatson v. Skene, ii. 357.
Beaty v. Gibbons, i. 545.
Beauchamp v. Croft, ii. 78, 335.
 v. **(Ld.) v. Gt. West. Rail. Co.**, ii. 287.
 v. **Powley**, ii. 666.
Beauford (D. of) v. Bates,
 v. **Crawshay**, ii. 631.
 v. **Mayor, &c., of Swansea**, i. 409.
Beauford (D. of) v. Patrick, i. 131.
Beaulieu v. Finglam, i. 366.
Beavan v. Beavan, ii. 488.
 v. **Delahay**, i. 782, 788.
Beaver v. Mayor of Manchester, i. 437, ii. 296.
Becher v. Gt. East Rail., ii. 528.
Beck v. Denbigh, i. 803.
 v. **Dyson**, i. 312.
 v. **Rebow**, i. 359.
Beckervaise v. Gt. West. Rail., i. 574.
Beckett v. Mid. Rail. Co., ii. 277, 278, 284.
Beckford v. Hood, i. 58, 67, 68, 71.
 v. **Montague**, ii. 162.
Beckwith v. Corral, i. 507.
 v. **Philby**, ii. 15, 18, 50.
 v. **Shoredike**, i. 392.
Bedford v. Bagshaw, ii. 405, 411, 457.
 v. **Hunt**, i. 90.
 v. **McKowl**, ii. 521.
Bedingfield v. Onslow, i. 113, 427, 472.
Beechey v. Sides, ii. 290.
Beeston v. Weate, i. 182.
Behn v. Kemble, ii. 398.
Behrens v. Gt. North. Rail. Co., i. 723, 726.
Belcher v. Bellamy, i. 532, 536.
 v. **Capper**, i. 537.
Belfast and Ballymena Rail. Co. v. Keys, i. 741.
Bell v. Byrne, ii. 378.
 v. **Chaplain**, i. 765.
 v. **Mid. Rail. Co.**, i. 22, ii. 646.
 v. **Oakley**, ii. 223.
 v. **Parke**, ii. 327.
 v. **Stone**, ii. 309.
 v. **Twentyman**, i. 235, 300.
 v. **Walker**, ii. 688.
 v. **Wardell**, i. 157, 454.
 v. **Wilson**, i. 141.
Bellamy v. Burch, ii. 350.
Bellew v. Langdon, i. 167.
Bellingay v. Bellingay, ii. 510.
Bellingham v. Clark, ii. 564.
Benest v. Pipon, i. 174.
Bendfield v. Solomons, ii. 543.
Bengal, The, ii. 576.
 (Bank of) v. Macleod, i. 524.
 v. **Fagan**, i. 524.
Bennet's Case, ii. 135.
Bennett v. Allcott, ii. 520.

- Bennett v. Bayes**, i. 790, ii. 555.
 v. Bennett, ii. 389.
 v. Deacon, ii. 327.
 v. Lond. and N. W. Rail. Co.,
 ii. 660.
 v. Man., Sheff., and Linc. Rail.
 Co., i. 777.
 v. Mellor, i. 755.
 v. Reeve, i. 161.
 v. Robins, i. 788.
 v. Thompson, ii. 670.
Bennison v. Cartwright, i. 191.
Benson v. Chester, i. 164.
 v. Frederick, ii. 647.
 v. Paul, ii. 759.
Bent v. Bent, ii. 494, 510.
Berkeley v. Earl of Pembroke, ii. 634.
Bermondsey Vestry v. Brown, i. 327, 328.
 v. Ramsey, i. 66.
Bernstein v. Baxendale, i. 724, 725.
Berresford v. Geddes, ii. 629.
Berridge v. Ward, i. 415.
Berrie v. Howitt, i. 683.
Berriman v. Peacock, i. 417.
Berry v. Heard, i. 546.
Berryman v. Wise, ii. 385.
Berthon v. Cartwright, ii. 511.
Bertie v. Beaumont, i. 213, 399, 547.
Berton v. Lawrence, ii. 157.
Bessant v. Gt. West. Rail. Co., i. 269.
Bessell v. Wilson, ii. 227.
Bessey v. Wyndham, ii. 163.
Best v. Drake, i. 476.
 v. Hayes, i. 693.
Beta, The, i. 596.
Betts v. De Vitre, i. 48, ii. 685.
 v. Gallais, ii. 685.
 v. Neilson, i. 81, 86, 89.
 v. Thompson, i. 160, 229.
 v. Willmott, i. 88, ii. 688.
Bevan v. Waters, i. 670.
Bewick v. Whitfield, i. 344, 511.
Bibbey v. Carter, i. 115, 217.
Bickett v. Morris, i. 107, 412.
Bickford v. Darcy, i. 613.
 v. Skewes, i. 85.
Biddle v. Bond, i. 504, 696, 700.
Biddulph v. St. George's Vestry, ii. 297.
Biederman v. Stone, i. 29.
Biggins v. Goode, i. 840.
Biggs v. Mitchell, i. 319.
Biglin v. Wylie, i. 333.
Bignoll v. Buzzard, ii. 310.
 v. Clarke, i. 820.
Bignold v. Waterhouse, i. 770.
Bilbao, The, ii. 576.
Bilbee v. Lond. and Bright. Rail. Co., i.
 579.
Billiter v. Young, i. 497.
Bills v. Smith, i. 527.
Binckes v. Pash, i. 202.
Binks v. S. Yorkshire and River Dun
 Co., i. 253, 257, 275.
Binns v. Pigot, i. 762.
Birch, Ex parte, ii. 695.
 v. Wright, i. 474.
Birchley's Case, ii. 350.
Birch-Wolfe v. Birch, i. 379.
Bird, Ex parte, ii. 723.
 v. Elwes, i. 288.
 v. Gt. Eastern Rail. Co., ii. 275.
 v. Gt. Northern Rail. Co., i. 579.
 v. Hollrook, i. 250.
 v. Jones, ii. 14.
 v. Peagram, ii. 533.
 v. Randall, ii. 593.
Bird v. Relph, ii. 560.
Birket v. Whitehaven Junction Rail
 Co., i. 271, 624, 767.
 v. Willan, i. 736.
Birks v. Silverwood, ii. 575.
Birley v. Salford, i. 421.
Birmingham Canal Co. v. Lloyd, ii. 691.
 Churchwardens v. Shaw, ii.
 211, 228.
 Gas Co., Ex parte, i. 526.
Birt v. Barlow, ii. 506.
Bishop v. Bryant, i. 812, 829.
 v. Trustees of Bedford Charity,
 i. 247, 253, 257, 266, 301, 306,
 310.
Bissil v. Williamson, ii. 591.
Black v. Baxendale, i. 735, 773.
Blackborn v. Greaves, i. 826.
Blackborne v. Blackborne, ii. 501.
Blackburn, Ex parte, i. 528.
 (Mayor, &c., of) *v. Parkinson*,
 ii. 274.
Blackett v. Bradley, i. 159.
Blackham v. Pugh, ii. 328.
Blackman v. Simmons, i. 285.
Blackmore, Ex parte, ii. 728.

- Blades v. Arundel, i. 15, ii. 130.
 v. Higgs, i. 15, 456, 513, 545.
- Blagg v. Sturt, ii. 323, 334.
- Blagrove v. Bristol Waterworks Co., ii. 248, 286, 534.
- Blake v. Barnard, ii. 3.
 v. Done, ii. 566, 629.
 v. Gt. Western Rail. Co., i. 738.
 v. Layton, ii. 511.
 v. Midland Rail. Co., i. 638.
 v. Nicholson, i. 670, 677.
 v. Peters, i. 346.
 v. Thirst, i. 303, 628.
- Blakemore v. Br. and Ex. Rail. Co., i. 10, 27, 35, 652, ii. 451, 528.
- Blanchard v. Bridges, i. 149, 190.
 v. Hill, ii. 471.
- Blanchenay v. Burton, ii. 144.
- Bland v. Bland, ii. 479.
 v. Lipscombe, i. 157.
- Blank v. Newcomb, ii. 701.
- Blaymire v. Haley, ii. 515.
- Bleaden v. Hancock, i. 671.
- Blenkiron v. Gt. Central Gas Co., i. 370.
- Blewett v. Jenkins, i. 159.
- Blewitt v. Hill, i. 15, 48.
 v. Tregoning, i. 129, 157.
- Bliss v. Hall, i. 234, 243.
- Blisset's Case, ii. 445.
- Blofield v. Payne, i. 17, ii. 455.
- Blood v. Keller, i. 199.
- Bloodworth v. Gray, ii. 347.
- Bloxam v. Elsee, i. 80, 87.
 v. Hubbard, i. 624.
 v. Metropolitan Rail. Co., ii. 687.
 v. Sanders, i. 519.
- Blundell v. Catterall, i. 169.
- Blunden v. Desert, i. 680.
- Blunt v. Beaumont, ii. 54.
- Blyth v. Birm. Water Co., i. 633.
- Blythe v. Topham, i. 257.
- Blything Union v. Warton, i. 288.
- Boardman v. Boardman, ii. 482, 502.
 v. Sill, i. 674.
- Bock v. Gorrisen, i. 676, 678.
- Bode (Baron de), *In re*, ii. 732.
- Bodley v. Reynolds, i. 565.
- Bogg v. Midland Rail. Co., ii. 274, 276.
 v. Pearse, ii. 744.
- Boggett v. Frier, ii. 535.
- Bogue v. Houlston, i. 76.
- Bohn v. Bogue, i. 69.
- Bolch v. Smith, i. 278.
- Bolland, *Ex parte*, i. 528.
- Bolton (Ld.) v. Tomlin, i. 838.
 v. Lanc. and York. Rail., i. 669.
- Bond v. Downton, i. 233.
- Bonomi v. Backhouse, i. 16, 20, 93, 101, 118, 217, ii. 58, 290, 599.
- Bonsey v. Wordsworth, ii. 570.
- Boorman v. Brown, ii. 527.
- Boosey v. Davidson, ii. 609.
 v. Wood, ii. 590.
- Booth v. Clive, ii. 33, 35, 150.
 v. Taylor, ii. 693.
- Boreham v. Boreham, ii. 486.
- Borries v. Hutchinson, i. 775.
- Borrodaile v. Brunton, ii. 463.
- Borrows v. Ellison, i. 404.
- Bos v. Helsham, ii. 427.
- Boss v. Litton, i. 584.
- Bostock v. Bostock, ii. 482, 483.
 v. Floyer, ii. 438.
 v. N. Staff. Rail. Co., ii. 299, 687.
- Boulding v. Tyler, ii. 668.
- Boulter v. Peplow, i. 838.
- Boulton's Case, i. 392.
- Boulton, *Ex parte*, i. 534.
 v. Bull, i. 81.
 v. Crowther, ii. 241, 252, 552.
 v. Reynolds, i. 811.
 v. Watt, i. 84.
- Bourke v. Warren, ii. 378.
- Bourne v. Alcock, ii. 673.
 v. Fosbrooke, i. 557, 700.
 v. Gatliffe, i. 737.
 v. Liverpool (Mayor of), ii. 281.
- Bovill v. Crate, ii. 690.
 v. Finch, i. 79.
 v. Goodier, ii. 688.
 v. Hitchcock, ii. 692.
- Bowditch v. Balchin, ii. 15.
 v. Wakefield Local Board, i. 332.
- Bowen v. Evans, ii. 714.
- Bower v. Hill, i. 16, 210, 220, 223.
- Bowes v. Foster, i. 520, 558.
- Bowler v. Nicholson, i. 833.
- Bowles's Case, i. 372.
- Bowman v. Taylor, i. 88.

- Bowyer v. Cook, i. 396, ii. 673.
 Box v. Green, ii. 713.
 Boyce, *In re*, ii. 108.
 v. Bayliffe, ii. 637
 v. Higgins, ii. 108, 154.
 Boyd v. Croydon Rail. Co., ii. 409.
 v. Shorrock, i. 363.
 Boydell v. M'Michael, i. 532.
 Boyfield v. Porter, ii. 274.
 Boyle v. Brandon, ii. 519.
 v. Tamlyn, i. 126, 187, 205, 222,
 390.
 v. Wiseman, ii. 611.
 Boys v. Pink, i. 724.
 Boyson v. Coles, i. 522.
 Bracegirdle v. Peacock, ii. 605.
 v. Orford, ii. 637.
 Bracey v. Carter, i. 614.
 Bradbee v. Christ's Hospital, i. 267.
 Bradbury v. Grinsell, i. 195.
 Bradby v. Southampton Local Board, ii.
 273.
 Bradley v. Arthur, ii. 552.
 v. Copley, i. 544, 556.
 v. Gill, i. 233, 249.
 v. Waterhouse, i. 38, 727, ii.
 631.
 Bradshaw v. Eyre, i. 207.
 v. Vaughton, ii. 47.
 Bradworth v. Foshaw, ii. 630.
 Brady v. Todd, ii. 453.
 Braham v. Bustard, ii. 471.
 Braithwaite v. Cooksey, i. 787.
 v. Skinner, i. 65.
 Bramley v. Chesterton, i. 474, ii. 640.
 Bramwell v. Eglinton, i. 790.
 v. Halcomb, ii. 689.
 Brancker v. Molyneux, i. 555.
 Brand v. Hammersmith Rail. Co., ii. 278,
 282, 285.
 Brandao v. Barnett, i. 679.
 Brandling v. Barrington, ii. 136.
 Brandon v. Brandon, i. 788, ii. 722.
 v. Scott, i. 689, 692.
 Brandt v. Craddock, ii. 54.
 Branly v. S. Eastern Rail. Co., i. 746.
 Brass v. Maitland, i. 35, ii. 439.
 Brassington v. Llewellyn, i. 398, 405,
 Bray v. Mayne, i. 657.
 v. Tracy, i. 372.
 Brayne v. Cooper, ii. 343.
 Brazier v. The Polytechnic Institution,
 i. 306.
 Brecon (Mayor, &c., of) v. Edwards,
 i. 25.
 Bree v. Holbech, ii. 428.
 Breedon v. Capp, ii. 708.
 v. Gill, ii. 702.
 Breese v. Jerdein, ii. 37.
 Bremner, *Ex parte*, i. 680, ii. 480.
 v. Hull, ii. 564.
 Brent v. Hadden, ii. 597.
 Brest v. Lever, i. 450.
 Brewer v. Drew, i. 565, ii. 545.
 v. Sparrow, i. 59.
 Brewin v. Short, i. 526, 531.
 Brewster v. Sewell, ii. 610.
 Briddon v. Gt. Northern Rail Co., i.
 712.
 Bridge v. Grand Junction Rail. Co., i.
 632.
 v. Wain, ii. 432.
 Bridges v. Blanchard, i. 147, 452.
 v. Hawkesworth, i. 512.
 v. North Lond. Rail., i. 578.
 Bridgett v. Coyney, ii. 183.
 Bridgewater's (Duke of) Trustees v.
 Bootlecum-Linacre, i. 409.
 Bridgland v. Shapter, i. 25.
 Cridson v. Benecke, ii. 690.
 Brierly v. Kendall, i. 563.
 Brig, *Ex parte* ii. 413, 718, 742.
 v. Evelyn, ii. 231.
 v. Mercht. Trad., &c., i. 669.
 v. Oliver, i. 36.
 v. Sowry, i. 782.
 Bright v. Walker, i. 179, 180, 190,
 442.
 Brind v. Dale, i. 668, 709.
 v. Hampshire, i. 521.
 Brine v. Bazalgette, ii. 333.
 v. Gt. West. Rail Co., i. 437, ii.
 248, 296.
 Brink v. Winguard, ii. 456.
 Brinsmead v. Harrison, i. 544, ii. 593,
 594, 597.
 Briscoe v. Drought, i. 105.
 Bristol and Exeter R. Co. v. Collins, i.
 738.
 Bristow v. Eastman, ii. 558.
 British Columbia Sawmill Co. v. Nettle-
 ship, i. 773, 774.

- British Empire Shipping Co. v. *Somes*,
i. 671.
- British Museum (Trustees of) v. *Fin-*
nis, i. 324.
- Britton v. S. Western Rail. Co., ii. 634,
654.
- Brittridge's Case, ii. 351.
- Broad v. Ham, ii. 69, 93.
- Broadbent v. Imperial Gas Co., i. 120.
296, ii. 248, 282, 286.
v. *Ledward*, i. 692.
v. *Ramshotham*, i. 105.
v. *Wilks*, i. 159.
- Broadwater v. *Blot*, i. 664.
- Broadwood v. *Granara*, i. 748, 762.
- Brock v. *Copeland*, i. 283.
- Brocklehurst v. *Lawe*, i. 800.
- Bromage v. *Prosser*, ii. 311.
- Bromley v. *Holden*, i. 802.
v. *Wallace*, ii. 508.
- Brooke v. *Montague*, ii. 358.
v. *Rawle*, ii. 361.
- Brooke v. *Clark*, ii. 634.
v. *Ewers*, ii. 724.
v. *Pickwick*, i. 718.
- Brooks v. *Brooks*, ii. 479.
v. *Titchborne*, ii. 374.
- Brookman v. *Wenham*, ii. 713.
- Brooks v., *Blanshard*, ii. 378.
v. *Hodgkinson*, ii. 144, 155.
v. *Warwick*, ii. 69.
- Broom v. *Davis*, i. 611.
- Broome v. *Gosden*, ii. 379.
- Broomhead, *In re*, i. 669.
- Brough v. *Homfray*, i. 605.
- Broughton's Case, ii. 634.
- Broughton v. *Jackson*, ii. 50.
- Brown's Case, i. 164.
(*Lady*) Case, i. 208,
- Brown v. Accrington Cotton Co., i. 277.
v. *Allen*, ii. 651.
v. *Annandale*, i. 81, 88.
v. *Arundel*, i. 796.
v. *Bateman*, i. 515.
v. *Best*, i. 105, 113.
v. *Brown*, ii. 479, 482.
v. *Bussell*, i. 247, 288.
v. *Chapman*, ii. 45, 81, 234.
v. *Cocking*, ii. 572, 573.
v. *Croome*, ii. 334.
v. *Edgington*, ii. 431.
- Brown v. *Elkington*, ii. 461.
v. *Gibbons*, ii. 662.
v. *Giles*, i. 392.
v. *Glenn*, i. 791.
v. *Heathcote*, i. 536.
v. *Holyhead Local Board*, i. 60,
ii. 216.
v. *Jarvis*, ii. 112, 162.
v. *Lond. and N. W. Rail. Co.*, ii.
569.
v. *Mallett*, i. 329, ii. 580.
v. *Met. Co., &c.*, i. 155, 801.
v. *Nicholls*, i. 135.
v. *Notley*, i. 447.
v. *Robins*, i. 101.
v. *Russell*, i. 247, 288.
v. *Shevill*, i. 796.
v. *Smith*, ii. 348.
v. *Wilkinson*, i. 637.
- Brown v. *Windsor*, i. 185.
v. *Wootton*, ii. 594.
- Browne v. *Dawson*, i. 394, ii. 11.
v. *Redmond*, ii. 682.
- Browning v. *Newman*, ii. 580.
- Brownlow v. *Met. Board of Works*, i.
303, ii. 241.
- Bruce v. *Helliwell*, i. 133.
- Brucker v. *Fromont*, i. 634.
- Brunswick (Duke of) v. *Hanover* (King
of), i. 54.
v. *Harmer*, ii. 377.
v. *Slowman*, ii.
167.
- Brunt v. *Mid. Rail. Co.*, i. 720, 724.
- Brunton v. *Hall*, i. 220, 453.
v. *Hawkes*, i. 89.
- Bryant v. *Foot*, i. 156.
v. *Wardell*, i. 547.
- Brydges v. *Kilburn*, i. 382.
v. *Stephens*, i. 378.
- Brydon v. *Stewart*, i. 280.
- Bryson v. *Wylie*, i. 533.
- Bubb v. *Yelverton*, i. 346.
- Buccleuch (Duke of) v. *Met. Board of*
Works, ii. 271, 278, 281.
- Buchanan v. *Findlay*, i. 673.
v. *Rucker*, ii. 734.
- Buckby v. *Coles*, i. 470.
- Buckland v. *Butterfield*, i. 354, 355.
v. *Johnson*, i. 544, ii. 594.
v. *Papillon*, i. 524.

- Buckle v. Bewes, ii. 167, 653.
 Buckley v. Gross, i. 512, ii. 15.
 v. Hann, ii. 706.
 v. Wood, ii. 321.
 Buckman v. Levi, i. 769.
 Buckmaster v. Buckmaster, ii. 484.
 Budenberg v. Roberts, ii. 676.
 Buggin v. Bennett, ii. 701, 715.
 Bullard v. Harrison, i. 440, 455.
 Buller, *Ex parte*, ii. 724.
 v. Michel, ii. 617.
 Bullock v. Bullock, ii. 491.
 Bunbury v. Matthews, ii. 160.
 Bunch v. Kennington, i. 818.
 Burbridge, *Ex parte*, i. 542.
 Burder v. Veley, ii. 697, 701, 703.
 Burges v. Lamb, i. 344, 346.
 Burgess v. Clements, i. 758, 760.
 v. Freelove, ii. 53.
 v. Gray, i. 214, 261.
 v. Great Western Rail. Co., i. 271.
 Burke v. Bryant, i. 548.
 Burland v. Kingston-upon-Hull Local Board, ii. 744, 761.
 Burley v. Bethune, ii. 226, 234.
 Burling v. Harleſ, ii. 151.
 v. Read, i. 431.
 Burn v. Brown, i. 673.
 v. Morris, i. 505, 523.
 Burnard v. Haggis, ii. 557.
 Burnby v. Bollett, ii. 441.
 Burne v. Richardson, i. 475, 782.
 Burnes v. Pennell, ii. 454.
 Burnett v. Lynch, i. 29.
 Buron v. Denman, i. 53, ii. 45.
 Burrige v. Nicholetts, i. 432, 456.
 Burroughes v. Bayne, i. 496.
 Burrows v. March Gas Co., i. 37.
 Burry v. Perry, ii. 662, 663.
 Burton, *In re*, ii. 726, 741.
 Burton v. Hughes, i. 538, 546.
 v. Legros, ii. 37, 147, 151.
 Bury v. Bedford, ii. 471.
 Bush v. Beavan, ii. 760, 761, 762, 763.
 v. Green, ii. 45.
 v. Martin, ii. 256, 260, 744.
 v. Parker, ii. 48.
 v. Steinman, i. 260, 303.
 Bushel v. Miller, i. 491.
 Busst v. Gibbons, ii. 66, 92.
 Buszard v. Capel, i. 791.
 Butcher v. Butcher, i. 449, ii. 11.
 v. Henderson, ii. 667.
 v. L. & S. W. Rail. Co., i. 137, 741.
 Butler v. Basing, i. 770.
 v. Hunter, i. 626.
 v. Knight, i. 615.
 v. Woolcott, i. 743.
 Butt v. G. W. Rail. Co., i. 727.
 v. Imperial Gas Co., i. 10, ii. 299.
 Butterfield v. Forrester, i. 610.
 Butterworth v. Brownlow, i. 36, 717, 718.
 Button v. Heyward, ii. 342, 343, 360.
 Buxton v. Baughan, i. 503, 675.
 v. N. E. Rail Co., i. 269, 738.
 Bwlch-y-plwm Mining Co. v. Baynes, ii. 412.
 Byerley v. Prevost, i. 510.
 Byles, *In re*, ii. 272, 281.
 Byne v. Moore, ii. 94.
 Byrne v. Boadle, i. 254, 261, 267, 633.
 Bywater v. Richardson, ii. 460.
 Cachar Co., *Re*, ii. 413.
 Caddy v. Barlow, ii. 87, 91.
 Cahill v. L. & N. W. Rail. Co., i. 741.
 Cailiff v. Danvers, i. 603.
 Caillaud's Pat. Tan. Co. v. Caillaud, ii. 682.
 Cairns v. Robins, i. 662, 735.
 Calabar, The, i. 595.
 Calcraft v. Harborough (Earl), ii. 508.
 Calder and Hibble Navig. Co. v. Pilling, i. 60, 63, 65.
 Calder v. Halkett, ii. 102, 179.
 Caldwell, *Ex parte*, i. 534.
 Caledonian Rail Co. v. Carmichael, ii. 679.
 v. Sprot, i. 141, 146.
 v. Ogilvy, ii. 241, 242, 278, 283.
 Calmady v. Rowe, i. 410.
 Calne's (Borough of) Case, ii. 740.
 Calvert v. Jolliffe, ii. 166.
 Calye's Case, i. 752.
 Camac v. Warriner, ii. 430.
 Cambrian Railways Co's. Scheme, ii. 131.

- Cameron v. Charing Cross Rail. Co., ii.**
279.
 v. Wynch, i. 563.
- Campbell v. Allgood, i.** 347.
 v. Mayor, &c., of Liverpool, i.
 407.
 v. Scott, i. 69, ii. 689.
 v. Spottiswoode, ii. 339.
- Campion v. Benyon, i.** 83.
- Canadian Prisoners' Case, ii.** 220.
- Cane v. Chapman, i.** 65, ii. 552.
- Canham v. Barry, ii.** 400, 417, 428, 459.
 v. Fisk, i. 135, 148.
 v. Jones, i. 78.
- Cann v. Clipperton, ii.** 34.
- Cannee v. Spanton, i.** 509.
- Cannington v. Nuttall, i.** 82.
- Canot v. Hughes, i.** 501, 505.
- Canterbury (Lord) v. The Queen, i.** 366.
 (Viscount) v. Att. Gen., i. 367.
- Capel v. Jones, ii.** 380.
 v. Powell, ii. 556, 557.
- Capella, The, i.** 598, 637.
- Card v. Card, ii.** 582.
 v. Case, i. 44, 308.
- Cardigan (Earl of) v. Armitage, i.** 133,
152, 155.
- Cargill v. Cargill, ii.** 477, 484, 487.
- Carington v. Wycombe, Rail Co., ii.**
287, 299.
- Carlisle (Mayor of) v. Graham, i.** 222,
411.
- Carlyon v. Lovering, i.** 114, 183, 308.
- Carnarvon (Earl of) v. Villebois, ii.**
612.
- Carne v. Brice, ii.** 533.
- Carnes v. Nisbitt, i.** 379.
- Carpenter v. Collins, i.** 401.
 v. Mason, ii. 202.
 v. Pearse, ii. 134.
 v. Smith, i. 89.
 v. Wall, ii. 523.
- Carpue v. L. and B. Rail. Co., i.** 578, ii.
291.
- Carr v. Benson, i.** 155, 156.
 v. Foster, i. 192.
 v. Hood, ii. 338.
 v. Lambert, i. 161.
 v. R. Exchange Ass. Co., ii, 582.
- Carrett v. Morley, ii.** 234.
- Carrill v. Pack, i.** 167.
- Carrington v. Roots, ii.** 529.
 v. Taylor, i. 235.
- Carruthers v. Payne, i.** 20, 539, 540
- Carslake v. Mapledoram, ii.** 347.
- Carstairs v. Taylor, i.** 111.
- Carter v. Crick, ii.** 434.
 v. James, ii. 594.
 v. Johnson, i. 556.
- Carter v. Jones, ii.** 606.
- Cartier v. Carlisle, ii.** 468.
- Cartledge v. Cartledge, ii.** 494.
- Cartwright v. Amatt, i.** 87.
 v. Eamer, i. 79.
 v. Wright, ii. 378.
- Cary v. Longman, i.** 69, 73.
- Casanova v. The Queen, i.** 549.
- Casburn v. Reid, ii.** 88.
- Cashill v. Wright, i.** 760.
- Cast Plate, Governor, &c., of, v. Mere-**
dith, ii. 252.
- Castellain v. Thompson, i.** 675.
- Castle, Ex parte, i.** 533.
- Castleman v. Hicks, i.** 808.
- Castrique v. Behrens, ii.** 61, 63.
 v. Imrie, ii. 592.
- Caswell v. Cook, i.** 26.
 v. Worth, i. 605.
- Catchmade's Case, ii.** 705.
- Catchpole v. Ambergate, &c., Rail Co.,**
i. 28, ii. 551.
- Cater v. Chignell, ii.** 153.
- Caterham Rail Co., Re, i.** 778.
- Catherwood v. Caslon, ii.** 503.
- Cator v. Lewisham Board of Works, ii**
267, 298.
- Catterall v. Kenyon, i.** 550, ii. 556.
- Catteris v. Cowper, i.** 447.
- Caudle v. Seymour, i.** 185, 186.
- Caudwell v. Hanson, i.** 291.
- Cave v. Coleman, ii.** 418.
- Cave v. Mountain, i.** 188. ii. 173,
- Cavey v. Liddbitter, i.** 240, 243.
- Cawkwell v. Russell, i.** 203, 238, 231.
- Chabot, In re, ii.** 696.
- Chadwick v. Marsden, i.** 133, 135.
 v. Trower, i. 267.
- Chalk v. Wyatt, i.** 476.
- Chamberlain v. Goodwin, ii.** 365.
 v. King, ii. 33, 34.
 v. West End, &c., Rail Co.,
 ii. 277, 278, 279.

- Chamberlaine v. Chester and Birk. Rail. Co., ii. 607.
 Chamberlayne v. Dummer, i. 346.
 Chambers v. Bernasconi, ii. 618.
 v. Caulfield, ii. 508.
 v. Robinson, ii. 91.
 Champernown v. Scott, i. 681.
 Champneys v. Arrowsmith, i. 407.
 Chandelor v. Doulton, i. 805, 841.
 v. Thompson, i. 190.
 Chandelor v. Lopus, ii. 418.
 Chaney v. Payne, ii. 203.
 Channon v. Patch, i. 554.
 Chanter v. Hopkins, ii. 430.
 Chantler v. Lindsey, ii. 535.
 Chapman v. Allen, i. 673.
 v. Chapman, i. 615.
 v. Cripps, i. 323.
 v. Jones, i. 408.
 v. Monm. Rail. Co., ii. 284.
 v. Pickersgill, i. 66.
 v. Rothwell, ii. 581.
 v. Speller, i. 518, ii. 136, 429.
 v. Van Toll, i. 635.
 Chappell v. Davidson, ii. 584.
 Chapple v. Watt, ii. 682.
 Charles v. Charles, ii. 491.
 Charlwood v. Greig, i. 284.
 Chase v. Westmore, i. 670.
 Chasemore v. Richards, i. 93, 103, 109, 110, 113.
 Chauntler v. Robinson, i. 266, 268, 305.
 Chauvin v. Alexandre, ii. 139.
 Cheasley v. Barnes, ii. 52.
 Cheese v. Scales, ii. 309.
 Cheesman v. Exall, i. 676, 690, 700, 769, 772.
 v. Hardham, i. 62.
 Cheetham v. Hampton, i. 214, 428.
 Chelsea Vestry v. King, i. 39.
 Cheltenham, &c., Carriage and Wagon Co., *Re*, ii. 104.
 Cherry v. Colonial Bank of Australasia, ii. 437.
 Chester v. Holyhead Rail. Co., i. 272.
 Chetham v. Hoare, i. 404.
 v. Williamson, i. 154, 170.
 Chetwynd v. Chetwynd, ii. 492, 493.
 Cheveley v. Morris, ii. 657.
 Chew v. Holroyd, ii. 573, 706.
 Chichester v. Lethbridge, i. 298, 327.
 Child v. Affleck, ii. 323.
 v. Chamberlain, i. 813.
 v. Hudson's Bay Co., i. 64.
 v. Mann, ii. 134.
 Childers v. Wooler, ii. 403, 420, 426 457.
 Chilton v. Barrington, i. 688, 702.
 v. Lond. & Croy. Rail Co., i. 65, ii. 27.
 Chinn v. Morris, ii. 649.
 Chinnery v. Viall, i. 496, ii. 638.
 Chinnock v. Sainsbury, ii. 685.
 Chivers v. Savage, ii. 54, 705.
 Chollet v. Hoffman, i. 88.
 Christie v. Cowell, ii. 346.
 v. Griggs, i. 584.
 v. Unwin, ii. 204.
 Christopherson v. Bare, ii. 4, 44.
 Church v. Barnet, ii. 580.
 v. Inclos. Comm., ii. 696.
 Churchill v. Siggers, ii. 65, 80, 110.
 Churchward v. Coleman, ii. 110, 725.
 v. Study, i. 513.
 Churton v. Frewen, i. 408.
 Cibber v. Sloper, ii. 508.
 Clapham v. Shillito, ii. 419, 458.
 Clare v. Maynard, ii. 639.
 Clark v. Armstrong, i. 285.
 v. Blything, i. 377, ii. 652.
 v. Calvert, ii. 545.
 v. Chamberlain, i. 502.
 v. Freeman, ii. 310.
 v. Gaskarth, i. 794.
 v. Newsam, ii. 57, 650.
 v. Nicholson, ii. 165.
 v. Webster, i. 286.
 v. Woods, ii. 223.
 Clark's Patent, i. 79.
 Clarke v. Clark, i. 227.
 v. Cogge, i. 138.
 v. Dixon, ii. 412.
 v. Earnshaw, i. 661, 663.
 v. Hutchins, i. 723.
 v. Leicester, &c., Canal Co., ii. 755.
 v. Postan, ii. 76, 90.
 v. Sarum (Bishop of), ii. 728, 739.
 v. Spence, i. 536.
 v. Tinker, i. 162.
 v. Watson, i. 618.

- Clay v. Oxford**, ii. 566.
 v. Roberts, ii. 310.
 v. Willan, i. 38.
- Clayards v. Dethick**, i. 610
- Clayton v. Corby**, i. 129, 170, 194, 438, 442, 445.
 v. Renton, ii. 575.
- Cleeve v. Mahany**, i. 243, 315.
- Clegg v. Dearden**, ii. 597.
- Cleland, Ex parte**, i. 680.
- Clement v. Chivis**, ii. 309.
 v. Milner, i. 816.
- Clements v. Flight**, i. 699.
 v. Lambert, i. 205.
 v. Ohrly, ii. 99.
- Clerk v. Gilbert**, i. 686.
- Cliff v. Mid. Rail.**, i. 580.
- Clifton v. Hooper**, ii. 164.
- Climie v. Wood**, i. 363.
- Clinton v. Clinton**, ii. 485.
- Clossman v. White**, i. 694, 699.
- Clothier v. Chapman**, ii. 612.
 v. Webster, ii. 251, 274.
- Clough v. L. and N. W. Rail.**, i. 520.
- Clout v. Clout**, ii. 494.
- Clowes v. Beck**, ii. 691.
 v. Hughes, i. 781.
- Coats v. Chaplin**, i. 764.
 v. Clarence Rail. Co., ii. 268, 297.
- Cobb v. Mid. Wales Rail. Co.**, ii. 679.
- Cobban v. Downe**, i. 664.
- Cobbett v. Clutton**, ii. 500.
 v. Grey, ii. 3.
 v. Wheeler, ii. 659.
- Cock v. Gent**, ii. 289.
- Cockayne v. Hodgkinson**, ii. 330
- Cockcroft v. Smith**, ii. 9, 12, 34.
- Cocker v. Cowper**, i. 130, 218.
 v. Cardwell, i. 288.
 v. Crompton, i. 429, 450.
 v. Musgrove, ii. 135.
- Cockle v. L. & S. E. Rail.**, i. 577.
- Cocks v. Chandler**, ii. 470.
- Codrington v. Lloyd**, ii. 156, 159.
- Coe v. Wise**, ii. 256.
- Coffin v. Coffin**, i. 381.
- Coggs v. Bernard**, i. 642, 643, 656, 666, 693, 694, 713, ii. 527.
- Cohen, Ex parte**, i. 527, 543.
 v. Huskisson, ii. 23.
- Cohen v. Morgan**, ii. 75, 234.
- Colchester (Mayor of) v. Brooke**, i. 41, 263, 292, 410.
- Cole v. Forth**, i. 340, 341.
 v. Foxman, i. 162.
 v. Goodwin, i. 719.
 v. Green, i. 17, 338.
 v. Maundy, i. 456, 480, 455.
 v. Turner, ii. 4.
- Colegrave v. Dios Santos**, i. 499.
- Coleman v. Coleman**, ii. 486.
 v. Foster, i. 155.
 v. Riches, ii. 553.
- Colemere, Re**, i. 527.
- Collard v. Allison**, i. 85.
 v. S. E. Rail. Co., ii. 636.
- Collen v. Wright**, ii. 436, 437, 463, 464, 639, 640.
- Collett v. Curling**, i. 786.
 v. Foster, ii. 41, 155.
 v. Lond. and N. W. Rail. Co., i. 575, 766, ii. 528.
- Collins v. Bristol and Exeter Rail. Co.**, i. 738.
 v. Cave, i. 48, ii. 405.
 v. Evans, ii. 403, 420, 426.
 v. Forbes, i. 539.
 v. Martin, i. 680.
 v. Renison, ii. 13.
 v. Ross, ii. 230.
- Collins Co. v. Brown**, ii. 468.
 v. Reeves, ii. 471.
- Collis v. Selden**, i. 28, 281, 306, 604.
- Colnaghi v. Ward**, i. 76.
- Colwell v. Reeves**, ii. 531.
- Colyer v. Speer**, ii. 135.
- Compton v. Richards**, i. 149.
- Concordia, The, and The Spring**, i. 597
- Connell v. Watson**, ii. 681.
- Conradi v. Conradi**, ii. 510.
- Constable v. Nicholson**, i. 157.
- Conybeare v. Farries**, ii. 676.
- Cook, Ex parte**, ii. 724.
 v. Batchellor, ii. 363.
 v. Bath (Mayor of), i. 197, 200.
 v. Beal, ii. 12.
 v. Cox, ii. 365.
 v. Field, ii. 373, 386.
 v. Ipswich Local Board, i. 332.
 v. Leonard, ii. 33, 34.
 v. Palmer, ii. 118.

- Cook v. Ward**, ii. 307.
Cooke v. Cooke, ii. 482.
 v. Forbes, i. 316.
 v. Hemming, i. 532.
 v. Hughes, ii. 381.
Cooke v. Jackson, i. 430.
 v. Waring, i. 44.
 v. Wildes, ii. 323, 391.
Coomber v. Howard, i. 786.
Coombs v. Beaumont, i. 532.
 v. Coombs, ii. 480.
 v. Bristol and Exeter Rail. Co.,
 i. 764.
 v. Noad, i. 697.
Cooper v. Barber, i. 107.
 v. Bill, i. 669.
 v. Blandy, i. 837.
 v. Booth, ii. 77.
 v. Gordon, ii. 737.
 v. Harding, ii. 41.
 v. Hubbuck, i. 177, 190, 193,
 227, 309, 316, 438.
 v. Lond. & S. W. Rail. Co., i.
 777.
 v. Marshall, i. 166, 290, 392.
 v. Shepherd, ii. 597.
 v. Slade, ii. 678.
 v. Stephenson, i. 616.
 v. Wandsworth Board, &c., i.
 437, ii. 190, 734.
 v. Willomat, i. 690.
 v. Woolley, i. 239.
Copeland v. N. East. Rail. Co., ii. 760.
 v. Stephens, i. 525.
Copley v. Burton, i. 747.
Coppinger v. Gubbins, i. 378.
Corbet's (Sir Miles) case, i. 162
Corbett v. Brown, ii. 118, 409, 455.
 v. Gen. St. Nav. Co., ii. 570.
 v. Ludham, ii. 695.
Corby v. Hill, i. 212, 216, 254.
Corner v. Champneys, i. 559.
Cornfoot v. Fowke, ii. 452.
Cornill v. Hudson, ii. 599.
Cornish v. Hockin,
 v. Keene, i. 80, 88.
 v. Stubbs, i. 131.
Cornwall v. E. C. Rail. Co., i. 271.
Cornwall v. Metrop. Com. of Sewers, i.
 258.
 v. Richardson, ii. 94.
Cornwell v. Sanders, ii. 193.
Corrance v. Corrance, ii. 492.
Corrigan v. Lond. and Bl. Rail. Co., ii.
 285.
Cosens v. Bognor Rail. Co., ii. 300.
Coshay v. Tute, i. 724.
Cossey v. Lond. and Brighton Rail., ii.
 588.
Costar v. Hetherington, ii. 47.
Costard v. Wingfield, i. 163.
Costello v. Corlett, ii. 681.
Costworth v. Betison, i. 808.
Cotching v. Bassett, i. 225, 316, ii. 691.
Cotes v. Michill, ii. 143, 144, 159.
Cotesworth v. Spokes, i. 815.
Cotterell v. Griffiths, i. 201.
 v. Jones, ii. 79, 80.
Cotterill v. Hobby, i. 214.
 v. Starkey, ii. 44.
Cotton v. Brownie, ii. 87.
 v. Bull, i. 803.
 v. James, ii. 82.
 v. Wood, i. 36, 585.
Couch v. Steel, i. 59, 67, 68.
Coulson v. White, i. 476.
Coulthart v. Coulthart, ii. 486.
Coupland v. Hardingham, i. 257.
Courtald v. Legh, i. 190.
Cousens v. Hall, i. 220.
Coutts v. Gorham, i. 149.
Coventry v. Gladstone, i. 522.
 v. Lond. Brighton, and S. C.
 Rail. Co., ii. 287.
Coward v. Baddeley, ii. 3, 8.
 v. Gregory, ii. 561.
Cowell v. Amman Coll. Co. ii. 669, 671.
 v. Simpson, i. 674.
Cowing v. Cowing, ii. 509.
Cowlam v. Slack, i. 161.
Cowles v. Potts,
Cowley v. Mayor, &c., of Sunderland, i.
 276, 605, 652, ii. 549.
Cowling v. Higginson, i. 220.
Cowper (Earl) v. Baker, i. 378, 476.
Cox v. Bent, i. 784.
 v. Burbidge, i. 43, 45, 388.
 v. Cox, ii. 689.
 v. Feeney, ii. 338.
 v. Glue, i. 100, 395, 445.
 v. Gt. East. Rail. Co., i. 708, 743.
 v. Land and Water Journal, i. 71

- Cox v. Lee**, ii. 309, 380.
 v. Leech, i. 615.
 v. London (Mayor of), ii. 698, 707.
 v. Matthews, i. 149.
 v. Mitchell, ii. 591.
 v. Mousley, i. 393.
 v. Reid, ii. 33.
- Coxe v. Smith**, i. 51.
- Coxen v. Gt. West. Rail. Co.**, i. 738.
- Coxhead v. Richards**, ii. 327, 328, 383.
- Crabb v. Crabb**, ii. 483.
- Cracknell v. Mayor of Thetford**, i. 264, ii. 552.
- Craft v. Boite**, ii. 663.
- Crafter v. Metrop. Rail. Co.**, i. 271.
- Craig v. Hasell**, ii. 82.
- Cramer v. Mott**, i. 802, 803.
- Cranch v. White**, i. 505.
- Cranden v. Walden**, ii. 251.
- Crane v. London Dock Co.**, i. 517.
 v. Price, i. 81, 85.
- Cranwell v. London (Mayor of)**, ii. 300.
- Craven, Ex parte**, i. 528.
 v. Smith, ii. 668, 670.
 v. Stubbins, ii. 219.
- Crawford's Case**, ii. 104.
- Crawford v. Middleton**, ii. 344, 356.
 v. Satchwell, ii. 137.
- Crawshay v. Homfrey**, i. 674.
 v. Thompson, ii. 439, 455, 462.
- Crease v. Barrett**, ii. 615.
- Crepps v. Durden**, ii. 186, 192.
- Creuze v. Hunter**, ii. 497.
- Crewe v. Crewe**, ii. 489.
- Cristie v. Cowell**, ii. 346.
- Crocker v. Molyneux**, i. 515.
- Croft v. Alison**, i. 590, 634, 635.
 v. Day, ii. 469.
 v. Lond. and N. W. Rail. Co., ii. 282, 285.
 v. Stevens,
- Crofts v. Brown**, ii. 342.
 v. Haldane, i. 222.
 v. Waterhouse, i. 573.
- Crompton v. Ibbotson**, i. 80.
- Cronshaw v. Chapman**, ii. 151, 154, 426.
- Crook v. Dowling**, ii. 88.
- Crosby v. Leng**, i. 55.
 v. Wadsworth, i. 446.
- Cross, Ex parte**, ii. 220.
- Cross v. Andrews**, i. 759.
 v. Androes, i. 748.
 v. Lewis, i. 175, 189.
- Crosse v. Gardner**, ii. 429.
- Crossfield v. Such**, i. 701, 703.
- Crossley v. Beverly**, i. 83.
 v. Lightowler, i. 108, 120, 149, 200, 204, 317, 412.
- Crouch v. Great Northern Rail. Co.**, i. 746.
 v. Great West. Rail. Co., i. 738.
 v. Lond. and N. W. Rail. Co., i. 707, 723.
- Crowder v. Long**, ii. 117.
 v. Tinkler, i. 318.
- Crowley v. Page**, ii. 659.
- Crozer v. Pilling**, ii. 83.
- Crozier v. Cundey**, ii. 224, 225.
- Crump v. Day**, ii. 134.
 v. Lambert, i. 315.
- Cubitt v. Porter**, i. 419, ii. 548.
- Cubley v. Cubley**, ii. 493.
- Cudlipp v. Cudlipp**, ii. 484.
- Cullen v. Morris**, i. 50, 51.
 v. Thomson, ii. 412.
- Culling v. Tuffnell**, i. 361.
- Culwick v. Swindell**, i. 363.
- Cumberland v. Copeland**, i. 72.
- Cumpston v. Haigh**, i. 671, 697.
- Cunnington v. Cunnington**, ii. 486, 488.
- Curlewis v. Broad**, i. 28.
 v. Carter, ii. 693.
 v. Laurie, i. 436.
 v. Mornington, ii. 602.
- Curry v. Walter**, ii. 335.
- Curtis, Re**, ii. 498.
 v. Curtis, ii. 480.
 v. Drinkwater, i. 630.
 v. Mills, i. 284.
 v. Platt, ii. 692.
 v. Wheeler, i. 782.
- Cuthbertsons v. Parson**, i. 626.
- Cutler v. Dixon**, ii. 320.
- Czech v. Gen. St. Nav. Co.**, i. 36, 730.
- Da Costa v. The Russia Co.**, ii. 740.
- Daines v. Hartley**, ii. 381.
- Daintry v. Brocklehurst**, i. 397, 449.
- Dale v. Birch**, ii. 151.
 v. Hall, i. 715, 768.

- Dale v. Wood**, ii. 54.
Dalton v. Mid. Co. Rail. Co., ii. 533.
 v. S. E. Rail. Co., i. 639.
 v. Whitten, i. 792.
Dalyell v. Tyrer, i. 45, 625.
Damerell v. Protheroe, ii. 624.
Danby v. Lamb, ii. 664, 667.
Dand v. Kingscote, i. 137.
Daniel v. Anderson, i. 136, 181, 207.
 v. Gracie, i. 784.
 v. Metrop. Rail. Co., i. 579.
 v. North, i. 174, 223.
 v. Wilson, ii. 292.
Daniels v. Fielding, ii. 84.
 v. Potter, i. 254, 259, ii. 620.
Dann v. Spurrier, i. 225.
Dansey v. Richardson, i. 661, 663, 763.
Danvers v. Morgan, ii. 36.
Darby v. Harris, i. 792.
 v. Ouseley, ii. 382, 606, 608.
 v. Waterlow, ii. 130.
Darcy v. Allin, i. 79.
D'Arcy (Lord) v. Askwith, i. 341.
Dare v. Heathcote, i. 220.
 v. Hopkins, i. 509.
 v. Valley Rail. Co., *Re*, ii. 281.
Darley v. The Queen, ii. 739.
Darling v. Clue, i. 192.
Daunt v. Crocker, i. 408.
Davenport v. Rylands, ii. 685, 688.
Davey v. Chamberlain, i. 585.
 v. Mason, i. 724.
 v. Warne, ii. 295.
Davidson v. Tulloch, ii. 551, 635.
Davies v. England, i. 277.
 v. Jenkins, i. 12, ii. 20, 137.
 v. Lond. and Blackw. Rail., i. 267.
 v. McHenry, ii. 710.
 v. Mann, i. 41, 292.
 v. Marshall, i. 190, 224, 317, 452, ii. 603.
 v. Nicholas, i. 500.
 v. Price, ii. 578.
 v. Sear, i. 138.
 v. Solomon, ii. 352.
 v. Stacey, i. 832.
 v. Stear, i. 128.
 v. Stephens, i. 174, 219, 326, 453.
 v. Vernon, i. 500, ii. 555.
Davies v. Williams, i. 289, 290, 516, ii. 520.
Davis v. Bowsher, i. 679.
 v. Curling, ii. 291, 293.
 v. Danks, i. 546.
 v. Gardiner, ii. 352.
 v. Gyde, i. 790.
 v. James, i. 765.
 v. Jones, i. 355.
 v. Living, i. 536.
 v. Lond. and N. W. Rail. Co., i. 702.
 v. Nest, i. 696.
 v. Noake, ii. 75.
 v. North. West. Rail. Co., i. 772, ii. 636.
 v. Oswald, i. 565.
 v. Russell, ii. 16, 18, 50.
 v. Swansea (Mayor of), ii. 291.
 v. Symonds, ii. 459.
 v. Thomas, ii. 681.
Davidson v. Duncan, ii. 338.
 v. Gill, i. 414.
 v. Wilson, i. 394, 436.
Daw v. Eley, ii. 104, 688.
Dawes v. Hawkins, i. 323, 324, 327.
 v. Peck, i. 764.
Dawkes v. Coveney, i. 55.
Dawkins v. Paulet (Lord), ii. 52, 323.
 v. Rokeby (Lord), ii. 52, 78.
Dawson v. Chamney, i. 759.
 v. Cropp, i. 783, 807, 826.
 v. Manch., &c., Rail. Co., i. 578.
 v. Van Sandau, ii.
 v. Willoughby-with-Sloothby, i. 331.
 v. Wood, ii. 128.
Dawtry v. Huggins, i. 388, 389.
Day v. Buller, ii. 350.
 v. Carr, ii. 133.
 v. Day, i. 490.
 v. King, ii. 205.
Dayrell v. Hoare, i. 436.
Dean v. Branthwaite, i. 589.
 v. Hogg, ii. 55.
 v. Peel, ii. 515.
 v. Taylor, ii. 54.
 v. Clayton, i. 251.
Deane v. Keate, i. 657.
Dearden v. Townsend, i. 746.
Death, Ex parte, ii. 697.
 v. Harrison, ii. 154.

- De Beauvoir v. Owen, i. 831.
 De Crespigny v. Wellesley, ii. 306, 307.
 Deeble v. Lineham, i. 174, 180.
 Deere v. Guest, i. 477.
 Deering v. Moor, i. 427.
 Degg v. Midland Rail. Co., i. 608.
 De Gondouin v. Lewis, ii. 649.
 De Haer v. Portugal (Queen of), ii. 698.
 Delacroix v. Thevenot, ii. 375.
 Delamere (Lord) v. The Queen, ii. 749.
 De la Rue v. Fortescue, ii. 694.
 Delegal v. Highley, ii. 88, 293.
 Delaney v. Metrop. Board of Works, ii. 286.
 Delfe v. Delamotte, i. 69.
 Delisser v. Towne, ii. 77.
 Dempster v. Dempster, ii. 492.
 Dendy v. Simpson, i. 415.
 Dengate v. Gardiner, ii. 534.
 De Nicholls v. Saunders, i. 785, 789.
 Dennett v. Grover, i. 452.
 Dennis v. Pawling, ii. 649.
 Denston v. Ashton, ii. 682.
 Dent v. Auction Mart. Co., i. 120.
 v. Dent, ii. 510.
 v. Turpin, ii. 469.
 Denton v. Gt. North. Rail. Co., i. 710,
 ii. 434, 454.
 v. Macneil, ii. 412.
 v. Marshall, ii. 700, 707.
 Derby (Earl of) v. Bury Improvement
 Commissioners, i. 288.
 Derecourt v. Corbishley, ii. 22.
 Dering v. Dering, ii. 486.
 Derosne v. Fairie, i. 83.
 De Rothschild v. R. M. St. P. Co., i.
 663, 668.
 De Roufigny v. Peale, i. 614.
 Devaux v. Steinkeller, ii. 409, 455.
 Devonshire (Duke of) v. Elgin, i. 131,
 224, ii. 691.
 Dewell v. Sanders, i. 392.
 Dews v. Riley, ii. 111.
 Dexter v. Hayes, ii. 610.
 D'Eyncourt v. Gregory, i. 354.
 Dibble v. Bowater, i. 802.
 Dibdin v. Swan, ii. 338.
 Dickenson v. Watson, i. 6.
 Dickinson v. Coward, ii. 544.
 v. Follett, ii. 461.
 Dickinson v. North-East. Rail. Co., i.
 621.
 Digby v. Thompson, ii. 307.
 Dignam v. Baily, ii. 680.
 Dimes v. Grand Jun. Can. Co., ii. 101,
 214.
 v. Petley, i. 262, 292.
 Dimmock v. Hallett, ii. 427.
 v. North Staff. Rail. Co., ii.
 250.
 Dimsdale v. Lond., Brighton, and S.
 Coast Rail. Co., ii. 669, 671.
 Dingle v. Hare, ii. 642.
 Dirks v. Richards, i. 509.
 Ditcham v. Bond, i. 451.
 Dixon v. Bell, i. 570, 630, ii. 529, 642.
 v. Enoch, ii. 377.
 v. Fawcus, i. 14, ii. 469.
 v. Holden, ii. 310.
 v. Smith, ii. 648.
 Dixon v. Stansfeld, i. 678.
 Dobell v. Stevens, ii. 428, 459.
 Dobree v. Napier, i. 54.
 Dobson v. Blackman, i. 426.
 v. Blackmore, i. 213.
 Dockwray v. Dickenson, i. 548, 563.
 Dod v. Monger, i. 803.
 Dodd v. Burchall, i. 135, 201.
 v. Holme, i. 267.
 v. Norris, ii. 521, 523.
 v. Robinson, ii. 351.
 Dods v. Evans, ii. 681.
 Dodwell v. Burford, ii. 8.
 Doe v. Arkwright, ii. 625.
 v. Beckett, i. 402.
 v. Benham, i. 402.
 v. Billett, i. 402.
 v. Bridges, i. 65.
 v. Challis, i. 475.
 v. Coombes, i. 405.
 v. Coulthred, ii. 625.
 v. Davidson, i. 132.
 v. Filliter, ii. 647, 679.
 v. Gartham, ii. 734.
 v. Gower, i. 402.
 v. Hampson, i. 415.
 v. Harlow, i. 475.
 v. Hinde, i. 402.
 v. Johnson, i. 397.
 v. Jones, ii. 737.
 v. Kemp, i. 416.

- Doe v. Laming**, i. 749.
 v. Leeds and Bradford Rail. Co., ii. 270.
 v. Massey, i. 406.
 v. McKaeg,
 v. Moore, i. 400.
 v. Morris, i. 837.
 v. Murless, ii. 158.
 v. Pearsey, i. 415.
 v. Penfold, i. 396.
 v. Phillips, i. 401.
 v. Pulman, ii. 625.
 v. Reed, i. 172.
 v. Rock, i. 401.
 v. Somerton, ii. 611.
 v. Stacey, ii. 617, 625.
 v. Stanton, i. 299.
 v. Thorn, ii. 144.
 v. Trye, ii. 118.
 v. Turford, ii. 611.
 v. Wood, i. 154, 170.
Donald v. Suckling, i. 509, 658, 686.
Donaldson v. Beckett, i. 68.
 v. Gillott, i. 41.
Donford v. Ellys, i. 475.
Doorman v. Jenkins, i. 643, 659, 666, 693.
Dorchester (Mayor of) v. Ensor, i. 25.
Dorrington v. Carter, i. 552.
Doswell v. Impey, ii. 100, 105.
Douglas v. Corbett, ii. 92.
 v. Yallop, ii. 111.
Doulton v. Met. Board of Works, ii. 678.
Doust v. Slater, ii. 293.
Dovaston v. Payne, i. 391.
Dover, Ex parte, i. 535.
 v. Mills, i. 662.
 v. Rawlings, i. 829.
Dowling v. Gt. West. Rail. Co., ii. 715.
Dowell v. Gen. Steam Nav. Co., i. 597.
Dowglass v. Kendall, i. 152.
Dowling v. Betjemann, i. 702, ii. 690.
Down v. Halling, i. 524.
Downes v. Price, ii. 413.
Downey's Case, ii. 221.
Downing v. Butcher, ii. 94.
 v. Capel, ii. 35.
Downshire (Marquis of) v. Lady Sandys, i. 347.
Downton Overseers, Ex parte, ii. 727.
Dowse, The, ii. 527.
Doyle v. Falconer, ii. 104.
Dracachi v. Anglo Egyptian Nav. Co., i. 522.
Drake v. Beckham, ii. 544.
 v. Sykes, ii. 117, 160.
Draper v. Fulkes, ii. 556.
 v. Sperring, i. 288.
Dresser v. Bosanquet, i. 685.
Drewell v. Towler, i. 125.
Drummond v. Sant, i. 400, 401.
Drury v. Molins, i. 378.
Duberley v. Gunning, ii. 507, 654, 656.
Dubois v. Keats, ii. 72, 74.
Du Bost v. Beresford, ii. 650.
Du Boulay v. Du Boulay, ii. 467, 471.
Duckworth v. Johnson, i. 621, 634.
Duddell v. Simpson, ii. 427.
Dudden v. Guardians of Clutton Union, i. 105.
Dudley v. Smith, i. 572.
Dudley Can. Nav. Co. v. Grazebrook, i. 143.
Dudley and West Bromw. Bank Co. v. Spittle, i. 55.
Duff v. Budd, i. 736, 765.
Dugdale v. Robertson, i. 101.
Duignan, Ex parte, i. 526, 528, 529.
Duke v. Barnett, ii. 428.
Dumas, Ex parte, i. 540.
Dumergue v. Rumsey, i. 361.
Dun. Nav. Co. v. North Mid. Rail. Co., ii. 300.
Duncan v. Blundell, i. 612.
 v. Findlater, ii. 241, 253, 264, 762.
 v. Louch, i. 203, 220.
 v. Thwaites,
Duncomb v. Reeve, i. 808.
Dundalk Western Rail. Co. v. Tapster, i. 65.
Dundonald (Earl of) v. Masterman, i. 613.
Dunlop v. Lambert, i. 765.
Dunn v. Large, i. 475.
Dunnicliff v. Mallett, i. 87.
Dunraven (Lord) v. Llewellyn, ii. 612.
Dunston v. Paterson, ii. 20, 137, 145, 667.
Duppa v. Mayo, i. 590.
Durell v. Pritchard, i. 227, ii. 685, 692.

- Durham and Sund. Rail. Co. v. Wawm,**
i. 380.
- Du Terraux v. Du Terraux,** ii. 486.
- Dutton v. Powles,** ii. 580.
- Duvergier v. Fellows,** i. 87.
- Dwyer v. Collins,** ii. 610.
- Dyce v. Hay,** i. 128, 157.
- Dyer v. Hargrave,** ii. 415.
- Dyer's Co. v. King,** i. 202.
- Dyke v. Duke,** ii. 114.
- Dynen v. Leach,** i. 279, 603.
- Dyson v. Collick,** i. 447, 448.
- Dyster v. Battye,** ii. 454.
- Eager v. Dyott,** ii. 86, 89.
- Eager v. Grimwood,** ii. 517, 519, 521.
- Eagle v. Charing Cross Rail. Co.,** ii. 778.
- Eagleton v. Gutteridge,** i. 833.
- Earle v. Holderness,** i. 550.
v. Picken, i. 838.
- Earle's Case,** ii. 736.
- Easley v. Crockford,** i. 506.
- East India Co. v. Pullen,** i. 770.
v. Vincent, i. 224, 382.
- East and West I. D. Co. v. Gattke,** ii. 277.
- Eastern Co. Rail. Co. v. Broom,** ii. 43,
549.
v. Dorling, i. 138,
293.
- Easton v. London,** i. 516.
v. Richmond Highway Board, i. 329.
- Eastwood v. Bain,** ii. 412, 459.
- Eaton v. Johns,** ii. 309.
v. Swansea Water Co., i. 106,
191.
- Eaves v. Dixon,** ii. 460.
- Eccleston v. Clipsham,** ii. 547.
- Eclipse, The,** i. 598.
- Edelsten v. Edelsten,** ii. 468, 470.
- Edge v. Parker,** ii. 149.
- Edgeberry v. Stephens,** i. 88.
- Edgell v. Francis,** ii. 55.
- Edmonson v. Machell,** ii. 518.
v. Nuttall, i. 544, 559, 560,
564, 841, ii. 650.
- Edsall v. Russell,** ii. 343, 386.
- Edwards v. Bridges,** ii. 128.
v. Crock, ii. 509.
- Edwards v. Farebrother,** ii. 129.
v. Ferris, ii. 183.
v. Gt. West. Rail. Co., ii. 295.
v. Halinder, i. 265.
v. Hodges, ii. 629.
v. Hooper, i. 508, 527.
v. L. & N. W. Rwy., ii. 42.
v. Martin, i. 534.
v. Sherratt, i. 770.
- Eggington's Case,** ii. 138, 220.
- Eggington v. Mayor of Lichfield,** ii. 549.
- Egremont (Lord) v. Pulman,** i. 209,
235.
- Egyptian (The),** i. 594.
- Eicholz v. Bannister,** ii. 429.
- Ekins v. Tresham,** ii. 415, 429.
- Eliot v. Allen,** ii. 34, 651, 656.
- Elliot's Case,** i. 321.
- Elliotson v. Feetham,** i. 233, 243, 249.
- Elliott v. Bishop,** i. 355, 360, 361.
v. Nicklin, ii. 521.
v. North-East. Rail. Co., i. 143.
- Ellis v. Abrahams,** ii. 77.
v. Bridgnorth (Mayor of), i. 26,
150, 169.
v. Cowne, ii. 617.
v. Kelly, ii. 219.
v. Lond. & S. W. Rail. Co., i. 274,
282.
v. Sheffield Gas Co., i. 261, 303.
v. Taylor, i. 810.
- Ellison v. Isles,** ii. 605.
- Ellwood v. Christy,** i. 77.
- Elmhirst v. Spencer,** i. 120.
- Elmslie v. Boursier,** i. 86.
- Elsam v. Faucett,** ii. 509.
- Elsee v. Smith,** ii. 74, 177.
- Elstob v. Wright,** ii. 37, 43.
- Elston v. Rose,** ii. 572, 573.
- Elwell v. Crowther,** i. 121.
- Elwes v. Maw,** i. 351, 358, 361.
- Elworthy v. Sandford,** i. 516, 549.
- Ely (Dean, &c., of) v. Warren,** i. 162.
- Emblem v. Myers,** i. 636, 646.
- Embrey v. Owen,** i. 16, 105, 107.
- Emerson v. Emerson,** ii. 538.
- Emery, In re,** ii. 572, 574.
v. Barnett, ii. 104.
- Emmerton v. Matthews,** ii. 441.
- Enderby, Ex parte,** i. 533.

- Energy, The, i 594.
 England v. Bourke, ii. 386
 English v. Purser, ii. 53.
 Ennor v. Barwell, i. 105, 121.
 Esdaille v. Oxenham, i. 681.
 Esk, The, i. 597, 598.
 Europ. & Austr. R. M. Co. v. R. M. Steam P. Co., i. 503, 769.
 Evans, *Ex parte*, ii. 702, 708.
 v. Botterill, ii. 189.
 v. Edmonds, ii. 407.
 v. Evans, ii. 480.
 v. Hallam, i. 530.
 v. Harlow, ii. 349.
 v. Harries, ii. 370, 648.
 v. Matthias, i. 837.
 v. Nichol, i. 519.
 v. Rees, ii. 625, 662.
 v. Roberts, 446.
 v. Walton, ii. 512, 514.
 v. Wright, i. 497, 800.
 Evelyn v. Raddish, i. 119, 372, 376.
 Everard v. Kendall, ii. 576.
 Everett v. Grapes, i. 61, 296.
 Eversfield v. Newman, ii. 193, 573.
 Everton (Overseers of), *Ex parte*, ii. 708.
 Every v. Smith, i. 395, 447.
 Ewart v. Cochrane, i. 135.
 v. Graham, i. 133.
 Ewbank v. Nutting, i. 550, 559.
 Excelsior (The), i. 598.
 Exeter Carriers' Case, i. 742.
 Exeter (Corporation of) v. Devon (Earl of), i. 264, 316.
 Exley v. Inglis, i. 526.
 Explorer, The, i. 596.

 Fabrigas v. Mostyn, ii. 633.
 Fairman v. Ives, ii. 322, 326.
 Faithful, *Re*, i. 681.
 Faldo v. Ridge, i. 434.
 Falke v. Fletcher, i. 485.
 Fallon, *Ex parte*, ii. 36.
 Fairbrother v. Ansley, ii. 651.
 Farina v. Silverlock, ii. 470.
 Farley v. Danks, ii. 81.
 Farmer v. Darling, ii. 66.
 v. Hunt, i. 480.
 v. Joseph, ii. 520.
 Farnsworth v. Garrard, i. 612.
 Farnworth v. Packwood, i. 756.

 Farr v. Newman, ii. 129.
 Farrant v. ———, i. 518.
 v. Barnes, i. 35, 570, 6c4, 642
 689, 718, ii. 398, 448, 451.
 v. Lovell, i. 380.
 v. Thompson, i. 547, 555.
 Farrow v. Hague, ii. 703.
 Farshaw v. DeWette, ii. 669.
 Farwell v. Boston, &c., Rail. Co., i. 28c
 Fauconberg v. Piers, i. 229.
 Fawcett v. Beavres, ii. 511.
 Fawcett v. Fearne, i. 526, 531.
 Fawcett v. York and N. Mid. Rail. Co
 i. 274.
 Fay v. Prentice, i. 233.
 Feather v. The Queen, i. 79.
 Felkin v. Herbert (Lord), ii. 687.
 Fell v. Knight, i. 748.
 v. Whittaker, i. 827.
 Feltham v. England, i. 280.
 Fenham (The), i. 597.
 Fenn v. Bittleston, i. 547.
 v. Dixe, ii. 369.
 v. Griffith, ii. 608.
 v. Harrison, ii. 453.
 Fenner v. Duplock, i. 837.
 Fennings v. Grenfield (Lord), i. 508.
 Fentiman v. Smith, i. 130.
 Fenton v. Logan, i. 799.
 Fenwick v. Laycock, ii. 129, 133.
 Ferguson, *Ex parte*, i. 599.
 v. Carrington, i. 497.
 v. Kinnoul (Earl), i. 28, 30,
 49, ii. 100.
 v. Wilson, ii. 414, 685.
 Fernandez, *Ex parte*, ii. 105.
 Fernie v. Young, ii. 688, 692.
 Fernley v. Worthington, ii. 237.
 Ferrand v. Bradford (Corpor. of), ii. 269.
 Ferrers (Earl of) v. Staff. & Uttox. Rwy.,
 ii. 301.
 Fetter v. Beale, ii. 58, 595, 643.
 Feversham v. Emerson, i. 432.
 Field v. Adames, i. 818.
 v. Brown, i. 344.
 v. Carnarvon & Llanberis Rail.
 Co., ii. 301.
 v. Mitchell, i. 805.
 Figlia Maggiore, The, i. 602.
 Filliter v. Phippard, i. 20, 367, 368, 374
 Finch v. Blount, i. 559.

- Findon v. M'Laren**, i. 798.
Finlay v. Finlay, ii. 507.
Finnerty v. Tipper, ii. 388, 389.
Finucane v. Small, i. 662.
Firth v. Purvis, i. 807.
Fisher v. Algar, i. 805, 827.
 v. Bristow, ii. 87.
 v. Clement, ii. 384.
 v. Fisher, ii. 491.
 v. Magnay, ii. 137, 145.
 v. Prowse, i. 258.
Fitch v. Rawlings, i. 125, 157.
Fitzgerald v. Fitzgerald, ii. 484.
 v. Northcote, ii. 49.
Fitzjohn v. Mackinder, i. 51, ii. 73, 74.
Fleeming v. Orr, i. 285, 312.
Fletcher v. Bowsher, ii. 450.
 v. Braddick, i. 599.
 v. Calthorp, ii. 202.
 v. Fletcher, ii. 29, 485.
 v. Greenwell, ii. 291.
 v. Rylands, i. 111, 267.
Flewster v. Royle, ii. 40.
Flight v. Leman, ii. 79.
 v. Thomas, i. 188, 191, 309.
Flinn v. Perkins, ii. 567.
Flower v. Adam, i. 39.
 v. Gardner, ii. 680.
 v. London, Brighton, & S. C. Rail. Co., ii. 299.
Floyd v. Barker, ii. 78.
Flyn v. Matthews, i. 536.
Foiston v. Crachroode, i. 158.
Foley v. Wilson, i. 344.
Ford v. Leche, ii. 118.
 v. Tynte, i. 345.
Forde v. Skinner, ii. 3, 8.
Fordham v. Akers, i. 824.
 v. Brighton Rail. Co., i. 578.
Foreman v. Canterbury (Mayor of), ii. 257.
Fores v. Wilson, ii. 520.
Forest Queen, The, ii. 576.
Foreman v. Dawes, i. 554, 630.
Forsdyke v. Stone, ii. 387, 666.
Forster v. Forster, ii. 508.
Forsyth's Case, i. 82, 84.
Forth v. Simpson, i. 673.
Forward v. Pittard, i. 714.
Foster v. Bates, ii. 543.
 v. Charles, ii. 408.
Foster v. Cookson, ii. 135.
 v. Crabb, i. 688, 698.
 v. Denny, ii. 499.
 v. Dod, i. 288.
 v. Foster, ii. 697.
 v. Hilton, ii. 135, 166.
 v. Pointer, ii. 663, 672.
 v. Pritchard, ii. 134, 151.
 v. Stewart, ii. 512.
Fotherby v. Metrop. Rail. Co., ii. 280, 758, 759.
Fouldes v. Willoughby, i. 496.
Foulger v. Newcomb, ii. 348.
 v. Taylor, ii. 148.
Fountain v. Boodle, ii. 332.
Fowkes v. Joyce, i. 799.
Fowler v. Down, i. 555.
Fowles v. Great West. Rail. Co., i. 738.
Fox, Ex parte, i. 87.
 v. Fisher, i. 542.
 v. Gaunt, ii. 20.
Foxall v. Barnett, ii. 59, 95.
Foxcraft v. Wood, i. 677.
Foxham Tithing Case, ii. 180.
Foxley, Ex parte, i. 527.
Foy v. London, Brighton, &c., Rail. Co., i. 577.
France v. Gaudet, i. 565.
Frances v. Ley, i. 16.
Francis v. Cockrell, i. 584.
 v. Wyatt, i. 798.
Frankland v. Cole, i. 614.
Franklin v. Hosier, i. 670.
 v. Neate, i. 690.
 v. S. E. Rail. Co., i. 638.
Franks v. Franks, ii. 485.
 v. Weaver, ii. 468.
Frankum v. Falmouth (Earl of),
Fraser v. Berkeley, ii. 649.
 v. Swansea Navig. Co., i. 533
Fray v. Fray, ii. 307.
 v. Voules, i. 615.
Frean v. Sargeant, ii. 663.
Freedom, The, i. 602.
Freeman v. Appleyard, i. 678.
 v. Arkell, ii. 90, 94.
 v. Birch, i. 691, 765.
 v. Cooke, ii. 621.
 v. Edwards, i. 800.
 v. Read, i. 330, ii. 578, 711.
 v. Rosher, i. 827.

- Freemantle v. Gt. North. Rail. Co., ii.**
 250.
Freer v. Marshall, ii. 78.
Freestone v. Caswell, i. 292.
Fremantle v. Lond. & N. W. Rail. Co.,
 i. 368, 369, 374.
French v. Phillips, i. 806, 835.
Freshney v. Carrick, i. 533.
Frewen v. Hastings Local Board, ii.
 712.
 v. Phillips, i. 189.
Friswell v. King, i. 680.
Frith v. Cartland, i. 544.
 v. Forbes, i. 683.
Fryer v. Kinnersley, ii. 331.
Fulber, Ex parte, ii. 110.
Fuller v. Mackay, ii. 570.
 v. Wilson, ii. 453.
Furber, Ex parte, ii. 725.
Furnis v. Leicester, ii. 429.
 v. Midland Rail. Co., ii. 288.
Fursdon v. Clogg, i. 404.
Futcher v. Hinder, ii. 140.
Fynn, In re, ii. 495.

Gabriel v. Dresser, ii. 584, 589.
Gaby v. Wilts. Canal Co., ii. 290.
Gage v. Collins, ii. 676.
 v. Smith, i. 344.
Gahan v. Laffitte, ii. 100.
Gale v. Dalrymple, ii. 48.
Gallagher v. Humphrey, i. 254.
 v. Piper, i. 280.
Galliard v. Laxton, ii. 15, 223.
Galloway v. Bird, i. 822.
 v. Bleaden, i. 89.
 v. London (Corp. of), ii. 299.
Gallwey v. Marshall, ii. 351, 367.
Gambart v. Ball, i. 76.
 v. Sumner, i. 76.
Gambrell v. Falmouth, ii. 680.
Gandy v. Jubber, i. 214, 244, 301.
Gann v. Whitstable Free Fishers, i.
 410, 411.
Gardiner v. Gray, ii. 452.
 v. Williamson, i. 783.
Gardner v. Broadbent, ii. 68.
 v. Slade, ii. 332.
Garnett v. Backhouse, i. 294.
 v. Ferrand, ii. 99.
 v. Willan, i. 738.

Garside v. Trent Navig. Co., i. 735.
Garrard v. Guibelei, ii. 566, 629.
 v. Tuck, i. 401.
Garret v. Taylor, i. 22.
Garrett v. Messenger, i. 320.
Garritt v. Sharp, i. 201.
Garth v. Howard, ii. 620.
Garton v. Bristol & Exeter Rail. Co., i.
 712, 731, 745.
 v. Gt. West. Rail. Co., i. 776
 ii. 291, 296, 677, 715.
Gaskell v. Marshall, ii. 429.
Gatehouse v. Gatehouse, ii. 483.
Gateward's Case, i. 158.
Gathercole v. Miall, ii. 340.
Gaudret v. Egerton, i. 255.
Gauntlett v. King, i. 827.
Gaved v. Martyn, i. 182, 183, 184.
Gawler v. Chaplin, ii. 113.
Gay v. Matthews, ii. 222, 226.
Gayford v. Moffatt, i. 138, 207
Gee v. Lanc. and York. Rail. Co. i. 773,
 ii. 676.
Gelley v. Clerk, i. 760.
General Exchange Bank, Re, i. 679.
 v. Horner, i.
 620.
Gen. St. Navig. Co. v. Br. and Col. St.
 Navig. Co., i.
 594, 597.
 v. Guillou, ii. 548.
 v. Hedley, i. 597.
Genges v. Genges, i. 680.
Gent v. Harrison, i. 345, 372.
George v. Beaumont, i. 88.
 v. Chambers, ii. 226.
George and Richard, The, i. 596, 602.
George v. Skivington, i. 49, 612, ii. 452.
Gerard v. Lewis, ii. 80.
Gerhard v. Bates, i. 12, 49, ii. 410, 455.
Gerrard v. Cooke, i. 140.
Gibbins v. Phillips, ii. 161.
Gibbon v. Paynton, i. 38.
Gibbons v. Alison, ii. 84.
 v. Pepper, i. 14, 571, 629, 632.
Gibbs v. Cole, i. 83.
 v. Ralph, ii. 662.
 v. Trus. of Liv. Dock, i. 274, 275,
 306, ii. 254, 255.
Giblin v. McMullen, i. 619, 659.
Gibson v. Bray, i. 537.

- Gibson v. Hammersmith Rail. Co.**, ii. 269, 300.
 v. Humphrey, i. 550.
 v. Ireson, i. 796.
 v. Preston (Mayor of), ii. 257.
 v. Smith, i. 378, ii. 687.
 v. Wells, i. 342.
- Gilbert v. Burtenshaw**, ii. 387, 653.
- Gilbertson v. Richardson**, ii. 635.
- Gilding v. Eyre**, ii. 81.
- Giles v. Lond. & Chat. Rail. Co.**, ii. 269.
 v. Spencer, i. 785, 790, 795.
 v. Taff Vale Rail. Co., ii. 550.
- Gill v. Cubitt**, i. 524.
- Gillard v. Brittain**, ii. 650.
- Gillett v. Wilby**, i. 86.
- Gillon v. Boddington**, ii. 290, 536, 606.
- Gilman v. Elton**, i. 796.
- Gilpin v. Cohen**, ii. 139.
 v. Fowler, ii. 325, 353.
- Gimbert v. Coyney**, ii. 224.
- Gimson v. Woodfall**, i. 518.
- Gipps v. Gipps**, ii. 489, 491.
- Girlington v. Pitfield**, ii. 89.
- Gisbourn v. Hurst**, i. 795.
- Gittins v. Symes**, ii. 694.
- Gladman v. Johnson**, i. 312.
- Gladstone v. Padwick**, ii. 129.
- Gladwell v. Steggall**, i. 635, ii. 529, 532.
- Glaholm v. Barker**, i. 595.
- Glasgow (City of) Union Rwy. v. Hunter**, ii. 271, 278.
- Glasgow Nat. Ex. Co. v. Drew**, ii. 454.
- Glasspoole v. Young**, i. 562, ii. 128.
- Glave v. Harding**, i. 135.
- Glennie v. Glennie**, ii. 489.
- Glover v. Dixon**, ii. 604.
 v. Lond. & N. W. Rail. Co., i. 504.
 v. Lond. & S. W. Rail. Co., ii. 57.
 v. North Staff. Rail. Co., ii. 278, 285.
- Glyn v. Aberdare Rail. Co.**, ii. 280.
- Glynn v. Houston**, ii. 53, 636.
 v. Thomas, i. 806, 810, 814, 820, 835.
- Goddard v. Harris**, ii. 138.
- Goddart v. Haselfoot**, ii. 349.
- Godfrey v. Dalton**, i. 615.
 v. Jay, i. 614.
- Godfrey v. Furzo**, i. 541.
- Godson v. Horne**,
- Godts v. Rose**, i. 522.
- Godwin v. Francis**, ii. 465.
- Goff v. Gt. North. Rail. Co.**, ii. 27, 28, 41, 43, 549, 553.
- Goggerley v. Cuthbert**, i. 505.
- Gold v. Strode**,
- Golden v. Manning**, i. 736.
- Golding v. Stocking**, i. 292.
- Goldsmid v. Tunbridge Wells Commrs.**, i. 314, 317.
- Goldstein v. Foss**, ii. 391.
- Gompertz v. Kensit**, ii. 507.
- Good v. Lond. Steam Shipowners' Association**, i. 601.
- Goodall v. Ensell**, ii. 663.
- Goode v. Job**, i. 403.
- Goodheim v. Goodheim**, ii. 485.
- Goodman v. Boycott**, i. 662, 691, 694, 699, 701.
 v. Harvey, i. 506.
- Goodtitle v. Alker**, i. 395.
 v. Tombs, i. 479.
- Goodwin v. Noble**, ii. 561.
- Goodwyn v. Cheveley**, i. 387, 391, 817, 834.
- Gordon v. East India Co.**, i. 534.
 v. Harper, i. 546.
 v. Woodford, i. 345.
- Gore v. Grey**, ii. 28.
 v. English Fishery Commissioners, i. 294.
- Gorton v. Falkner**, i. 799.
- Goslin v. Corry**, ii. 387, 643.
- Gossett v. Howard**, ii. 201.
- Gott v. Gandy**, i. 265.
- Gough v. Everard**, i. 543.
- Gould v. Capper**, ii. 701.
- Governor, &c., of Cast Plate v. Meredith**, 739.
- Govett v. Radnidge**, ii. 566.
- Gowens v. Moore**, ii. 668.
- Grace v. Morgan**, ii. 641.
- Graham v. Furber**, i. 531.
 v. Graham, ii. 492.
- Grainger v. Hill**, i. 497, ii. 14, 82, 84.
- Grand Junction Canal Co. v. Shugar**, i. 110.
- Granger v. George**, ii. 601.
- Grant v. Astle**, ii. 634.

- Grant v. Moser, ii. 22, 51.
 v. Norway, ii. 452.
 v. Vaughan, i. 506.
 Grantham v. Hawley, i. 154.
 Graves v. Ashford, i. 76.
 Graves' Case, i. 77.
 Gray v. Bond, i. 174.
 v. Carr, i. 669.
 v. Pullen, i. 260, 302, 628.
 v. West, ii. 668.
 Grayburn v. Clarkson, ii. 561.
 Greasly v. Codling, i. 57.
 Greatrex v. Hayward, i. 185.
 Gt. North Co. v. Shepherd, i. 708, 741.
 Gt. Ship Co., *Re*, ii. 631.
 Gt. West. Rl. Co. of Canada v. Braid, ii. 261.
 v. Fawcett, i. 272, 579.
 Great West. Rail. Co. v. Bennett, i. 142.
 v. Crouch, i. 742.
 v. Goodman, i. 740.
 v. Redmayne, i. 774.
 v. Rimell, i. 727, 774.
 v. The Queen, ii. 722.
 v. Sutton, i. 746.
 Great Yarmouth (Mayor of) v. Groom, i. 25.
 Greathead v. Morley, ii. 132.
 Green v. Bartram, ii. 51.
 v. Button, i. 18, 49, 51, ii. 406, 454.
 v. Dunn, i. 502.
 v. Elgie, ii. 156.
 v. Farmer, i. 677.
 v. Goddard, ii. 10.
 v. Greenback, ii. 557.
 v. Ingham, i. 534.
 v. Lon. Gen. Om. Co., i. 298, ii. 549.
 v. New River Co., i. 48.
 v. Pope, ii. 756.
 v. St. Cath. Dock Co., i. 803.
 Greene v. Jones, ii. 604.
 Greenhow v. Ilsley, i. 211.
 Greening v. Wilkinson, i. 561.
 Greenland v. Chaplin, i. 41, 43, 593, 598.
 Greenslade v. Darby, i. 407.
 v. Halliday, i. 292.
 Greenway v. Fisher, ii. 561.
 v. Hurd, ii. 32, 292.
 Greenwich Board of Works v. Maudsley, i. 325.
 Gregg v. Wells, i. 558.
 Gregory's Case, ii. 480.
 Gregory v. Brunswick (Duke of), ii. 62.
 v. Cotterell, ii. 115, 117, 167.
 v. Hill, ii. 12.
 v. Piper, i. 304, 428.
 v. West Mid. Rail. Co., i. 733.
 v. Williams, ii. 643.
 Gregson v. Theaker, ii. 507.
 Gresham v. Postan, ii. 415.
 Greville v. Chapman, ii. 310, 379.
 Griffin v. Coleman, ii. 6, 15, 17, 41, 149, 225.
 v. Dighton, i. 407.
 Griffith v. Matthews, i. 171.
 Griffiths v. Gidlow, i. 280, 604.
 v. Kynaston, ii. 680.
 v. Lewis, ii. 330, 348, 367, 392.
 v. Longdon & Ellersfield Drainage Board, i. 97.
 v. Teetgen, ii. 515.
 Grill v. Gen. Iron Screw Collier Co., i. 36, 601.
 Grimby v. Ackroyd, ii. 705.
 Grimstead v. Marlow, i. 158.
 Grimston v. Innkeeper, i. 761.
 Grindley v. Booth, ii. 694.
 Grinham v. Willey, ii. 40, 54.
 Grinnell v. Wells, i. 58, 515, ii. 519.
 Grocers' Co. v. Donne, ii. 248, 252.
 Groenvelt v. Burwell, ii. 106, 213.
 Grose v. West, i. 416.
 Grote v. Ches. & Holyh. Rail. Co. i. 579.
 Grove v. Nevill,
 Groves v. Groves, i. 262, ii. 486.
 Grubb v. Burlington (Earl of), i. 351.
 Grymes v. Boweren, i. 355.
 Grymes v. Peacock, i. 205.
 Guest v. Poole & Bournemouth Rail. ii. 275.
 v. Warren, ii. 59, 595, 705.
 Guille v. Swan, i. 250.
 Guldaxe, The, i. 596.
 Gulliver v. Cosens, i. 819, 825.

- Gunmakers' Co. v. Fell**, i. 65.
Guntor v. Astor, ii. 524.
Gurr v. Cuthbert, i. 510.
Gustard's Case, ii. 765.
Gutsole v. Mathers, ii. 360, 365, 454.
Gwinnett v. Phillips, i. 835.
Gwynn v. Poole, ii. 102.
- Haddrick v. Heslop**, ii. 69, 87.
Hadesden v. Gryssel, i. 167, 514.
Hadley v. Baxendale, i. 773, ii. 463, 638.
 v. Taylor, i. 253, 282.
Hague v. Dandeson, i. 669.
Haigh v. Haigh, ii. 485.
 v. Jaggar, i. 381.
 v. Lond. & N. West. Rail. Co.,
 i. 274, 281.
Hailes v. Marks, ii. 50 68.
Haines v. East India Co., ii. 164, 621.
 v. Roberts, i. 141.
 v. Taylor, i. 315.
 v. Welsh, i. 785.
Haire v. Wilson, ii. 308, 303, 390.
Hakewill, *In re*, ii. 495.
Hale v. Oldroyd, i. 204.
Hall's Case, i. 317.
 Estate, *Re*, ii. 506.
Hall v. Ball, i. 516.
 v. Barrows, ii. 467, 471.
 v. Booth, ii. 18.
 v. Bristol (Mayor of), ii. 272.
 v. Fearnley, i. 44, 632.
 v. Harding, i. 210.
 v. Hollander, ii. 531, 532.
 v. Johnson, i. 607.
 v. Lund, i. 135.
 v. Pickard, i. 590.
 v. Smith, ii. 552.
 v. Swift, i. 104.
 v. Taylor, ii. 762.
Halley, The, i. 597.
Halliday, *In re*, i. 500.
 v. Holgate, i. 509.
Hallows v. Fernie, ii. 413.
Hamar v. Alexander, ii. 408.
Hambleton v. Veere, ii. 634.
Hambly v. Trott, ii. 558.
Hamer v. Knowles, i. 100.
Hamilton v. Bell, i. 536, 540.
 (Duke of) v. Graham, i.
 393.
- Hamilton v. Vere**, ii. 311, 657.
Hammack v. White, i. 36, 571.
Hammond v. Barclay, i. 678.
Hamond v. Howell, ii. 98, 104.
Hams, *In re*, i. 533.
Hancke v. Hooper, i. 612.
Hancock v. Caffyn, ii. 545.
 v. Peaty, ii. 487.
 v. Somes, ii. 47.
 v. Southall, i. 633.
Hand, *In re*, ii. 732.
Handcock v. Baker, i. 438.
Handford v. Palmer, i. 657.
**Hando v. Lond., Chat., & Dover Rail
 Co.**, i. 608.
Hankinson v. Bilby, ii. 360.
Hanna (The), i. 594.
Hannaford v. Hunn, ii. 52.
Hannam v. Mockett, i. 19, 20, 392.
Harbidge v. Warwick, i. 188, 189.
Harcourt v. Fox, ii. 171, 735.
 v. White, i. 382.
 v. Wyman, ii. 532.
Hardcastle v. S. York, &c., Rail Co., i.
 253, 257, 283.
Harding v. Carter, ii. 622.
 v. Greening, ii. 375.
 v. King, ii. 46.
 v. Metrop. Rail. Co., ii. 275.
 v. Pollock, ii. 735.
Hardwick v. Moss, ii. 293.
Hardy v. Ryle, ii. 229, 601.
 v. Veasey, i. 619.
 v. Walker, ii. 698, 706.
Hare v. Celey, ii. 546.
 v. Horton, i. 426.
Hargrave v. Le Breton, ii. 361.
Harland v. Mayor of Newcastle-on-Tyne
 ii. 667, 679.
Harman v. Cornelius, i. 612.
 v. Delaney, ii. 310, 341.
Harmer v. Bell, ii. 591.
Harnett v. Maitland, i. 336, 343.
Harold v. Smith, ii. 679.
Harper v. Charlesworth, i. 326, 447.
 v. Godsell, i. 691.
 v. Luffkin, ii. 517.
 v. Pole, ii. 575.
Harries v. Thomas, ii. 662.
Harrington (Earl) v. Ramsay, ii. 574.
Harris v. Baker, ii. 552.

- Harris v. Butler**, ii. 515.
 v. Cockermouth Rail., i. 777.
 v. Costar, i. 573, 631.
 v. Dignum, ii. 40, 53, 619.
 v. Ryding, i. 141.
 v. Shipway, i. 790.
 v. Thompson, ii. 333.
Harrison, Ex parte, i. 534.
 v. Barnby, i. 789.
 v. Blackburn, i. 447.
 v. Bush, ii. 322, 334.
 v. Dixon, i. 553.
 v. Good, i. 250.
 v. Gt. North. Rail. Co., i. 37, 95, 248.
 v. Lond. Br., & S. C. Rail. Co., i. 731.
 v. Parker, i. 448.
 v. Pearce, ii. 387.
 v. Taylor, i. 75.
 v. Thornborough, ii. 342.
 v. Wright, ii. 578.
Harrop v. Hirst, i. 107, 118.
Harrow School v. Alderton, i. 376, 382.
Hart's Case, ii. 765.
Hart v. Aldridge, ii. 511.
 v. Baxendale, i. 769.
 v. Crowley, i. 632.
 v. Frame, i. 613.
 v. Frontino and Bolivia Gold Mining Co., ii. 624.
 v. Leach, i. 827.
Hartley, In re, ii. 221.
 v. Halliwell, i. 312.
 v. Harriman, i. 307.
 v. Hindmarsh, ii. 46, 55.
 v. Moxham, i. 804.
Hartnall v. Ryde Improv. Commrs., i. 216, 740.
Hartop v. Hoare, i. 674.
Hartz v. Schrader, i. 382.
Harvey v. Brydges, i. 395.
 v. French, ii. 379.
 v. Mitchell, ii. 611.
 v. Pocock, i. 793, 841.
Harwood v. Great North. Rail. Co., i. 89.
Haseler v. Lemoyne, i. 827.
Haselinton v. Gill, i. 541.
Hassall v. Wright, i. 87, 88.
Haswell v. Haswell, ii. 486.
Hatch v. Hale, i. 811.
 v. Lewis, i. 636, ii. 669.
Hatton v. Kean, i. 72.
Haviland v. Haviland, ii. 483, 487.
Hawkes v. Dunn, i. 501, 522.
 v. Smith, i. 716.
Hawkins v. Carbines, i. 220.
 v. Harwood, i. 614.
 v. Plomer, ii. 140.
Haworth v. Hardcastle, i. 90.
Hawthorn v. Hammond, i. 748.
Hay v. Weakley, ii. 82.
Haycraft v. Creasy, ii. 407, 409, 422.
Hayes v. S. W. Rail. Co., i. 738.
Hayley v. Racket, ii. 146.
Hayling v. Okey, i. 435.
Haylock v. Sparke, ii. 173, 230, 231, ii. 236.
Hayward, In re, ii. 201, 728.
 v. Met. Rail. Co., ii. 679.
 v. Seawood, i. 500.
Hazeldine v. Grove, ii. 230.
Head v. Briscoe, i. 556.
Headlam v. Hedley, i. 416.
Heal v. Heal, ii. 510.
Heald v. Carey, i. 498.
Heap v. Barton, i. 362.
Hearn v. Lond. and S. W. Rail. Co., i. 726.
Hearne v. Stowell, ii. 340, 391.
Heath v. Bucknell, i. 190.
 v. Milward, i. 557.
Heaton Steel and Iron Co., Re, ii. 765.
Hebbert v. Thomas, i. 446.
Hebblethwaite v. Hebblethwaite, ii. 502.
Heden v. Atlantic Mail, &c., Co., ii. 666.
Hedges v. Tagg, ii. 516, 520.
Heeley v. Thames Valley Rail. Co., ii. 279.
Heeman v. Evans, ii. 145.
Hegan v. Johnson, i. 784.
Hegingbotham v. East. and Cont. St. P. Co., i. 240, 321.
Heilbut v. Nevill, i. 527.
Heinrich v. Sutton, i. 682.
Hellawell v. Eastwood, i. 792.
Helliwill v. Hobson, ii. 579.
Helsham v. Blackwood, ii. 386.
Heming v. Power, ii. 343.
Hemming v. Hale, ii. 635.
Hemmings v. Gasson, ii. 366, 379, 382.

- Henderson v Broomhead**, ii. 320.
 v. Lacon, ii. 412.
 v. Lond. and N. W. Rail., i. 725.
 v. Squire, i. 474, 725.
- Henkel v. Pape**, i. 27.
- Henley v. Mayor of Lyme, &c.**, i. 30, 167.
- Henman v. Lester**, ii. 609.
- Henning v. Burnett**, i. 454.
- Hepburn v. Lordan**, i. 318.
- Heriot v. Stuart**, ii. 339.
- Heriot's Hospital Feoffees v. Ross**, ii. 264.
- Herlakenden's Case**, i. 342.
- Hermann v. Seneschall**, ii. 33.
- Hern v. Nichols**, ii. 453.
- Hernaman v. Bowker**, i. 523.
- Herne v. Benbow**, i. 342.
- Herr v. Union Bank**, ii. 686.
- Herring v. Finch**, i. 50.
 v. Metrop. Bd. of Works, ii. 252, 274.
- Hervey v. Smith**, i. 226.
- Herz v. Union Bank**,
- Heslop v. Baker**, i. 553.
 v. Chapman, ii. 71.
- Hesse v. Stevenson**, i. 87.
- Heugh v. Lond. and N. W. Rail.**, i. 737, 742.
- Heurteloup's Case**, i. 80.
- Hewison v. Guthrie**, i. 674.
- Hewitt v. Cory**, ii. 577.
 v. Isham, i. 432.
 v. Macquire, ii. 159.
- Hewlett v. Cruchley**, ii. 73, 654.
- Hewlins v. Shippam**, i. 130, 216, 218.
- Hewston v. Phillips**, ii. 715.
- Hey v. Moorhouse**, i. 450.
- Heydon and Smith's Case**, i. 158.
- Heymann v. Eur. Central Rail. Co.**, ii. 412.
- Heywood v. Collinge**, ii. 82.
 v. Potter, i. 75.
- Hibbs v. Ross**, i. 634.
- Hickinbotham v. Leech**, ii. 373.
- Hide v. Thornborough**, i. 185.
- Hider v. Dorrell**, ii. 38.
- Higgins v. Bretherton**, i. 744.
 v. Thomas, i. 552.
- Higgon v. Mortimer**, i. 341, 551.
- Higsons v. Burton**, i. 521.
- Higham v. Rabett**, i. 441.
- Highmore v. Harrington Earl of**), ii. 387.
- Hilbery v. Hatton**, i. 499.
- Hill, *In re***, ii. 705.
 v. Balls, i. 125, 447.
 v. Goodchild, ii. 651.
 v. Gray, ii. 443.
 v. Lane, ii. 412.
 v. Reg., ii. 739.
 v. Sheriff of Middlesex, ii. 162.
 v. Thompson, i. 82, 85, 90.
 v. Tupper, i. 111, 151, 155.
 v. Warren, i. 610.
- Hills v. Evans**, ii. 688.
- Hilton v. Earl Grauville**, i. 159.
 v. Woods, i. 471.
- Hilton (Overseers of) v. Bowes (Overseers of)**, i. 151.
- Hinchliffe v. Kinnoul (Earl)**, i. 135.
- Hinde v. Sheppard**, ii. 668, 670.
- Hindley v. Eméry**, i. 382.
- Hindustan (Bank of), *Re***, i. 680, ii. 765.
- Hinsley v. Wilkinson**, i. 392.
- Hinton v. Dibbin**, i. 725.
 v. Heather, ii. 69.
- Hipkins v. Birm., &c., Gas Co.**, i. 296.
- Hirst v. Halifax Local Board**, i. 330.
 v. Molesbury, ii. 24.
- Hiscocks v. Jones**, ii. 141.
- Hiscox v. Greenwood**, i. 510, 675.
- Hitchings v. Thompson**, i. 837.
- Hitchman v. Walton**, i. 361.
- Hoare v. Dickinson**, i. 235, 305.
 v. Silverlock, ii. 309, 335, 370, 380.
- Hobson v. Thelluson**, ii. 131, 165.
 v. Todd, i. 211.
- Hoddesdon v. Gresil**, i. 167.
- Hodges v. Paterson**, ii. 157.
 v. Windham, ii. 508.
- Hodgkinson v. Enner**, i. 235, 248, 305.
 v. Fernie, i. 53, 600.
- Hodgman v. West Midl. Rail. Co.**, i. 254, 728.
- Hodgson v. Duce**, i. 476.
 v. Fullarton, i. 663.
 v. Gascoigne, ii. 135.
 v. Scarlett, ii. 358, 359.
 v. Sidney, ii. 544, 545.
 v. Towning, ii. 125.

- Hodsoll v. Stallebrass**, ii. 531, 643.
Hodson v. Walker, ii. 574.
Hoe's Case, ii. 144.
Hoey v. Felton, i. 13.
Hoffman v. Postill, ii. 688.
Hogarth v. Jackson, i. 514.
Hogg v. Ward, ii. 16.
Holborow v. Jones, ii. 668.
Holcome v. Rawlins, i. 449.
Holden v. Holden, ii. 480.
 v. *Liv. Gas Co.*, i. 308, 370.
 v. *Weeks*, i. 349, 380.
Holden's Case, ii. 765.
Holder v. Coates, i. 418.
 v. *Soulby*, i. 763.
Holderness v. Collinson, i. 677.
 v. *Rankin*, i. 536.
Holdringshaw v. Rag, i. 441.
Hole v. Barlow, i. 240, 244.
 v. *Sittingbourne, &c., Rail. Co.*, i. 260, 266, 303.
 v. *Thomas*, i. 380.
Holford v. George, i. 294.
 v. *Hankinson*, i. 216, 438.
Holland's Case, ii. 171.
Holland (Lady) v. Kensington Vestry, i. 332.
Holliday v. Camsell, i. 507.
Hollier v. Laurie, ii. 133, 153.
Hollis v. Claridge, i. 681.
 v. *Goldfinch*, i. 417.
 v. *Marshall*, ii. 154.
 v. *Smith*, ii. 537.
Hollister v. Nowlen, i. 719.
Holloway v. Abel, ii. 519.
 v. *Holloway*, ii. 468.
 v. *Turner*, ii. 641.
Holmes v. Bellingham, i. 415.
 v. *Clarke*, i. 279, 605.
 v. *Goring*, i. 203.
 v. *Hodgson*, i. 551.
 v. *Lond. & N. W. Rail. Co.*, i. 86.
 v. *North-East Rail.*, i. 271, 281.
 v. *Onion*, i. 625.
 v. *Pemberton*, ii. 682.
 v. *Simmons*, ii. 505.
 v. *Sixsmith*, ii. 459.
 v. *Sparkes*, ii. 157.
 v. *Wilson*, i. 396, 449, ii. 596.
Holme's Case, i. 321.
Holroyd v. Breare, ii. 105.
 v. *Marshall*, i. 153.
Holt v. Daw, i. 440.
 v. *Frost*, ii. 134.
 v. *Rochdale, Corporation of*, ii. 264, 297.
Holyday v. Morgan, ii. 415, 460, 461.
Homan, Ex parte, i. 535.
Home v. Camden, ii. 701.
 v. *Grimble*, ii. 34.
Homer v. Taunton, ii. 379.
Honess v. Stubbs, ii. 584.
Hood v. N. E. Rail., ii. 298.
Hoole v. Gt. West Rail. Co., ii. 687.
Hooman, Ex parte, i. 543.
Hooper, In re, ii. 705.
 v. *Bristol Port Rail. Co.*, ii. 277, 284.
 v. *Hooper*, ii. 485.
 v. *Lane*, ii. 125, 126, 129, 140, 143.
Hopcroft v. Keys, i. 781.
Hope v. Hope, ii. 479, 499.
Hopgood v. Parkin, i. 616.
Hopkins, Ex parte, ii. 214.
 v. *Crowe*, ii. 32, 34, 40.
 v. *Hitchcock*, ii. 468.
 v. *Tanqueray*, ii. 418.
Hopkinson v. Burghley (Lord), ii. 689.
Hopper, In re, ii. 99, 101, 704, 705.
 v. *Reeve*, i. 4.
Hopwood v. Schofield, i. 213, 224.
 v. *Thorn*, ii. 329, 343, 352.
Horn v. Baker, i. 532, 538.
 v. *Swinford*, ii. 25.
 v. *Thornborough*, ii. 33.
Hornblower v. Boulton, i. 82.
 v. *Proud*, i. 532.
Horncastle v. Farran, i. 674.
Horne v. Horne, ii. 485, 492.
 v. *Widlake*, i. 454.
Hornidge v. Cooper, i. 523.
Hornsby v. Miller, i. 530.
Horrocks v. Metrop. Rail. Co., ii. 280.
Horsefall v. Davy, i. 364, 421, 802.
 v. *Mather*, i. 364.
Horsfall v. Holland, i. 421.
 v. *Thomas*, i. 49.
Horsford v. Webster, i. 790, 795.
Horwood v. Smith, i. 518.
Hosking v. Phillips, i. 317, 426, 473.
Hoskins v. Knight, ii. 162.

- Hoskins v. Robins**, i. 165, 817.
Hossack v. Gray, i. 594.
Hotten v. Arthur, i. 69.
Houghton v. Butler, i. 495.
 v. Matthews, i. 678.
Houghton's Patent, i. 79.
Houlden v. Smith, ii. 103.
Hounsell v. Smyth, i. 253.
Housin v. Barrow, ii. 115.
How v. Hall, ii. 611.
Howard v. Crowther, ii. 544.
 v. Jemmett, i. 542.
 v. Lovegrove, ii. 641.
 v. Newton, ii. 563.
 v. Shepherd, i. 27.
 v. Sheward, ii. 453.
 v. Smith, i. 838.
Howarth v. Brown, ii. 660.
 v. Tollemache, i. 553.
Howden v. Standish, ii. 114, 158.
Howe v. Hunt, ii. 685.
 v. Scarrot, i. 781.
Howell v. Jackson, i. 748, ii. 10, 23.
 v. Rodbard, ii. 659.
 v. Young, ii. 290, 602.
Howes v. Ball, i. 800.
 v. Barber, ii. 679.
Howlett v. Haswell, ii. 557.
 v. Tarte, ii. 592, 594.
Howton v. Frearson, i. 138, 440.
Hoye v. Bush, ii. 224.
Hubbard v. Bagshaw, i. 532.
 v. Lees, ii. 506.
Huckle v. Money, ii. 55, 633, 634, 644.
Huddart v. Grimshaw, i. 81.
 v. Rigby, ii. 604.
Hudson v. Baxendale, i. 742.
 v. Granger, i. 678.
 v. McRae, i. 168, 193.
 v. Roberts, i. 286.
Hudston v. Midl. Rail., i. 708.
Huffer v. Allen, ii. 81.
Hughes v. Buckland, ii. 33, 290, 293.
 v. Græme, ii. 463, 639.
 v. Hughes, ii. 486.
 v. Quentin, i. 634.
Hull v. Pickersgill, ii. 553.
Humberstone v. Dubois, i. 831.
Hume v. Oldacre, i. 473, ii. 57, 650.
 v. Pocock, ii. 428.
Humfrey v. Gery, i. 797.
Humfrey v. Lond. and N. W. Rail. Co.,
 i. 439.
Humfreys v. Mears, ii. 253.
Humphrey v. Mitchell, ii. 138.
Humphries v. Brogden, i. 97, 100, 146,
 185.
Hunt v. Coison, i. 399.
 v. Dowman, ii. 364, 378.
 v. Harris, i. 420.
 v. Hooper, ii. 115.
 v. Maniere, i. 504, ii. 469.
 v. North Staff., &c., Rail. Co., ii.
 571, 704.
 v. Peake, i. 98, 101, 121, 185.
Hunter v. Caldwell, i. 616, 633.
 v. French, ii. 91.
 v. Westbrook, i. 546.
Huntley v. Herring, ii. 369.
 v. Russell, i. 348.
 v. Simson, ii. 70, 76.
Hurst v. Gt. West. Rail. Co., i. 710.
Hussey v. Christie, i. 683.
Hutchins v. Scott, i. 834.
Hutchinson v. Copestake, i. 201.
 v. Guion, ii. 448.
 v. Lowndes, ii. 184.
 v. Morley, ii. 459.
 v. York, Newc., &c., Rail.
 Co., i. 585, 592, 607.
Hutchison v. Birch, ii. 124.
Hutton v. Cruttwell, i. 528.
Huxley v. Berg, ii. 637.
Huzzey v. Field, i. 46.
Hyams v. Webster, i. 264, 628.
Hyde v. Graham, i. 129, 451, ii. 603.
 v. Hyde, ii. 485.
 v. Trent. Nav. Co., i. 714, 735, 767.
Ibbett v. De La Salle, i. 815.
Ibbotson v. Peat, i. 21, 235.
Ile's Case, ii. 740.
Illidge v. Goodwin, i. 14, 629.
Ilott v. Wilkes, i. 251.
Imperial Gas Co. v. Broadbent, i. 315.
Imray v. Magnay, ii. 116.
Inchbald v. Barrington, i. 315.
 v. Robinson, i. 315.
Incedon v. Berry, ii. 89.
Indermaur v. Dames, i. 253, 255, 281.
Industrie (The), i. 398.
Ingate v. Christie, i. 709.

- Ingle v. Bell, ii. 23.
 Inglis v. Spence, ii. 544.
 Ingram v. Lawson, ii. 309, 643.
 Ings v. Lond. and S. W. Rail. Co., ii. 667.
 Inman v. Reck, i. 598.
 Insole, *Re*, ii. 484.
 Iona, The, i. 595.
 Ipswich (Tailors of), i. 60.
 Ireland (Bank of) v. Trustees of Evan's Charities, i. 41, 43.
 Ireland v. Johnson, i. 835.
 v. Livingston, ii. 437.
 Ireson v. Pearman, i. 615, 616.
 Irons v. Smallpiece, i. 515.
 Irving v. Wilson, ii. 223, 292.
 Irwin v. Brandwood, ii. 350.
 v. Dearman, ii. 518, 520, 521.
 v. Grey, i. 30.
 Isaac v. Belcher, i. 553.
 v. Wyld, ii. 705.
 Isack v. Clarke, i. 481.
 Isle of Wight Ferry Co. v. Ryde Com., &c., ii. 661.
 Israel v. Clark, i. 584.
 Iveson v. Moore, i. 298.
 Limey v. Stocker, i. 166, 184, 205.
 Jacklin v. Fytche, ii. 232.
 Jackson v. Beaumont, ii. 698, 701, 702, 707, 713, 714.
 v. Calesworth, ii. 658.
 v. Cator, i. 224, 382.
 v. Courtenay, ii. 9.
 v. Cummins, i. 673.
 v. Everett, ii. 676.
 v. Pesked, i. 112, 430.
 v. Smithson, i. 284.
 v. Tollett, i. 592.
 v. Turquand, i. 620.
 Jacobs v. Humphrey, ii. 136, 162.
 v. Latour, i. 670, 686.
 v. Seward, i. 351, 508, ii. 520, 631.
 Jacobsohn v. Blake, ii. 270.
 Jacob v. Dodgson, ii. 229.
 v. Knight, i. 149.
 James (The), i. 597.
 James v. Biddington, ii. 509.
 v. Boston, ii. 325, 329.
 v. Brook, ii. 366.
 James v. Campbell, ii. 3, 56.
 v. Gt. Western Rail. Co., i. 582.
 v. Hayward, i. 221, 259, 293, 327.
 v. James, ii. 470.
 v. Lond. and S. W. Rail., ii. 695.
 v. Phelps, ii. 92.
 v. Plant, i. 207.
 v. Rutlech, ii. 347.
 v. Swift, ii. 37.
 Janson v. Brown, i. 48, 559.
 v. Stuart, ii. 305, 373.
 Jardine v. Smith, ii. 725.
 Jarman v. Hooper, ii. 128, 155, 164.
 Jarman v. Woolloton, i. 541.
 Jarrett v. Kennedy, ii. 407.
 Jarrold v. Houlston, i. 69.
 Jarvis v. Dean, i. 255, 257, 310, 325.
 Jaxon v. Tanner, ii. 634.
 Jayne v. Price, i. 396.
 Jeans v. Wheedon, ii. 90.
 Jeff Davis (The), i. 680, 683.
 Jefferson v. Durham (Bishop of), i. 371.
 v. Jefferson, i. 427.
 Jefferys v. Boosey, i. 68.
 Jeffreys v. Jeffreys, ii. 488.
 Jeffries v. Gt. West. Rail. Co., i. 557.
 v. Williams, i. 115, 217.
 Jeffrye's Case, ii. 702.
 Jegen v. Vivian, i. 471.
 Jenings v. Florence, ii. 80.
 Jenkins v. Betham, i. 618.
 v. Gething, i. 355.
 v. Hutchinson, ii. 407, 436.
 v. Turner, i. 44, 284, 307.
 Jenner v. A'Beckett, ii. 310.
 v. Clegg, i. 782.
 Jennings v. Gt. North. Rail. Co., i. 746.
 v. Rundall, ii. 557.
 Jessel v. Chaplin,
 Jesser v. Gifford, i. 112, 124, 213.
 Jessop's Case, i. 83.
 Jessop v. Crawley, ii. 53.
 Joel v. Morison,
 John v. Bacon, i. 281, 739.
 Johns v. Jenkins, i. 801.
 Johnson v. Emerson, ii. 82.
 v. Faulkner, i. 801.
 v. Hill, i. 762.
 v. Hudson, ii. 378.
 v. Johnson, ii. 428, 495.
 v. Leigh, ii. 119.

- Johnson** v. Lord, ii. 296.
 v. Midland Rail. Co., i. 707.
 v. Ossenton, i. 510.
 v. Pye, ii. 442, 587.
 v. Renton, i. 412, ii. 766.
 v. Royal Mail. S. P. Co., .500, 510.
 v. Stear, i. 496, 563, 681, ii. 638.
 v. Upham, i. 810.
 v. Windle, i. 523
- Johnston** v. Renton,
Johnstone v. Sutton, i. 52, 53, ii. 78, 92.
Jolly v. Arbutnot, i. 781.
 v. Wimbledon, &c., Rail. Co., ii. 277.
Jombart v. Woollett, i. 539.
Jones v. Bewicke, ii. 386.
 v. Bird, i. 267, ii. 37, 232, 251.
 v. Bowden, ii. 442.
 v. Boyce, i. 636.
 v. Bright, ii. 415, 430.
 v. Brown, i. 508, ii. 520.
 v. Carmarthen (Mayor of), i. 91.
 v. Carter,
 v. Chapman, i. 431, 450.
 v. Davies, i. 552.
 v. Dowle, i. 694, 700.
 v. East. Co. Rail. Co., i. 777.
 v. Festiniog Rail. Co., i. 369.
 v. Gooday, i. 471, ii. 296.
 v. Harber, i. 520, 527, 528.
 v. Hart, i. 549.
 v. Howell, ii. 33.
 v. Johnson, ii. 226.
 v. Jones, i. 289, 290, 394, ii. 480, 706.
 v. Lewis, ii. 642.
 v. Mackie, ii. 664.
 v. Morris, i. 832.
 v. Nicholls, ii. 37.
 v. Owen, ii. 186, 700.
 v. Pearce, i. 79.
 v. Pearle, i. 686, 762.
 v. Perry, i. 286, 686.
 v. Pope, ii. 156, **159**.
 v. Powell, i. 234, 240.
 v. Price, i. 438, 440.
 v. Pritchard, ii. 363.
 v. Sawkins, i. 815, ii. 589.
 v. Smith, ii. 546.
 v. Sparrow, ii. 665.
- Jones** v. Stevens, ii. 389.
 v. Tapling, i. 190, 201, **227**.
 v. Tarleton, ii. 611.
 v. Thurloe, i. 763.
 v. Tyler, i. 758, 768.
 v. Vaughan, ii. 223.
 v. Williams, i. 289, ii. **144, 155** 667.
 v. Wood, ii. 161.
Jordan v. Moore, i. 89.
Jordin v. Crump, i. 251.
Jory v. Orchard, ii. 237.
Joseph v. Henry, ii. 698.
Joule v. Jackson, 796, 798.
 v. Taylor, ii. 290.
Joyce v. Foukes, i. 795.
Jubb v. Hull Dock Co., ii. **271, 279**.
Judge v. Cox, i. 312.
Judson v. Etheridge, i. 673.
Jupe v. Pratt, i. 84, 86.
Justice v. Gosling, ii. 25.
- Kavanagh** v. Gudge, i. 432, **451**.
Kay v. Grover, ii. 224.
 v. Marshall, i. 89.
 v. Wheeler, i. 662.
Keane, *Re*, i. 683.
Kearney v. Lond. & Brighton Rail. 36, 633.
Kearns v. Cordwainers' Co., i. 264.
Keats v. Keats, ii. 490.
Keble v. Hickeringill, i. 20, 23, **235**.
Keech v. Keech, ii. 484.
Keen v. Priest, i. 793, 841.
Keene v. Dilk, i. 565.
Keihley v. Bell, ii. 52, 82, 320.
Keightley v. Birch, ii. 163.
Kelcey v. Stubbles, ii. 671.
Kelk v. Pearson, i. 221, **226**,
Kelly v. Hutton, i. 70.
 v. Kelly, ii. 481.
 v. Lawrence, ii. 737.
 v. Moray, ii. 543.
 v. Morris, i. 69, 70, ii. **543**.
 v. Partington, ii. 330.
 v. Sherlock, ii. 387.
 v. Tinling, ii. 340.
Kelsack v. Nicholson, i. 698.
Kemp v. Balne, ii. 710.
 v. Burt.
 v. Neville, ii. 75, 98, **106**.

- Kemp v. Rose, ii. 99, 101.
 Kempston v. Butler, i. 145, 186.
 Kendall v. King, ii. 762.
 v. Wilkinson, ii. 212.
 Kendillon v. Maltby, ii. 355, 359.
 Kennedy v. Panama Steam Co., ii. 413.
 Kent v. Astley, i. 605.
 v. Freehold Land Co., ii. 413.
 v. Gt. Western Rail. Co., ii. 291.
 v. Shuckard, i. 752.
 Kent Coast Rail. Co. v. Lond., Chatham,
 and Dover Rail. Co., ii. 300.
 Kenyon v. Hart, i. 25.
 Keppel v. Bailey, i. 153.
 Kerbey v. Denby, ii. 125.
 Kerby v. Harding, i. 812.
 Kerford v. Mondel, i. 502, 509.
 Kernaghan v. Williams, ii. 687.
 Kershaw v. Bailey, ii. 357.
 Key, *Ex parte*, i. 529.
 v. Flint, i. 673, 677.
 Keynsham Blue Lias Co. v. Baker, ii.
 569.
 Keyse v. Powell, i. 393.
 Keyworth v. Hill, i. 550, ii. 556.
 Kiddell v. Burnard, ii. 460.
 Kidgill v. Moor, i. 212, 213, 214.
 Kimberley v. Dick, ii. 99.
 Kimbray v. Draper, ii. 570.
 Kimpton v. Willey, ii. 700, 705.
 Kine v. Evershed, ii. 33, 35.
 King (The) v. Watts, i. 329.
 King v. England, i. 810, 815.
 v. Hoare, ii. 593.
 v. Lake, ii. 342, 350.
 v. Milsom, i. 506.
 v. Rose, i. 481.
 Kingsford v. Merry, i. 521, 522.
 Kingsley, *In re*, ii. 477.
 Kingston's (Duchess of) Case, ii. 216.
 Kinloch v. Craig, i. 678.
 v. Nevile, i. 443.
 Kinlyside v. Thornton, i. 340.
 Kinning v. Buchanan, ii. 155.
 Kirby v. Simpson, ii. 227, 231, 233, 235.
 Kirkin v. Jenkins, ii. 189.
 Kirkley v. Hodgson, i. 533.
 Kirkman v. Shawcross, i. 684.
 Kitchen v. Campbell, ii. 591.
 Kite and Lane's Case, ii. 204.
 Knapman v. Pryer, ii. 666.
 Knapp v. Lond., Chatham, and Dover
 Rail. Co., ii. 270, 275.
 v. Salisbury, ii. 44.
 Knight v. Bennett, i. 784.
 v. Cox, i. 837.
 v. Egerton, i. 840.
 v. Fox, i. 303.
 v. Gibbs, ii. 354.
 v. Mosely, i. 380.
 v. Quarles, i. 615, ii. 542.
 v. Waterford (Marquis), ii. 617.
 Knock v. Metropolitan Rail. Co., ii. 277.
 Knott v. Morgan, ii. 470.
 Knowles v. Holden, ii. 530, 706.
 v. Richardson, i. 10.
 Kramer v. Waymark, i. 40.
 Krehl v. Gt. Central Gas Co., i. 526.
 Kruger v. Wilcox, i. 678.
 Kynaston v. Crouch, i. 552.
 L—— v. H——, ii. 510.
 Labalmondier v. Addison, i. 291.
 v. Frost, i. 297, ii. 201.
 Laclough v. Towle, i. 772.
 Lacon v. Liffen, i. 527.
 Lacy v. Rhys, i. 74.
 Ladd v. Thomas, i. 810.
 Lade v. Shepherd, i. 395.
 Ladyman v. Grave, i. 189.
 Lafone v. Smith, ii. 372, 664.
 Laing v. Whaley, i. 108, 114, 215.
 Laird v. Birkenhead Rail. Co., i. 225,
 433.
 Lake v. King, ii. 322.
 v. Smith, ii. 555.
 Lamb's Case, ii. 374.
 Lamb v. Burnett, ii. 49.
 v. Palk, i. 586.
 Lambert v. Buckmaster, i. 680.
 v. Hepworth, i. 732.
 v. Hodgson, ii. 604.
 v. Robinson, i. 744.
 La Mert, *Ex parte*, ii. 738.
 Lampen v. Kedgewin, ii. 594.
 Lancaster v. Eve, i. 342, 356.
 Lanc. Canal Co., *Ex parte*, i. 534.
 v. Parnaby, i. 255, 274.
 Lanc. Wagon Co. v. Fitzhugh, i. 497, ii.
 605.
 Lanc. and York Rail. Co. v. Evans, ii.
 286.

- Land v. North, i. 698.
 Land Credit Co. of Ireland v. Fermoy (Lord), i. 620.
 Landens v. Shiel, ii. 715.
 Lane v. Applegate, ii. 590.
 v. Cotton, i. 30.
 v. Dixon, i. 445.
 v. Tewson, i. 553, 696.
 Lanfranchi v. Mackenzie, i. 190, 226, 227.
 Lang v. Gisborne, ii. 688.
 Langford v. Foot, ii. 129.
 v. Selmes, i. 782.
 Langley v. Hammond, i. 206, 207.
 v. Headland, i. 680.
 Langmead, *In re*, i. 534.
 Langridge v. Levy, i. 49, ii. 398, 404, 451.
 Langton v. Waite, i. 509.
 Lanphier v. Phipos, i. 612.
 Lansdowne v. Lansdowne, i. 346.
 Lanyon v. Blanchard, i. 685.
 Latch v. Rumner Rail. Co., i. 575, 578.
 Latham v. Rutley, i. 771.
 Lathropp v. Marsh, i. 378.
 Laughner v. Brefitt, i. 564.
 v. Pointer, i. 45, 589, 591.
 Loughton v. Taylor, ii. 591.
 Laverack v. Bean, ii. 710.
 Laveroni v. Drury, i. 662.
 Law v. Dodd, ii. 295.
 Lawford v. Partridge, ii. 572, 661, 706.
 Lawless v. Anglo-Egypt. Cotton Co., ii. 317, 333.
 Lawrence v. Gt. Northern Rail. Co., ii. 244, 248, 282, 286, 643.
 v. Hedger, ii. 15.
 v. Hitch, i. 26.
 v. King, i. 292.
 v. Obee, i. 200.
 Lawrenson v. Hill, ii. 188, 207, 228, 230.
 Lawson v. Carr, i. 598.
 v. Dickenson, i. 681.
 v. London (Bank of), ii. 441.
 v. Weston, i. 506, 524.
 Lawton v. Lawton, i. 360.
 Layton v. Hurry, i. 821.
 Lea v. Rossi, i. 133.
 Leach v. Thomas, i. 355, ii. 634.
 Leader, The, i. 680.
 Leader v. Homeward, i. 362.
 Leader v. Moxon, i. 53, 254, ii. 274.
 v. Rhys, ii. 670.
 Leake v. Loveday, i. 553.
 Leame v. Bray, i. 8, 365, 563, 568, 630.
 Leary v. Patrick, ii. 184, 208, 209, 227.
 Leather v. Simpson, ii. 437, 462.
 Leather Cloth Co. v. American Cloth Co., ii. 468, 471, 472.
 v. Hirschfield, i. 17.
 Leatt v. Vine, ii. 193.
 Leck v. Maestaer, i. 660.
 Leconfield (Lord) v. Dixon, i. 133.
 Le Conteur v. Lond. and S. W. Rail. Co., i. 709, 722.
 Lee, *Ex parte*, ii. 726.
 v. Bayes, i. 56, 503, 519, 690.
 v. Cooke, i. 807.
 v. Gansell, ii. 124.
 v. Haley, ii. 467.
 v. Jones, i. 49.
 v. Lanc. and Yorks. Rail., ii. 588.
 v. Lopes, ii. 135.
 v. Milner, ii. 282.
 v. Riley, i. 43, 389.
 v. Robinson, i. 503.
 v. Smith, i. 663, 786.
 v. Stevenson, i. 131, 150.
 v. Vessey, ii. 224.
 Leech v. North Staffordshire Rail. Co., i. 273.
 Leeds (Duke of) v. Lord Amherst, i. 346.
 Leete v. Hart, ii. 33, 34, 35.
 v. Leete, ii. 480.
 Le Fanu v. Malcolmson, ii. 363, 378, 546.
 Legg v. Evans, i. 687.
 v. Pardoe, ii. 193.
 Legge v. Tucker, ii. 668.
 Lehmann v. McArthur, i. 29.
 Leicester (Earl of) v. Walter, ii. 388.
 Leigh v. Shepherd, i. 789.
 v. Smith, i. 663.
 v. Webb, ii. 76.
 Leith v. Pope, ii. 95.
 Lemprière v. Humphrey, i. 451.
 v. Lemprière, ii. 486.
 v. Pasley, i. 537, 675.
 Le Neve v. Mile End, &c., Vestry, i. 258, 327.

- Le Roy v. Champion**, ii. 740.
Leslie v. Guthrie, i. 532.
 v. Pound, i. 247, 302.
Lester v. Garland, ii. 36.
Lestrangle v. Rowe, i. 409.
Lethbridge v. Phillips, i. 501.
 v. Winter, i. 324.
Letton v. Goodden, i. 24.
Leuckhart v. Cooper, i. 677, 684, 698.
Levi v. Sanderson, ii. 667.
Levy v. Edwards, ii. 22.
 v. Langridge, i. 49.
 v. Moylan, ii. 105.
 v. Rice, ii. 580.
 v. Rutley, i. 70, 72.
Leward v. Basely, ii. 49.
Lewis, Ex parte, i. 543.
 v. Alcock, ii. 158.
 v. Branthwaite, i. 393.
 v. Clement, ii. 335.
 v. Davis, i. 87.
 v. Great West. Co., i. 731.
 v. Harris, i. 787.
 v. Levy, ii. 100, 321, 371.
 v. Marling, i. 89.
 v. Peake, ii. 641.
 v. Read, i. 827.
 v. Rochester (Mayor of), ii. 263.
 v. Walter, i. 805, ii. 335, 356.
Lexden Un. v. Southgate, ii. 703, 704.
Ley v. Peter,
Liddard v. Kain, ii. 416, 418.
Lidster v. Borrow, ii. 35.
Liford's Case, i. 136, 152, 449.
Liggins v. Inge, i. 117, 132, 199.
Lightfoot v. Keane, i. 681.
Lilley v. Harvey, ii. 572.
Lillie v. Price, ii. 370.
Limpus v. Lond. Gen. Omn. Co. (Limited), i. 48, 586.
Lindon v. Hooper, i. 816.
Lindsay v. Leigh, ii. 201.
Linford v. Gudgeon, ii. 151.
 v. Lake, ii. 56, 59, 648.
Lingard v. Messiter, i. 533.
Lingham v. Biggs, i. 532, 533.
Lingwood v. Gyde, i. 159.
 v. Stowmarket Paper Co., i. 120.
Lion, The, i. 594, 595.
Litchfield v. Ready, i. 449.
Littledale, Ex parte, i. 534.
 v. Scaith, i. 514.
Liverpool (Mayor of), Ex parte, i. 387, 407.
 Adelphi, &c., v. Fairhurst, i. 58, ii. 442, 556, 587.
 New Cattle Market v. Hodson, i. 239.
 (Rector of), *Ex parte*, i. 407.
Livesay v. Hood, i. 540.
Livett v. Wilson, i. 172, 410.
Llandaff, &c., Market Co. v. Lyndon, 13.
Lloyd, Ex parte, i. 532.
 v. Burrap, i. 65.
 v. Peell, ii. 561.
 v. Sandilands, ii. 121, 124.
 v. Screw Collier Co., 396.
Load v. Green, i. 541, 675.
Lock v. Ashton, ii. 56.
Locke v. Matthews, i. 406.
Lockley v. Pye, i. 562.
Loeschman v. Machin, i. 547, 625.
Lomax v. Buxton, i. 528.
London's (Bishop of), Case, i. 514.
London (Bishop of) v. Webb, i. 345, 346, 378.
 (City of) v. Pugh, i. 379.
 v. Wood, ii. 101.
Chatham & Dover Railway, Re, ii. 301.
 (Mayor of) v. Cox, ii. 696, 698, v. Hedger, i. 378.
& N. W. R. Co. v. Ackroyd, i. 143.
 v. Bartlett, i. 736.
 v. Bradley, ii. 241, 278, 285.
 v. Lancashire &c. Rail. Co., i. 226, 477.
 v. Skirton, i. 273.
 v. Smith, ii. 279.
& S. W. Rwy. v. Blackmore, ii. 287.
& West. Loan, &c., Co., i. 362.
Cotton Co., Re, ii. 131.

- London & Devon Biscuit Co.,** *Re*, ii. 131.
 & Provincial Tel. Co., *Re*, ii. 624.
- Long v. Orsi**, 405.
- Longbottom v. Berry**, i. 363, 792.
 v. Longbottom, ii. 705.
- Longford v. Ellis**, ii. 561.
- Longman v. Tripp**, i. 533.
- Longmeid v. Holliday**, ii. 452, 529, 534.
- Longmore v. Great West, Rail. Co.**, i. 272.
- Lonsdale (Earl) v. Curwen**, i. 476.
 v. Nelson i. 290.
 v. Rigg, i. 513.
- Looker v. Halcomb**, ii. 21.
- Loosemore v. Radford**, ii. 642.
- Lopes v. De Tastet**, i. 631.
- Lord v. Mid. Rail. Co.**, i. 733.
 v. Sydney (Commrs. of), i. 514.
- Loring v. Warburton**, i. 810.
- Losh v. Hague**, i. 80, 89.
- Lotan v. Cross**, i. 548.
- Loton v. Devereux**, ii. 167.
- Louis v. Louis**, ii. 485.
- Lousley v. Hayward**, i. 171.
- Lovegrove v. Lond. & Brighton Rail. Co.**, i. 608.
 v. White, i. 616.
- Lovell v. Martin**, i. 523.
 v. Smith, i. 202.
- Lover v. Davidson**, i. 73.
- Lovering v. Lovering**, ii. 489.
- Lovett v. Hobbs**, i. 709, 769.
- Low v. Routledge**, i. 69.
 v. Ward, i. 70.
- Lowe v. Carpenter**, i. 191.
 v. Govett, i. 414.
- Lowe's Case**, ii. 764.
- Loweth v. Smith**, ii. 48.
- Lowry v. Guildford**, i. 614.
- Lowther v. Radnor (Earl)**, ii. 180.
- Lucan (Earl) v. Smith**, ii. 370.
- Lucas v. Dorrien**, i. 678, 679.
 v. Lond. Dock Co., i. 550.
 v. Tarleton, i. 814, 828, 835, 840.
- Ludlow v. Browning**, i. 542.
- Lukin v. Godsall**, i. 314, 377.
- Lumby v. Allday**, ii. 343, 352, 385.
- Lumley v. Gye**, i. 18, 51, ii. 511, 524.
- Lumsden's Case**, ii. 765.
- Lundy Granite Co.,** *Re*, i. 782, 798.
- Lunn v. Thornton**, i. 153.
- Lunt v. Lond. & North Rail. Co.**, i. 583.
- Lutterell v. Reynell**, i. 55.
- Luttrell's Case**, i. 163.
- Lycett v. Staff. & Uttox. Rail.**, ii. 301.
- Lyde v. Barnard**, ii. 408.
- Lygo v. Newbold**, i. 610.
- Lyme Regis (Mayor, &c., of), v. Henley**, i. 91, ii. 548.
- Lynch v. Knight**, ii. 43, 58, 352.
 v. Nurdin, i. 14, 40, 629, 636.
- Lyne, Ex parte**, ii. 25.
 v. Leonard, i. 294.
 v. Siesfeld, ii. 584.
- Lynvi Co., Ex parte**, i. 525.
 v. Brogden, i. 471.
- Lyon v. Knowles**, i. 74.
 v. Mells, i. 731.
 v. Tomkies, i. 813.
- Lyons v. Blenkin**, ii. 495,
 v. Martin, i. 827.
- Lysney v. Selby**, ii. 417, 427, 455, 458.
- Lythgoe v. Vernon**, i. 59.
- Maauss v. Henderson**, i. 685.
- M'Cance v. Lond. & N. W. Rail. Co.**, i. 733, ii. 621.
- MacCarthy v. Young**, i. 35, 652.
- M'Clellan, Ex parte**, ii. 495.
- M'Combie v. Davies**, i. 499.
- Macrae v. Clark**, ii. 167.
- M'Crea v. Holdsworth**, i. 75.
- M'Curday v. Driscoll**, ii. 48.
- M'Dermott v. Justices of British Guiana**, ii. 215.
- M'Donald v. Rooke**, ii. 69.
 v. Thompson, i. 524.
- M'Donnell v. Evans**, ii. 608.
 v. M'Kinty, i. 398.
- MacDougal v. Patterson**, ii. 665, 670.
- M'Dougall v. Claridge**, ii. 328.
- M'Eniry v. Waterford**,
- M'Fadzen v. Mayor, &c., of Liverpool**, ii. 88.
- M'Gargor v. Deal & Dover Rail. Co.**, ii. 437.
 v. Galsworthy, ii. 37.
 v. Gregory, ii. 373.
 v. Thwaites, ii. 100, 306.
- Mackay v. Ford**, ii. 358.
- McKean v. M'Ivor**, i. 738.
- McKenzie v. M'Leod**, i. 369.

- M'Kewen v. Cotching**, i. 557.
M'Kinnon v. Penson, ii. 250.
M'Kone v. Wood, i. 285.
M'Laughlin v. Pryor, i. 591.
M'Leish v. Tate, i. 784.
M'Leod v. M'Ghie, i. 563.
M'Manus v. Crickett, i. 470, 585.
 v. Lanc., &c., Rail. Co., i. 731,
 732.
M'Murray v. Wright, vi. 591.
McNiel's Case.
M'Pherson v. Daniels, ii. 356, 364, 370,
 374, 386.
M'Swiney v. Haynes, i. 122, 139, 209.
Mace v. Cammel, i. 535.
 v. Philcox, i. 63, 169, 409.
Machell v. Ellis, i. 825.
Machu v. L. & S. W. Rail. Co., i. 728,
Macklin v. Richardson, ii. 680.
Macrow v. Gt. West. Rwy., i. 709.
Madrid Bank, Re, ii. 413.
Magdalena Steam Navig. Co. v. Mar-
 tin, ii. 582.
Magnay v. Burt, ii. 78, 84, 139.
 v. Monger, ii. 140.
Magor v. Chapwick, i. 183.
Mahoney v. Widow's Life Ass., ii. 588.
Maitland v. Goldney, ii. 365, 377.
Major v. Park Lane Co., i. 291.
Malachy v. Soper, ii. 361.
Mali Ivo, The, i. 597, ii. 591.
Mallam v. Arden, i. 786.
Mallinson v. Mallinson, ii. 484, 493.
Malone v. Harris, i. 153, 155.
Manby v. Scott, ii. 557.
 v. Witt, ii. 330.
Manceaux, Ex parte, i. 83.
Manchester & Altr. Rail. Co. v. Fullar-
 ton, ii. 241, 249.
 Sheff., &c., Rail. Co. v. Work-
 sop Board of Health,
 i. 567, ii. 817.
Man., Sheff. & Lin. Rail. Co. v. Wallis, i.
 269, 817.
 v. Wood,
 i. 296.
Manders v. Williams, i. 548, 689.
Mangan v. Atterton, i. 40.
Manley v. Field, ii. 515.
 v. St. Helen's Can. & Rail. Co.,
 i. 245, 275.
- Mann v. Forrester**, i. 679, 685.
 v. Shniffner, i. 679.
Manning v. Clement, ii. 386.
 v. Farquharson, ii. 698, 707.
 v. Wasdale, i. 125.
Mansergh, In re, ii. 110.
Manton v. Moore, i. 536.
 v. Parker,
March v. March, ii. 492, 494.
Marchmont v. Marchmont, ii. 503.
Marfell v. South Wales Rail Co., i. 269,
 270, 274.
Margate Pier Company (The) v. Hannam,
 ii. 184.
Margetson v. Wright, ii. 416.
Maria, The, i. 594.
Marker v. Kendrick, i. 340.
Markham v. Cobb, i. 55.
Marks v. Lahee, ii. 617.
 v. Feldman, i. 527.
Marlborough (Duke of) v. Saint John, i.
 380.
Marrable, Ex parte, i. 535.
Marriott v. Lond. & S. W. Rail. Co., i.
 776.
Marris v. Marris, ii. 489.
Marsh v. Conquest, i. 74.
 v. Dewes, ii. 572.
 v. Loader, ii. 15.
 v. Marsh, ii. 493.
Marshall v. Martin, ii. 663.
 v. Moran, i. 594.
 v. Ross, ii. 472.
 v. Ulleswater, i. 413.
 v. Watson, i. 382.
 v. York, Newcastle, &c., Rail.
 Co., i. 718, 765, ii. 528.
Marshalsea (The) Case, ii. 147.
Marson v. Lond., Chat., & Dover Rail.
 Co.,
Martin, Ex parte, i. 541.
 v. Bell, ii. 161.
 v. Gilham, i. 342.
 v. Great Ind. Peninsul. Rail. Co.,
 i. 708, 730.
 v. Great North. Rail. Co., i. 271,
 609.
 v. Headon, i. 226, 227.
 v. Kennedy, ii. 591.
 v. Porter, i. 471.
 v. Pridgeon, ii. 190.

- Martin v. Roe**, i. 349, 354.
 v. Shopper, ii. 3.
 v. Strong, ii. 330.
 v. Temperley, i. 626.
- Martindale v. Smith**, i. 496.
- Martini v. Coles**, ii. 531.
- Martins v. Upcher**, ii. 37, 232.
- Martyn v. Knowles**, i. 551, ii. 530, 548.
 v. Williams, i. 154, ii. 630.
- Martyr v. Bradley**, i. 361, 373.
- Mary's (Robert) Case**, ii. 39.
- Mary Caroline, The**, i. 637.
- Marzetti v. Williams**, i. 18, 27.
- Mason v. Barker**, ii. 238.
 v. Birkenhead Com., &c., ii. 291.
 v. Cæsar, i. 290.
 v. Farnell, i. 696.
 v. Hill, i. 103.
 v. Keeling, i. 284, 388, 392.
 v. Mitchell, ii. 475.
 v. Newland, ii. 825.
 v. Paynter, ii. 112, 165.
 v. Sainsbury, ii. 652.
 v. Shrewsbury & Hereford Rail.,
 i. 103, 176, 184.
 v. Tucker, ii. 670.
- Massam v. Hunter**, i. 205.
- Massey, Re**, i. 683.
 v. Goyder, i. 267.
 v. Johnson, ii. 201, 229, 601.
 v. Sladen, i. 510.
- Masterman, Ex parte**,
- Masters v. Farris**, i. 832, ii. 653.
- Mather v. Lay**, i. 531.
- Mathers v. Green**, i. 87.
- Mathew v. Sherwell**, i. 563.
- Mathieson v. Harrod**, i. 77.
- Matson v. Cooke**, i. 447.
- Matthews v. Hopping**, i. 667.
- Matthias v. Mesnard**, i. 796.
- Matts v. Hawkins**, i. 420.
- Maughan v. Sharpe**, i. 658.
- Maund v. Monm. Rail. Co.**, ii. 548.
- Maunder v. Venn**, ii. 520.
- Mawby, Ex parte**, ii. 738.
- Maxwell v. Hogg**, i. 70, ii. 468, 690, 691.
- May, Ex parte**, ii. 199, 212.
 v. Brown, ii. 389.
 v. Burdett, i. 42, ii. 283, 307.
 v. Footner, ii. 628, 630.
 v. Great West. Rail., ii. 287.
- May v. Harvey**, i. 691.
- Mayall v. Higby**, i. 21, ii. 695.
- Mayer v. Burgess**, ii. 714.
- Mayhew v. Eames**, i. 38.
 v. Herrick, i. 508
 v. Locke, ii. 184.
 v. Maxwell, i. 69.
 v. Nelson, i. 724.
 v. Suttle, i. 399, 547.
- Maynard v. Moseley**, ii. 428.
- Mears v. Lond. & S. W. Rail. Co.** **L**
 547, 623, 689.
- Mechelen v. Wallace**, i. 785.
- Med. Nav. Co. v. Romney (Earl of)**, **i**
 III.
- Medina v. Stoughton**, ii. 429.
- Melling v. Leak**, i. 401.
- Mellor v. Baddeley**, ii. 77.
 v. Leather, i. 829, ii. 31, 225.
 v. Spateman, i. 164.
- Mellors v. Shaw**, i. 276, 280, 604.
- Melville v. Doidge**, i. 666.
- Melvina, The**, i. 622.
- Mennie v. Blake**, i. 822, 823.
- Mercer v. Jones**, i. 563.
 v. Peterson, i. 510.
 v. Stanbury, ii. 581.
 v. Whall, ii. 606.
 v. Woodgate, i. 258.
- Merest v. Harvey**, i. 15, 386, 468, ii. 644.
- Meriton v. Coombes**, i. 388, 395, 432.
- Merivale v. Exeter Turnp. Rd. (Trustees of)**, ii. 35, 332.
- Merryweather v. Nixon**, ii. 651.
- Mersey Dock Trustees v. Gibbs**, ii. 250.
 v. Penhallow, **i**
 275.
- Meryweather v. Turner**, ii. 378.
- Mesnard v. Aldridge**, ii. 460.
- Messiter v. Roe**, ii. 583.
- Metcalf v. Hetherington**, **i**, 216, 306.
 v. Lond. & Bri. &c., Rail. Co., **i**
 692, 726, 771.
 v. Lumsden, **i**, 518.
 v. Westaway, **i**, 133.
- Metropolitan Associat. v. Petch**, **i**, 213,
 218, 221, 307.
 Bd. of Works v. Metro.
 Rail. Co., **i**, 141.
 Co. Ins. Soc. v. Brown, **i**
 361.

- Metropolitan Rail. Co. v. Turnham, ii. 678.
 Saloon Om. Co. v. Hawkins, ii. 309, 370, 387.
- Meyer v. Everth, ii. 459.
- Meyerstein v. Barber, i. 522.
- Meynell v. Angell, i. 693.
- Michael v. Alestree, i. 592.
- Michell v. Brown, i. 294.
 v. Hughes, ii. 544.
 v. Williams, ii. 71, 85.
- Micklethwaite v. Micklethwaite, i. 346.
- Middlesex, Sheriff of, *Ex parte*, i. 526, 529.
- Middleton v. Fowler, i. 770.
- Midl. Rail. Co. v. Checkley, i. 142.
 v. Daykin, i. 270.
 v. Pye, ii. 476.
 v. Taylor, ii. 740.
- Midelton v. Gale, ii. 226.
- Milan, The, i. 593, 598, 601, 622, 637.
- Milburn v. L. & S. W. Rail., i. 600.
- Mildred v. Weaver, i. 322.
- Miles v. Cattle, i. 774.
- Milford v. Milford, ii. 481, 492, 493.
- Milgate v. Kebble, i. 510.
- Mill v. New Forest Comm., i. 179.
- Milar v. Taylor, i. 68.
- Miller v. Miller, ii. 510.
 v. Race, i. 506, 523.
- Milligan v. Picken, i. 74.
 v. Wedge, i. 627.
- Millington v. Fox, ii. 468.
- Mills v. Colchester (Mayor of), i. 156.
 v. Collett, ii. 186.
 v. Graham, ii. 558.
- Milman v. Dolwell, i. 552.
- Milne v. Leisler, ii. 618.
 v. Marwood, ii. 404, 407.
 v. Milne, ii. 491, 510, 532.
- Milner, *Ex parte*, ii. 724.
 v. Milner, ii. 485.
 v. Milnes, ii. 533.
- Milton v. Green, ii. 224.
- Miner v. Gilmour, i. 105, 150.
- Minet v. Morgan, i. 229.
- Minna, The, i. 595, 622.
- Minor v. Lond. & N. W. Rail. Co., ii. 570.
- Minshull v. Lloyd, ii. 160.
- Minter v. Wells, i. 80, 82.
- Minter v. Williams, i. 86.
- Mires v. Solebay, i. 502.
- Mitchell v. Crassweller, i. 586, ii. 582, 629.
 v. Foster, ii. 189.
 v. Jenkins, ii. 92.
 v. Tarbutt, i. 428, ii. 562.
- Mitten v. Faudrye, i. 481.
- Mobbs v. Vandenbrande, ii. 658.
- Mody v. Gregson, ii. 434.
- Moffatt v. Bateman, i. 36, 585.
- Mold v. Wheatcroft, i. 224, 225, ii. 685.
- Molesworth v. Robbins, i. 681.
- Money v. Leach, ii. 224.
- Moneypenny v. Hartland, i. 611.
- Monk v. Sharp, i. 526.
- Monkton v. Ashley, ii. 53.
- Monmouth Canal Co. v. Harford, i. 442.
- Monm. Can. & Rail. Co. v. Hill, i. 417.
- Monprivatt v. Smith, ii. 604.
- Moody v. Spencer, i. 680.
 v. Steward, ii. 683.
- Moon v. Raphael, i. 564.
- Moone v. Rose, ii. 149.
- Moore v. Gt. South & West. Rail. Co., ii. 278.
 v. Meagher, ii. 369.
 v. Moore, ii. 110.
 v. Plymouth (Earl), i. 435.
 v. Rawson, i. 197, 200.
 v. Robinson, ii. 531.
 v. Watson, ii. 669, 671.
 v. Wilson, i. 765.
- Morant v. Chamberlain, i. 258, 328.
- Mordaunt v. Mordaunt, ii. 487.
- Morden v. Porter, ii. 193.
- Moreland v. Richardson, i. 131, ii. 688.
- Moreton v. Harden, i. 630.
 v. Holt, ii. 710.
- Morgan v. Cubitt, ii. 533.
 v. Hughes, ii. 40, 186.
 v. Knight, ii. 544.
 v. Lingen, ii. 309.
 v. Marquis, i. 508, 696.
 v. Met. Rail. Co., ii. 275, 280, 745, 760.
 v. Palmer, ii. 231.
 v. Powell, i. 475.
 v. Ravey, i. 748, 759.
 v. Seaward, i. 79, 81, 90.
 v. Sim, i. 36.

- Morgan v. Steble**, ii. 545.
 v. Vale of Neath R. Co., i. 607, 609.
- Moriarty v. L. C. & D. Rail.**, i. 635.
- Morison v. Salmon**, ii. 455, 462, 665.
- Morland v. Cook**, i. 167.
- Morley v. Attenborough**, i. 518, 523, ii. 429.
 v. Pincombe, i. 793.
 v. Pragnell, i. 234.
- Morphett v. Morphett**, ii. 482.
- Morrell v. Martin**, ii. 226.
- Morris v. Ashbee**, i. 70.
 v. Branson, i. 87.
 v. Cannon, i. 534.
 v. Edgington, i. 138.
 v. Miller, ii. 504.
 v. Morris, i. 346, ii. 491.
 v. Nugent, i. 286.
 v. Ogden, ii. 203.
 v. Reynolds, ii. 99.
 v. Robinson, ii. 597.
 v. Wright, i. 70.
- Morrish v. Murray**, ii. 119.
- Morrison, Ex parte**, i. 680.
 v. Gen. St. Nav. Co., i. 598.
- Morse v. James**, ii. 159.
- Mortimer v. Cottrell**, i. 476.
 v. Cradock, i. 561, ii. 635.
 v. S. W. Rail. Co., ii. 285.
 v. Wright, ii. 501.
- Morton v. Woods**, i. 782, 784.
- Mosley v. Fosset**, i. 664.
- Moss, Re**, i. 681.
 v. Townsend, i. 762.
- Mossop v. Great North. Rail. Co.**, ii. 707.
- Mostyn v. Fabrigas**, i. 52, 54, ii. 582.
- Motley v. Downman**, ii. 471.
- Motteram v. E. Co. Rail. Co.**, ii. 200.
- Moule v. Garrett**, i. 29.
- Mounsey v. Ismay**, i. 157, 179, 454.
- Mount v. Taylor**, ii. 667.
- Mountjoy's Case**, i. 155.
- Mountjoy v. Wood**, ii. 107.
- Mountney v. Watton**, ii. 373.
- Mountnoy v. Collier**, ii. 573, 575.
- Mourilyan v. Labalmondiere**, i. 291.
- Mouse's Case**, i. 747.
- Muir v. Fleming**, i. 673.
- Mulkern v Ward**, ii. 310.
- Muller v. Moss**, i. 534.
- Mullet v. Challis**, ii. 113.
- Mullett v. Mason**, ii. 447, 464.
- Mumford v. Oxford, Worc. & Wolv Rail. Co.**, i. 301.
- Mummery v. Paul**, ii. 456.
- Mungean v. Wheatley**, i. 824, ii. 707, 715.
- Munns v. Isle of Wight Rail.**, ii. 301.
- Munro v. Butt**, i. 612.
- Munster v. S. E. Rail Co.**, i. 729, 740.
- Murchie v. Black**, i. 97, 102.
- Mure v. Kaye**, ii. 50.
- Murgatroyd v. Robinson**, i. 107, 248, 309.
- Murish v. Murray**, ii. 577.
- Murly v. M'Dermott**, i. 419.
- Murphy v. Caralli**, i. 627.
- Murray, Ex parte**, i. 540.
 v. Currie, i. 627.
 v. Hall, i. 419, 423.
- Muschamp v. Lan. & Pres. Rail. Co.**, i. 738.
- Musgrave's Case**, ii. 765.
- Musgrave v. Bovey**, ii. 351.
 v. Forster, i. 133.
- Mushett v. Hill**,
- Muspratt v. Gregory**, i. 794, 798.
- Mutton v. Young**, ii. 134.
- Myers v. L. & S. W. R.**, i. 707.
- Mytton v. Mid. Rail. Co.**, i. 738, 741, 767.
- Napier, Ex parte**, ii. 731.
- Nargett v. Nias**, i. 793, 826, 828.
- Nash, Ex parte**, ii. 742.
 v. Dickenson, ii. 129.
 v. Lucas, i. 791.
- Nathan v. Buckland**, i. 691.
- National Guar. Manure Co. v. Donald**, i. 198.
- Naylor v. Collinge**, i. 361.
 v. Mangles, i. 677.
- Neale v. Cripps**, i. 381.
 v. Mackenzie, i. 783.
- Neat v. Harding**, i. 544.
- Needham v. Rawbone**, i. 497.
- Neilau v. Hanny**, i. 497.
- Neilson v. Betts**, ii. 688.
- Nelson's Case**, i. 205.
- Nelson v. Couch**, i. 596, 622, ii. 597.

- Nelson v. Mackintosh, i. 667.
 Neporter, The, i. 602.
 Neville, *Ex parte*, i. 613
 Newbold v. Coltman, ii. 199.
 Newbould v. Met. Rail. Co., ii. 197, 273.
 New Bruns., &c., Rail Co. v. Conybeare, ii.
 411, 437.
 v. Muggeridge,
 ii. 411.
 Newby v. Colt's Firearms Co., ii. 548.
 v. Harrison, i. 155.
 Newcastle (Duke of) v. Clarke, i. 448.
 v. Hundred of Brox-
 towe, i. 470.
 v. Morris, ii. 138.
 Newcombe v. De Roos, ii. 706.
 Newman v. Bendyshe, ii. 192.
 New River Co. v. Johnson, ii. 272.
 Newsam v. Carr, 294.
 Newsome v. Newsome, ii. 489.
 Newton v. Beck, i. 516.
 v. Boodle, ii. 680.
 v. Cubitt, i. 24.
 v. Ellis, ii. 262, 292.
 v. Harland, i. 394, ii. 11, 125.
 v. Holford, ii. 586.
 v. Newton, i. 516, 679.
 v. Rowe, ii. 664.
 v. Scott, i. 782.
 Nicholl v. Allen, i. 91.
 v. Darley, ii. 141.
 Nicholls v. Chamberlain, i. 135.
 v. Parker, ii. 612.
 Nicholson v. Great West. Rail. Co., i. 777.
 v. Lanc. & York Rail. Co.,
 i. 271.
 v. Mouncey, i. 599.
 v. Williams, i. 409.
 Nicklin v. Williams, i. 210.
 Nicoll v. Glennie, i. 549, ii. 554, 563.
 Nicolls v. Bastard, i. 548, 691, 765.
 Nightingale v. Adams, i. 822.
 Nixon v. Freeman, i. 791.
 v. Roberts, i. 591.
 Noden v. Johnson, ii. 11, 48.
 Norbury (Lord) v. Kitchen, i. 105.
 Norman v. Westcombe, i. 833.
 Normand's Patent, i. 79.
 Normandy, The, i. 600.
 Norris v. Baker, i. 289.
 v. Irish Land Co., ii. 740, 742, 760.
 Norris v. Seed, ii. 29.
 v. Staps, i. 60.
 v. Williams, i. 669.
 North v. Cox, i. 165.
 v. Gt. Northern Rail. Co. ii. 690.
 v. Holroyd, ii. 705, 714.
 v. Miles, ii. 162.
 v. Smith, i. 47, 572.
 North-East Rail. Co. v. Crossland, i.
 141.
 v. Elliott, i. 141,
 144, 228
 Northam v. Bowden, i. 447, 555.
 v. Hurley, i. 215.
 Northampton's (Lord) Case, ii. 374.
 Northampton (Mayor of) v. Ward, i. 396.
 Northumberland (Duke of) v. Houghton,
 i. 411.
 Northumbria, The, i. 595.
 Norton v. Nicholls, i. 75.
 v. Scholefield, i. 234, 308, ii. 371.
 Norway v. Rowe, i. 381.
 Norwood v. Pitt, ii. 33, 675.
 Notara v. Henderson, i. 601.
 Nott v. Nost, ii. 484.
 Nottingham Town Clerk's Case, ii. 732
 Novello v. Sudlow, i. 68.
 Nugent v. Vetzera, ii. 499.
 Nuova Raffaelina, The, ii. 576.
 Nuttall v. Bracewell, i. 109.
 v. Staunton, i. 787.
 Nutting, *Ex parte*, i. 534.
 Nylander v. Barnes, ii. 682.
 Oakes v. Turquand, ii. 412.
 v. Wood, ii. 8, 12, 54.
 Oakley v. Davis, ii. 606.
 v. Kensington Can. Co., ii. 290.
 v. Ports. and Ryde St. Packet
 Co., i. 713.
 O'Brien v. Bryant, ii. 386.
 v. Clement, ii. 372, 373.
 v. Lewis, i. 680.
 Ogle v. Atkinson, i. 690.
 O'Hanlan v. Gt. West. Rail. Co., i. 774.
 Ohrby v. Ryde Comm., ii. 250.
 Ohrloff v. Briscall, i. 596, 730.
 Oldacre v. Hunt, i. 315.
 Oldham v. Langmead, i. 88.
 Bridge Co. v. Heald, ii. 570.
 Olivant v. Berino, i. 550.

- Olive v. Smith, i. 685.
 Oliver v. Bartlett, i. 532.
 v. Oliver, i. 480, 516, 698.
 Olliet v. Bessey, ii. 102, 149.
 Onley v. Gardiner, i. 191, 196.
 Onslow v. ———, i. 379.
 Oppenheim v. Russell, i. 743.
 v. White Lion Hotel Co.,
 i. 758.
 Opperman v. Smith, i. 801.
 Orchard v. Rackstraw, i. 673.
 Ord, *Ex parte*, i. 542.
 Orme v. Orme, ii. 479.
 Ormond v. Holland, i. 280.
 Ormrod v. Huth, ii. 403, 432, 434.
 Orpheus (The), i. 595.
 Orpwood v. Barkses, ii. 377.
 Osbond v. Meadows, i. 13.
 Osborn v. Gough, ii. 37.
 Ostell v. Lepage, i. 591.
 Overend & Co. v. Gurney, ii. 559.
 Overton v. Freeman, i. 303.
 Owen v. Burnett, i. 724.
 v. Knight, i. 553.
 v. Legh, i. 810.
 v. Lond. and N. W. Rail. Co., ii.
 678.
 Owens v. Jones, ii. 570.
 v. Woosnam, ii. 570.
 Oxlade, *In re*, i. 710.
 v. North-East. Rail. Co., i. 710.
 Oxley v. Watts, i. 481, 804.

 Packer v. Wellstead, i. 206.
 Packington's Case, i. 378.
 Padmore v. Lawrence, ii. 357.
 Page v. Cowasjee Edulgee, i. 496.
 v. Hatchett, i. 117.
 v. Pearce, ii. 666.
 Paget's Case,
 Painter v. Liv. Gas Co., ii. 155, 210.
 v. Lond. and Br. Rail. Co., i. 778.
 Palk v. Skinner, i. 195.
 Palmer's Case, i. 152.
 Palmer v. Fletcher, i. 148.
 v. Grand Junc. Rail. Co., ii. 291.
 v. Jarman, i. 505.
 v. Lond. and Br. Rail. i. 744,
 777.
 v. Lond. and S. W. Rail. Co., i.
 778.
 Pantou v. Isham, i. 365, 371, 373, 377.
 v. Jones, i. 837.
 v. Williams, ii. 92, 93.
 Pape v. Lister, ii. 588.
 Papendick v. Bridgwater, i. 123.
 Pappa v. Rose, ii. 99.
 Pardington v. South Wales Rail. Co., i.
 731.
 Pardo v. Bingham, ii. 599.
 Pariente v. Pennell, i. 531.
 Paris v. Levy, ii. 340.
 Parke v. Eliason, i. 539.
 Parker v. Bristol and Ex. Rail Co., ii.
 713, 715.
 v. Crole, ii. 561.
 v. Flint, i. 749, 761.
 v. Godin, i. 549.
 v. Gt. West. Rail. Co., i. 746.
 v. Leach, i. 171.
 v. Mitchell, i. 193.
 v. Norton, ii. 561.
 v. Patrick, i. 675.
 v. Smith, i. 221.
 v. Staniland, i. 446.
 v. Tootal, ii. 658.
 Parkes v. Stevens, i. 82, 89.
 Park Gate Iron Co. v. Coates, ii. 714.
 Parkins v. Scott, i. 13, ii. 255, 364.
 Parkinson v. Gt. West. Rail., i. 777.
 v. Lee, ii. 433.
 v. Parkinson, ii. 483, 484.
 Parmenter v. Webber, i. 781.
 Parmiter v. Coupland, ii. 341, 390, 391.
 Parr v. Lillicrap, ii. 668.
 Parrett Navigation Co. v. Robins, i. 264.
 Parrington v. Moore, ii. 26.
 Parrot v. Carpenter, ii. 342.
 Parrott v. Anderson, i. 790, 807.
 v. Palmer, i. 382, ii. 691.
 Parry v. Roberts, i. 666.
 v. Thomas, i. 441.
 Parsons v. Brown, ii. 90.
 v. Gingell, i. 798, 799.
 v. Lloyd, ii. 41, 144.
 v. St. Matthews, Beth. Green,
 ii. 250.
 Parteriche v. Powlett, i. 346.
 Parton v. Williams, ii. 233, 236.
 Partridge v. Elkington, ii. 151.
 v. Gardner, ii. 659.
 v. Scott, i. 97, 186.

- Pasley v. Freeman, i. 48, 49, ii. 404, 408, 462,
 Patch v. Ward, ii. 216.
 Pater, *Re*, ii. 213, 215.
 v. Baker, ii. 362, 627.
 Paterson v. Harris, ii. 604.
 v. Paterson, ii. 480.
 v. Wallace, i. 603.
 Patrick v. Colerick, i. 432, 456.
 Patrickson v. Patrickson, ii. 507.
 Patten v. Rea, i. 634, 635.
 Patterson v. Patterson, i. 680, ii. 509.
 Pattison v. Jones, ii. 331.
 Paul v. Paul, ii. 492.
 Pauli, *Ex parte*, i. 540.
 Pawly v. Holly, i. 703.
 Pawsey v. Gooday, ii. 715.
 Pawson v. Watson, i. 407, 419.
 Payne v. Beaumorris, ii. 352.
 v. Brander, i. 518.
 v. Rogers, i. 266, 310.
 v. Shedden, i. 180, 202.
 Peaceable v. Watson, ii. 625.
 Peachey v. Rowland, i. 302, 303.
 Peacock v. Bell, 578.
 v. Peacock, ii. 490, 491.
 v. Reynal, ii. 375.
 Peake v. Oldham, ii. 343.
 Pearce v. Ornsby, ii. 382.
 v. Pearce, ii. 492.
 Percy v. Walter, ii. 44.
 Peardon v. Underhill, i. 453.
 Pearman v. Pearman, ii. 480.
 Pears v. Wilson, ii. 705.
 Pearce v. Coker, i. 475.
 v. Dobinson, ii. 216.
 Pearson v. Glazebrook, ii. 573.
 v. Le Maitre, ii. 382.
 v. Spencer, i. 135, 203, 206, 207.
 Pease v. Chaytor, ii. 175, 179, 195, 199, 213, 226.
 v. Gloahac, i. 522.
 Peatfield v. Barlow, i. 681.
 Pechell v. Watson, ii. 180.
 Pedgrift v. Chevallier, ii. 219.
 Pedley v. Davis, ii. 100, 197, 199, 211, 223, 229.
 Peck v. Gurney, ii. 412.
 v. Larsen, i. 669.
 v. North Staff. Rail. Co., i. 730, 731, 733.
 Peck v. Spencer, i. 229.
 v. Waterloo, &c., Loc. Bd., i. 288, 291.
 Peel's Case, ii. 413.
 Peer v. Humphrey, i. 517, 675.
 Peerless, The, i. 594.
 Re, ii. 204.
 Pegler v. Monm. Rail. Co., i. 745.
 Pell v. Northampton and Banbury Rail. Co., ii. 301.
 Pellas v. Bresslauer, ii. 667.
 Pemberton v. Colls., ii. 351.
 Pembroke's (Earl of) Case, i. 163.
 Penfold v. Westcote, ii. 346.
 Penn v. Bibby, ii. 688.
 v. Jack, i. 86, ii. 686.
 v. Ward, ii. 49, 54.
 Pennell v. Woodburn, ii. 641.
 Penny *In re*, ii. 107, 218, 283, 658.
 Penruddock's Case, i. 233, 300, ii. 536.
 Penson v. Gooday, ii. 634.
 Penton v. Browne, ii. 120.
 v. Robart, i. 360.
 Peppercorn v. Hofman, ii. 224.
 Peppin v. Shakspear, i. 129, 439.
 Percival v. Nanson, ii. 618.
 v. Stamp, i. 446, ii. 129, 138.
 Perham, *In re*, ii. 188.
 Perkins v. Smith, ii. 555.
 v. Vaughan, ii. 648.
 Perkinson v. Gilford, ii. 559.
 Perren v. Monm. Rail. Co., ii. 608.
 Perrot v. Perrot, i. 378.
 Perry v. Bennett, ii. 677.
 v. Fitzhowe, i. 289.
 v. Truefitt, ii. 469.
 Perryman v. Lister, ii. 51, 66.
 Peskett v. Somers, i. 783.
 Petch v. Tutin, i. 154.
 Peter v. Daniel, i. 441.
 v. Kendal, i. 24.
 Peterson v. Ayre, ii. 638.
 Peto v. Blades, ii. 442.
 Petrie v. Lamont, i. 828, ii. 84, 88, 564, 608.
 Pettimangin, *Ex parte*, ii. 181.
 Pewtriss v. Austen, ii. 437, 455.
 Peyton v. London (Mayor of), i. 186.
 Phelps v. Lond. and N. Western Rail. Co., i. 708, 740.
 Phené v. Popplewell, i. 782.
 Pheysey v. Vicary, i. 135, 207.

- Philippine, The, i. 683.
 Philips v. Biron, ii. 41.
 Phillips v. Bacon, ii. 658.
 v. Barlow, i. 345.
 v. Berryman, i. 834, ii. 594.
 v. Clark, i. 730.
 v. Eyre, i. 52, 54.
 v. Homfray, i. 471.
 v. Hudson, i. 229.
 v. Jansen, ii. 375.
 v. Jones, i. 701.
 v. Phillips, ii. 479, 489.
 v. Naylor, ii. 72, 77, 91.
 v. Shervill, i. 782.
 v. Smith, i. 341.
 Phillipson v. Gibbon, i. 419.
 Philp v. Squire, ii. 511.
 Philpott v. Dobbinson, i. 831
 v. Kelley, i. 498.
 Phosphate of Lime Co. v. Green, ii. 300.
 Phythian v. White, i. 451.
 Pianciani v. Lond. and S. W. Rail. Co.,
 i. 723, 769.
 Pickard v. Sears, ii. 621.
 v. Smith, i. 253, 257.
 Pickering v. Dowson, ii. 442, 450.
 v. Rudd, i. 304.
 Pickford v. Grand Junc. Rail. Co., i.
 707, 768.
 Pierce v. Bartrum, i. 62.
 Pierpoint v. Shapland, ii. 607.
 Piggot v. East Co. Rail. Co., i. 368,
 509.
 Piggott v. Birtles, i. 805, 833, 840.
 v. Cubley, i. 496, 509.
 v. Stratton, ii. 521.
 Pike v. Carter, ii. 179.
 v. Nicholas, i. 70.
 Pilgrim v. Southamp., &c., Rail. Co.,
 Pilkington v. Cooke, ii. 146, 157.
 v. Riley, ii. 37.
 Pillot v. Wilkinson, i. 503.
 Pilmore v. Hood, ii. 452.
 Pim v. Curell, i. 639, ii. 615.
 Pindar v. Wadsworth, i. 211, 376.
 Pinhorn v. Souster, i. 401, 833.
 Pinkett v. Wright, i. 542.
 Pinnington v. Galland, i. 138.
 Pipe v. Fulcher, ii. 616.
 Pippet v. Hearn, ii. 93.
 Pitcher v. King, ii. 113.
 Pitt v. Donovan, ii. 362
 v. Shew, i. 792.
 v. Valden, i. 614.
 Pitts v. Gaince, ii. 531.
 Plant v. James, i. 207.
 Plasterers' Co. v. Parish Clerks' Co., i.
 188.
 Plas-yn-Mhowys Mining Co., *Re*, ii. 131.
 Playfair v. Musgrove, ii. 127.
 Playford v. United Kingdom Telegraph
 Co., i. 27, 668.
 Pluckwell v. Wilson, i. 584.
 Plumer v. Plumer, ii. 508.
 Plunket v. Gilmore, i. 51.
 Poe, *In re*, ii. 707.
 Polden v. Bastard, i. 206.
 Polhill v. Walter, ii. 404, 436, 454.
 Polkinhorn v. Wright, ii. 10, 52.
 Pollard, *Ex parte*, ii. 215.
 Pollen v. Brewer, i. 394.
 Pollitt v. Forrest, i. 784, 830.
 Pollock v. Lester, i. 242.
 Pomfret v. Ricroft, i. 136, 150, 209.
 Ponsford v. Walton, i. 528.
 Pontifex v. Bignold, ii. 455.
 Poole's Case, i. 360.
 Poole v. Huskisson, i. 323.
 Popham v. Pickburn, ii. 323, 338.
 Portland (Duke of) v. Hill, i. 159.
 Portman v. Middleton, ii. 463, 638.
 Postlethwaite v. Gibson, ii. 223.
 Potter v. Faulkner, i. 609.
 v. North, i. 171.
 Potteries, Shrewsbury, & North Wales
 Rail., *Re*, ii. 132.
 v. Minor, ii. 132.
 Potts v. Port Carlisle Co., i. 277, 604.
 v. Plunkett, i. 278, 604.
 v. Smith, i. 221.
 Poulson v. Thirst, ii. 293.
 Poulton v. Lond. and S. West. Rail. Co.,
 ii. 27, 42.
 Pow v. Davis, ii. 437, 641.
 Powell v. Hodgetts, ii. 619.
 v. Rees, ii. 559.
 v. Salisbury, i. 124.
 v. Thomas, i. 224.
 Powes v. Marshall, i. 826.
 Powle v. Gandy, ii. 670.
 Powlett v. Bolton (Duchess of), i. 511.
 Powys v. Blgrave, i. 346, 347, 348, 381.

- Poynton v. Gill, i. 234.
 Pozzi v. Shipton, ii. 563.
 Pratt v. Brett, i. 378.
 v. Jenner, ii. 492.
 v. Pratt, i. 436.
 Preece v. Corrie, i. 737.
 Prentice v. Harrison, ii. 159.
 Prestige v. Woodman, ii. 231.
 Preston, *In re*, ii. 495.
 Price v. Harewood, ii. 137.
 v. Hewett, ii. 442.
 v. Messenger, ii. 224.
 v. Seeley, ii. 22, 51.
 v. Severn, ii. 655.
 v. Woodhouse, ii. 610.
 Priestley v. Fowler, i. 604, 615.
 Prickett v. Gratrix, ii. 184, 208, 232.
 v. Platt, i. 535.
 Prince v. Molt, ii. 656.
 Prince Albert v. Strange, i. 21, ii. 689.
 Princess Royal, The, i. 602.
 Pringle v. Taylor, i. 563, ii. 635.
 v. Wernham, i. 221.
 Pristwick v. Poley, i. 615.
 Pritchard v. Long, i. 554, 620.
 Pritchett v. Boevey, i. 565, ii. 58, 642.
 Proctor v. Harris, i. 254, 259.
 v. Hodgson, i. 138, 440.
 Progress Assurance Co., *Re*, i. 797.
 Prohibitions del Roy, ii. 696.
 Protheroe v. Mathews, i. 559.
 v. May, i. 88.
 Proud v. Holis, i. 454.
 Proudfoot v. Montefiore, ii. 453.
 Proudlove v. Twemlow, i. 840.
 Provost, &c., Queen's College v. Hallett,
 i. 338, 340.
 Pudding Norton (Overseers of), *Re*, ii.
 217.
 Pugh v. Acton, i. 362.
 v. Griffith, ii. 120.
 v. Vaughan, i. 346.
 Pullen v. Palmer, i. 788.
 Pulford v. Richards, ii. 407, 462.
 Pultney v. Keymer, i. 678.
 Purcell v. Macnamara, ii. 92.
 v. Nash, i. 380.
 Pursell v. Horne, ii. 3, 7.
 Purves v. Landell, i. 615.
 Pye v. Mumford, i. 445.
 Pyer v. Carter, i. 135, 136.
 Pym v. Gt. North. Rail. Co., i. 622, ii.
 655.
 Pine v. Dor, i. 345.
 Quarman v. Burnett, i. 591.
 Queensbury (Duke of) v. Shebbeare, i.
 21, ii. 689.
 Queen, The, i. 599.
 Queen's Case, The, ii. 608.
 Queen's College (Provost, &c., of) v.
 Hallett, i. 338.
 Queen v. Staines, ii. 129.
 Race, *In re*, ii. 496.
 v. Ward, i. 125, 156.
 Rackman v. Jesup, i. 555.
 Radcliff v. D'Oyly, ii. 560.
 Raitt v. Mitchell,
 Ralston v. Smith, i. 83, 85.
 Ram v. Lumley, ii. 319.
 Ramsay *Re*, ii. 104.
 Ramsbottom v. Burkhurst, ii. 160.
 Ramshire v. Bolton, ii. 462.
 Rance's Case, i. 620.
 Rand v. Vaughan, i. 802.
 Randal v. Cockran, i. 371, ii. 652.
 Randall v. Raper, ii. 641, 642, 643.
 v. Stevens, i. 406.
 Randell v. Trimen, ii. 407, 436, 455,
 463, 639.
 v. Wheble, ii. 162.
 Randleson v. Murray, i. 627.
 Rangeley v. Midland Rail. Co., ii. 297.
 Rankin v. De Medina, ii. 159.
 Ransome v. East Co. Rail. Co., i. 714,
 779.
 Raphael v. Bank of England, i. 506, 524.
 v. Goodman, ii. 117.
 v. Pickford, i. 735.
 v. Thames Valley Rail. Co., ii.
 298.
 Rapson v. Cubitt, i. 629.
 Rashall v. Ford, ii. 413, 420.
 Ratcliff v. Davies, i. 687.
 Ratcliffe v. Barnard, i. 616.
 v. Burton, ii. 119.
 v. Ratcliffe, ii. 503, 506.
 Rawlings v. Bell, i. 815, ii. 439, 455,
 937.
 v. Till, ii. 7.
 Rawlins v. Wickham, ii. 603.

- Rawnsley v. Hutchinson**, ii. 222.
Rawstorne v. Backhouse, i. 294.
Rawstron v. Taylor, i. 185.
Raymond v. Fitch, ii. 536.
Rea v. Sheward, i. 480, 553.
Read v. Burley, i. 794.
 v. Coker, ii. 3, 33, 224.
 v. Edwards, i. 44, 285, 392, 559.
 v. Gt. East. Rail. Co., i. 621.
 v. Vict. and Pimlico Rail. Co., ii. 280, 284.
Reade v. Conquest, i. 72.
 v. Lacy, i. 72.
Readhead v. Midl. Rail. Co.,
Reddie v. Scoolt, ii. 518, 519.
Redfern v. Smith, i. 336.
Redway v. Webber, ii. 660.
Reece v. Rigby, i. 614.
 v. Taylor, ii. 51.
Reed v. Harrison, i. 387.
 v. Taylor, ii. 77.
 v. Thoys, ii. 162.
Reddie v. Lond. & N. Western Rail. Co., i. 627.
Rees v. Bowen, ii. 88.
 v. Davies, ii. 195.
 v. Williams, ii. 711, 715.
Reeve v. Holgate, ii. 348.
 v. Palmer, i. 662, 694, 699.
 v. Taylor, ii. 54.
 v. Whitmore, i. 800.
Reeves v. Capper, i. 686.
Reg. v. Aberdare Canal Co., ii. 215, 697.
 v. Aberdean Canal Co., ii. 101.
 v. Abrahams, ii. 726, 731.
 v. Aire & Calder Nav. Co., i. 144, ii. 282, 745.
 v. Allen, ii. 180, 711.
 v. Ambergate, ii. 722, 732, 752, 753.
 v. Ardley, ii. 466.
 v. Arkwright, ii. 697.
 v. Ashby Folville, i. 331.
 v. Aston, ii. 211.
 v. Badger, ii. 215, 712.
 v. Baines, ii. 736.
 v. Baker, i. 332.
 v. Balby, &c., Turnpike Trust, ii. 731.
 v. Bateman, i. 287.
 v. Bedfordshire, ii. 612.
 v. Bessel, i. 74.
Reg. v. Birm., &c., Rail. Co., - 3 22, 745, 750.
 v. Blackburn, ii. 195.
 v. Blanshard, ii. 724.
 v. Bolton, ii. 218.
 v. Boteler, ii. 196, 723.
 v. Bradford Nav. Co., ii. 243.
 v. Brickhall, ii. 189, 215.
 v. Brancaster Churchwardens, ii. 743.
 v. Bristol Dock Co., ii. 730.
 v. Bristol & Exeter Rail. Co., ii. 729, 748.
 v. Brown, ii. 284.
 v. Browne, ii. 221.
 v. Bryan, ii. 466.
 v. Bucks (Justices of), ii. 186, 219.
 v. Burslem Local Board, ii. 744, 746.
 v. Caledonian Rail. Co., ii. 748.
 v. Cambrian Rail. Co., i. 24, ii. 277.
 v. Casterton, ii. 205.
 v. Cheadle Highway Trustees, ii. 748.
 v. Cheek, ii. 725, 755.
 v. Cheltenham Commers., ii. 214, 215.
 v. Chester (Dean and Chapter of), ii. 737.
 v. Chichester (Bishop of), ii. 718.
 v. Chorley, i. 203.
 v. Churchwardens, &c., ii. 744.
 v. Coles, ii. 697.
 v. Collins, ii. 221.
 v. Colvill, ii. 726.
 v. Commissioners of Woods and Forests, ii. 745.
 v. Cooper, ii. 376.
 v. Cotesworth, ii. 7.
 v. Cridland, ii. 193, 206.
 v. Crowan, ii. 203.
 v. Cumberland (Clerk, &c., of), ii. 746.
 v. Darlington Local Board, ii. 241.
 v. Darlington School Governors, ii. 736, 756.
 v. Davis, ii. 224.
 v. Denny, ii. 190.
 v. Derby, ii. 739.
 v. Derbys, &c., Rail. Co., ii. 742.
 v. Dickenson, ii. 200, 123, 216, 219.

Reg. v. Dodson, ii. 193.

- v. Dolgelly Guard., &c., ii. 739.
- v. Driscoll, ii. 8.
- v. Dunnas, ii. 465.
- v. Eagleton, ii. 465.
- v. East. Co. Rail. Co., ii. 719, 748.
- v. East Mark, i. 324.
- v. East Riding Justices, ii. 724.
- v. Evans, ii. 466.
- v. Fall, ii. 753, 756.
- v. Farrer, i. 332.
- v. Fox, ii. 726.
- v. Frere, i. 746.
- v. Garland, ii. 719, 739.
- v. Gen. Cemet. Co., ii. 742, 760.
- v. Gen. Council Med., &c., ii. 735.
- v. Gillyard, ii. 216.
- v. Goodrich, ii. 724.
- v. Gt. North of Engl. Rail. Co., i. 322.
- v. Grey, ii. 216.
- v. Halifax Road Trustees, ii. 746.
- v. Hampshire (Justices of), ii. 661.
- v. Harden, i. 288, ii. 574.
- v. Hardy, i. 57.
- v. Harris, i. 321.
- v. Harwood, ii. 725.
- v. Hawkhurst, i. 328.
- v. Hawkins, ii. 47, 192.
- v. Hellingley, ii. 219.
- v. Henson, i. 319.
- v. Herefordshire Justices, ii. 182.
- v. Hereford (Mayor of), ii. 750.
- v. Herford, ii. 697.
- v. Hertfordshire Justices, ii. 182, 214.
- v. Higginson, ii. 199.
- v. High Wycombe Rail. Co., ii. 744.
- v. Higham, ii. 219.
- v. Hopkins, ii. 732.
- v. Hornsea, i. 330.
- v. Hornsey (Inhab. of), i. 328.
- v. Howes, ii. 496.
- v. Hull and Selby Rail. Co., ii. 730, 749.
- v. Huntingtower (Lord), ii. 214.
- v. Huntley, ii. 222.
- v. Huntsworth, ii. 195.
- v. Hurstbourne Tarrant, &c., ii. 744, 746.
- v. Jenkins, i. 287.
- v. Johnson, ii. 4, 192, 206.
- v. Kendal, ii. 740.

Reg. v. Kent Justices, ii. 723.

- v. Kilham, ii. 467.
- v. Lambarde, ii. 212.
- v. Langley, ii. 394.
- v. Ledgard, ii. 748, 758.
- v. Lee, ii. 466.
- v. Leech, i. 319.
- v. Leeds (Mayor of), ii. 739.
- v. Leicester Deputies, ii. 724.
- v. Levi, i. 556.
- v. Light, ii. 21.
- v. Liver., Manch., &c., Rail. Co., ii. 742.
- v. Liverpool Recorder, ii. 724.
- v. Lond. and Coleraine Rail. Co ii. 250, 742.
- v. Lond. and N. W. Rail. Co., i. 273, 280, 722, 726, 752, ii. 282.
- v. Lond. and S. W. Rail. Co., ii. 283, 284.
- v. London (Lord Mayor of), ii. 275, 737.
- v. Long, ii. 711.
- v. Longton Gas Co., i. 320, ii. 294, 299.
- v. Lundie, i. 65.
- v. McCleverty, i. 517.
- v. Mainwaring, ii. 221, 506, 751.
- v. Manch. & Sheffield Rail. Co., ii. 101, 107, 182, 275.
- v. Manktelow, ii. 524.
- v. Mann, i. 65.
- v. Martin, ii. 4.
- v. Master, ii. 562.
- v. Mathias, i. 323.
- v. Metrop. Board, &c., i. 98, ii. 272, 279.
- v. Metrop. Com. of Sewers, ii. 272.
- v. Metrop. Police (Receiver of), ii. 732.
- v. Mid. Rail. Co., ii. 742.
- v. Middlesex Justices, ii. 222.
- v. Monmouth (Mayor of), ii. 721, 727.
- v. Munster, ii. 29.
- v. Musson, i. 409.
- v. Mutters, i. 257.
- v. Newborough, ii. 712.
- v. Newton Ferrers, ii. 205.
- v. New Windsor (Mayor of), ii. 712.
- v. Newport Guardians, ii. 724.

- Reg. v. Norfolk Comm. of Sewers, ii.**
 744.
v. North Mid. Rail. Co., ii. 722.
v. Norwich and Brandon Rail. Co.,
 ii. 748.
v. Nunneley, ii. 195.
v. Orchard, i. 321.
v. Orton Trustees, ii. 731, 740
v. Oxford (Mayor of), ii. 739.
v. Oxford, &c., Roads, ii. 727.
v. Payn, ii. 172, 732.
v. Paynter, ii. 221, ii. 755.
v. Petrie, i. 324.
v. Pinder, ii. 29.
v. Ponsford, ii. 731.
v. Powell, ii. 750, 755.
v. Pratt, ii. 209.
v. Purdey, ii. 219, 222.
v. Ragg, ii. 466.
v. Ramsden, i. 330.
v. Rand, ii. 102, 182.
v. Riall, ii. 714.
v. Richards, ii. 220, 724.
v. Richmond Recorder, ii. 724, 747.
v. Rochester (Dean, &c., of), ii. 736.
v. Roebuck, ii. 466.
v. Rogier, i. 320.
v. Rose, i. 61.
v. Rotherham, ii. 744.
v. Rynd, ii. 745.
v. Sadler's Co., ii. 734, 735.
v. St. Albans, ii. 215.
v. St. George's, Bloomsbury, ii. 201,
 205.
v. Saintiff, i. 321.
v. St. Luke's, ii. 278, 749.
v. St. Luke's, Chelsea,
v. St. Martin's, ii. 739.
v. St. Stephen's, ii. 737.
v. Salford, ii. 697.
v. Salop, ii. 195.
v. Scaife, ii. 716.
v. Scott, ii. 193.
v. Scotton, ii. 188.
v. Sheffield (Mayor of), ii. 263, 711.
v. Sherwood, ii. 466.
v. Skinner, ii. 359.
v. Smith, ii. 466, 495.
v. Southampton Port Commrs., ii.
 749.
v. S. E. Rail Co., ii. 749.
- Reg. v. South Wales Rail. Co., ii.** 137
 283.
v. Spencer, ii. 216.
v. Stamford (Mayor of), ii. 755.
v. Stannard, i. 320.
v. Stephens, i. 262.
v. Stewart, ii. 727,
v. Stimpson, i. 168, ii. 194.
v. Stock, ii. 210.
v. Stockton, ii. 204.
v. Stone, ii. 275.
v. Strand Board of Works, i. 414.
v. Suffolk Justices, ii. 182.
v. Suffolk, ii. 712, 714.
v. Surrey Justices, i. 182, 330, ii
 712.
v. Thallman, i. 321.
v. Timmins, ii. 496, 524.
v. Tithe Commissioners, ii. 748.
v. Totness, ii. 203, 210.
v. Train, i. 321, 328.
v. Treasury (Comms. of), ii. 732.
v. Treasury (Lords of), ii. 732.
v. Trustees of Cheadle Highw., ii
 748.
v. Twiss, ii. 698.
v. United Kingd. Teleg. Co., i. 328
v. Vaughan, ii. 272.
v. Victoria Park Co., ii. 729, 743.
v. Wallasey Local Board, ii. 273.
v. Warwick Justices, ii. 215.
v. Watson, i. 321.
v. Watts, i. 266.
v. West Riding Justices, ii. 213
 724.
v. Whitecross Street Prison (Gover
nor's of), ii. 726.
v. Williams, i. 320.
v. Wing, ii. 742.
v. Wood, i. 61, 64, ii. 199, 200, 216
v. Wood Ditton Surveyors, ii. 728.
Regnart v. Porter, i. 785.
Reid v. Ashby, ii. 671.
v. Fairbanks, i. 562.
v. Margison, ii. 160.
Reignolds v. Edwards, i. 54
Renuison v. Walker, ii. 566.
Renshaw v. Bean, i. 201.
Revett v. Brown, i. 448.
Revis v. Smith, ii. 320, 359.
Rex v. Abingdon (Lord), ii. 337.

- Rex v. Abingdon (Mayor, &c., of), ii. 750, 756.
 v. Allen, ii. 216.
 v. Amphlit, ii. 377.
 v. Arkwright, i. 80, 83, 87.
 v. Atkins, ii. 217.
 v. Austin, ii. 205.
 v. Avering Atte Bower, ii. 721.
 v. Axbridge (Mayor, &c., of), ii. 740.
 v. Backhouse, ii. 124.
 v. Bagley, i. 330.
 v. Bank of England, ii. 742.
 v. Barker, ii. 739.
 v. Barr, i. 322.
 v. Beare, ii. 374.
 v. Bedford Level, ii. 739.
 v. Benn, ii. 725.
 v. Berkley, ii. 216.
 v. Betterton, i. 317.
 v. Birmingham Canal Co., ii. 722.
 v. Birmingham Rector, ii. 738.
 v. Birnie, ii. 182.
 v. Bradshaw, i. 808.
 v. Brangan, ii. 91.
 v. Brecknock, &c., Canal Co., ii. 748.
 v. Bristow, ii. 727.
 v. Buckingham (Marquis of), i. 324.
 v. Burdett, ii. 377, 393.
 v. Burnaby, ii. 193.
 v. Butterson, i. 382.
 v. Cambridge, ii. 739.
 v. Cambridge Justices, ii. 725.
 v. Cambridge University, ii. 739.
 v. Carlile, ii. 335.
 v. Cashiobury Justices, ii. 210.
 v. Chalke, ii. 736.
 v. Chandler, ii. 204.
 v. Churchill, i. 165.
 v. Clapham, ii. 733.
 v. Clear, ii. 731, 748.
 v. Colchester (Mayor of), ii. 739.
 v. Colebrook, ii. 725.
 v. Coleridge, ii. 728.
 v. Commissioners of Customs, ii. 727.
 v. Commissioners of Sewers of Essex, i. 167.
 v. Commissioners of Tower Hamlets, ii. 262.
 v. Cotton, i. 783.
- Rex v. Creevey, ii. 337.
 v. Cross, i. 319.
 v. Croydon Churchwardens, ii. 733, 740.
 v. Crunden, i. 63, 169, 320.
 v. Cumberland Justices, ii. 720, 724.
 v. Curghey, ii. 750.
 v. Dant, i. 282.
 v. Davies, ii. 216.
 v. Davis, ii. 205.
 v. De Manneville, ii. 496.
 v. Derbyshire Justices, ii. 215.
 v. Dewsnap, i. 319.
 v. Dixon, i. 320.
 v. Dobbyn, ii. 205.
 v. Doherty, ii. 64.
 v. Dorset Justices, i. 317.
 v. Ecclesfield, i. 300.
 v. Edwards, ii. 205.
 v. Ely (Bishop of), ii. 726.
 v. England (Bank of), ii. 742.
 v. Essex, ii. 222, 262.
 v. Exeter (Bishop of), ii. 751.
 v. Faversham Fish. Co., ii. 752.
 v. Gaskin, ii. 734.
 v. Grantham, ii. 725.
 v. Great Chart, ii. 180.
 v. Great Yarmouth, ii. 180,
 v. Greenhill, ii. 497.
 v. Griffiths, ii. 751.
 v. Gudridge, ii. 180.
 v. Hardwick, ii. 620.
 v. Harrison, ii. 203.
 v. Hastings (Mayor of), ii. 721.
 v. Hatfield, i. 415.
 v. Hazell, ii. 204.
 v. Hendon, ii. 739.
 v. Hermitage, i. 205.
 v. Higginson, i. 319.
 v. Holt, ii. 394, 395.
 v. Hoseason, ii. 180.
 v. Hostmen of Newcastle,
 v. Huggins, i. 284.
 v. Hull, i. 837.
 v. Humphery, i. 684.
 v. Ilchester Bailiffs, &c., ii. 725.
 v. Ingram, ii. 732.
 v. Ivens, i. 748.
 v. James, ii. 104.
 v. Jefferies, ii. 207.
 v. Jeyes, ii. 727.

Rex v. Johnson, ii. 204.
 v. Jones, i. 319, 320.
 v. Jotham, ii. 735, 739.
 v. Jukes, ii. 202, 203.
 v. Kent Justices, &c., ii. 720.
 v. King, ii. 217.
 v. Langley, ii. 393.
 v. Leake, i. 326.
 v. Leeds and Selby Rail. Co., ii. 282, 745.
 v. Leicester Justices, ii. 726.
 v. Liverpool (Mayor of), ii. 736, 752.
 v. Lloyd, i. 322.
 v. London Dock Co., ii. 278.
 v. London (Mayor, &c., of), i. 446, ii. 737, 751.
 v. Londonthorpe, i. 355.
 v. Lyme Regis (Mayor of), ii. 752.
 v. March, ii. 740.
 v. Margate Pier Co., ii. 749, 755.
 v. Merchant Taylors' Co., ii. 742.
 v. Middlesex Justices, ii. 725.
 v. Midhurst, ii. 725.
 v. Milverton (Lord of), ii. 725.
 v. Mitton, i. 545.
 v. Monmouth Justices, ii.
 v. Montacute (Lord), ii. 721.
 v. Moor Critchell, ii. 205.
 v. Moore, i. 250, 319.
 v. Moreley, ii. 213.
 v. Morley, ii. 203.
 v. Morpeth Ballivos, ii. 733.
 v. Neil, i. 319.
 v. Newcastle Coopers, &c., i. 65.
 v. North, ii. 203.
 v. North Riding, &c., Justices, ii. 725.
 v. Norwich (Dean, &c., of), ii. 739.
 v. Norwich (Mayor of), ii. 758.
 v. Nottingham Old Water Works, ii. 744.
 v. Osborne, ii. 393.
 v. Otley, i. 355.
 v. Oxfordshire Justices,
 v. Pagham (Commissioners of), i. 2, 8, 264.
 v. Pappineau, i. 319.
 v. Payn, ii. 727, 732.
 v. Pease, ii. 241, 249.
 v. Pedley, i. 244, 245, 265.
 v. Pilkington, ii. 756.

II.—52

Rex v. Pocock, ii. 394.
 v. Price, ii. 204.
 v. Priest, ii. 207.
 v. Reed, ii. 90.
 v. Revel, ii. 181.
 v. Richardson, ii. 736.
 v. Ripon (Mayor of), ii. 750, 756.
 v. Rislip, ii. 386.
 v. Robinson, ii. 47.
 v. Rosewell, i. 289.
 v. Russell, i. 319, 321, 329.
 v. St. Cath. Dock Co., ii. 743.
 v. St. George, ii. 3.
 v. St. Nicholas, ii. 736.
 v. Sankey, i. 681.
 v. Severn and Wye Rail. Co., ii. 730.
 v. Sillifant, ii. 726,
 v. Smallpiece, i. 748.
 v. Smith, i. 248, 320, ii. 734.
 v. Southerby, ii. 136.
 v. Sparrow, ii. 87.
 v. Speed, ii. 202.
 v. Stafford (Marquis of), ii. 731
 v. Staffordshire Justices, ii. 726.
 v. Stoke Damerel, ii. 738.
 v. Stratford (Mayor of), ii. 636.
 v. Symonds, ii. 181.
 v. Taylor, i. 319.
 v. Tindall, i. 321.
 v. Topham, ii. 392.
 v. Tower, ii. 739.
 v. Treasury (Lords of), ii. 731.
 v. Vantandillo, i. 319.
 v. Ward, i. 321, 328.
 v. Watson, i. 319, ii. 378, 390, 393.
 v. Watts, i. 266.
 v. Wells (Mayor of), ii. 720.
 v. Weltye, ii. 393.
 v. West Torrington, ii. 172.
 v. Westwood, i. 61.
 v. Wheeler, i. 81, 83.
 v. White, i. 319, ii. 393.
 v. Wildman, ii. 733.
 v. Williams, ii. 393.
 v. Wilson, ii. 495.
 v. Wilton (Mayor of), ii. 736.
 v. Winchester (Mayor of), ii. 739.
 v. Windham, ii. 739, 741.
 v. Wix, ii. 738.
 v. Worcestershire Canal Co., ii. 742.

- Rex v. Worcestershire Justices, ii. 725.
 v. Wright, i. 328, 456.
 v. Wrightson, *N.* 393.
 v. Yarmouth (Great), ii. 180.
 v. York (Archbishop of), ii. 751.
- Reynolds v. Barford, ii. 146.
 v. Bowley, i. 534.
 v. Clark, i. 233.
 v. Clarke, i. 388.
 v. Harris, ii. 680, 681.
 v. Reynolds, i. 397.
- Rhodes v. Hull, ii. 115.
- Rice v. Dub. and Wick. Rail. Co., ii. 682.
- Rich v. Aldred, i. 691.
 v. Basterfield, i. 247.
 v. Woolley, i. 809, 833.
- Richards v. Dyke, ii. 701.
 v. Frankum, i. 695.
 v. Gellatly, ii. 588.
 v. Harper, i. 102.
 v. Johnston, ii. 134.
 v. Lond. B. &c., Rail. Co., i. 737, 741, 770.
 v. Morgan, ii. 610.
 v. Richards, ii. 389.
 v. Rose, i. 145.
 v. Symons, i. 553.
 v. Turner, ii. 386.
- Richardson, *Ex parte*, i. 532, 534.
 v. Ardley, ii. 135.
 v. Atkinson, i. 498.
 v. Dunn, ii. 436, 639, 641.
 v. Goss, i. 685.
 v. Locklin, i. 297.
 v. Mellish, ii. 643.
 v. Metrop. Rail. Co., i. 578.
 v. North-East. Rail., i. 716.
 v. Williamson, ii. 437, 630.
- Rickbell v. Alexander, ii. 546.
- Richmond v. Nicholson, ii. 560.
 v. N. Lond. Rail. Co., ii. 275.
 v. Smith, i. 754.
- Ricket v. Metrop. Rail. Co., ii. 241, 271, 278.
- Ricketts, *Ex parte*, ii. 732.
 v. East and West India Docks Rail. Co., i. 269.
- Riddle v. Pakeman, ii. 144.
- Rideal v. Fort, ii. 130, 138.
- Rideal v. Gt. West. Rail. Co., ii. 388.
- Rideout's Trusts, *Re*, ii. 501.
- Rider v. Smith, i. 214, 306.
- Ridgway v. Lord Stafford, i. 813.
- Riga, The, ii. 576.
- Rigby v. Hewitt, i. 593, ii. 635.
- Rigg v. Lonsdale, i. 165, 179, 513.
 v. Parsons, i. 375.
- Riley v. Baxendale, i. 604.
- Ringland v. Lowndes, ii. 273, 578, 746, 752.
- Rinquist v. Ditchell, ii. 453.
- Ripon (Earl) v. Hobart i. 121, ii. 691.
- Rippin v. Bastin, ii. 195.
- Riseley v. Ryle, ii. 157, 162.
- Ritchings v. Cordingley, i. 408.
- Riviere v. Bower, i. 149.
- Roads v. Overseers of Trumpington, i. 446.
- Robbins v. Jones, i. 258, 266, 267, 310.
- Robert Mary's Case, ii. 39.
- Roberts v. Camden, ii. 360, 379.
 v. Carr, i. 322.
 v. E. C. Rail. Co., ii. 588.
 v. Gt. West. Rail. Co., i. 270.
 v. Haines, i. 100.
 v. Humby, ii. 701.
 v. Hunt, i. 330.
 v. Macord, i. 221.
 v. Orchard, ii. 35.
 v. Read, ii. 290, 601.
 v. Roberts, ii. 352.
 v. Rose, i. 293, 309.
 v. Smith, i. 280.
 v. Taylor, i. 432, ii. 9.
 v. Thomas, ii. 128.
 v. Williams, ii. 38.
 v. Wyatt, i. 546.
- Robertson v. Adamson, i. 278.
 v. Fleming, i. 27.
 v. Gantlett, ii. 604.
 v. Sterne, ii. 671.
 v. Womack, ii. 714.
- Robins v. Barnes, i. 204.
- Robinson v. Briggs, i. 510.
 v. Byron (Lord), i. 121.
 v. Chartered Bank, ii. 687.
 v. Dunmore, i. 668, 741.
 v. Gell, ii. 111.
 v. Gt. West. Rail. Co., i. 710, 730.

- Robinson v. Hoffman**, i. 788.
 v. Lenaghan, ii. 703, 707.
 v. Litton, i. 379, 381.
 v. Marchant, ii. 348, 371.
 v. S. West. Rail. Co., i. 723.
 v. Vaughton, ii. 185.
 v. Waddington, i. 812.
 v. Ward, i. 662.
 v. Wray, i. 132, 165.
- Robotham v. Robotham**, ii. 491.
- Rochdale Canal Co. v. King**, i. 16, 118.
- Rochester (Mayor of) v. Reg.**, ii. 727.
- Rocke, Ex parte**, i. 529.
- Roden v. Eyton**, i. 805.
- Rodger v. Comptoir d'Escompte de Paris**, i. 522, 669.
- Rodgers v. Maw**, i. 544.
 v. Nowill, i. 17, ii. 439, 455, 461.
 v. Parker, i. 814, 836, 840.
- Rodrigues v. Melhuish**, i. 594.
- Rodriguez v. Tadmire**, ii. 94.
- Roe v. Birkenhead, Lanc., &c., Rail. Co.**
 ii. 554.
- Roebuck v. Stirling**, i. 81.
- Rogers, Ex parte**, i. 542.
 v. Brenton, i. 156, 158, 166.
 v. Challis, ii. 685.
 v. Clifton, ii. 332.
 v. Davenant, ii. 702.
 v. Driver, i. 75.
 v. Head, i. 667.
 v. Jones, ii. 190.
 v. Macnamara, i. 16, ii. 571.
 v. Ragendro Dutt, i. 23, 31, 50.
 v. Spence, i. 470, ii. 545, 584, 605.
 v. Taylor, i. 101, 115, 185, 217.
- Roles v. Davis**, ii. 628.
- Rolfe v. Gregory**, i. 408.
 v. Peterson, i. 379.
- Rolin v. Steward**, i. 18.
- Rolle v. Whyte**, i. 168, 293, 294.
- Rollins v. Hinks**, i. 374.
- Romney Marsh (Bailiffs of) v. Trinity House**, i. 602.
- Ronneberg v. Falkland Islands Co.**, ii. 641.
- Rooke v. Mid. Rail. Co.**, i. 504.
- Rooth v. N. East Rail. Co.**, i. 270, 729.
 v. Wilson, i. 214, 223, 268
- Roper v. Harper**, i. 452, ii. 563
- Roret v. Lewis**, ii. 78
- Roscorla v. Thomas**, ii. 417, 455.
- Roscorla v. Rose v. Groves**, i. 262, 299.
 v. Hart, i. 677.
 v. Miles, i. 57, 299.
 v. Wilson, ii. 51.
- Rosewell v. Pryor**, i. 149, 214, 245, ii. 597.
- Roskell v. Whitworth**, ii. 692.
- Roskruge v. Caddy**, i. 830.
- Ross v. Adcock**, i. 349.
 v. Estates Invest. Co., ii. 412, 414.
 v. Hill, i. 667, 709.
 v. Norman, ii. 89.
 v. Ross, ii. 489.
- Rosse v. Bramsteed**, i. 763.
- Roswell v. Prior**, i. 214, 245, 247.
 v. Vaughan, ii. 428.
- Rotheray v. Wood**, ii. 135.
- Routledge v. Hislop**, ii. 593.
- Rowbotham v. Wilson**, i. 100, 102, 153.
 155, 159, ii. 599.
- Rowe v. Brenton**, i. 555, ii. 617.
- Rowlands v. Samuel**, ii. 95.
- Rowley v. Rowley**, ii. 483.
- Rowning v. Goodchild**, i. 35, 59, 67.
- Royal British Bank, In re**, ii. 414.
- Ruck v. Williams**, ii. 261, 295.
- Rudd v. Scott**, ii. 33.
- Ruffey v. Henderson**, i. 362.
- Rugby v. Charity, Ex parte**, ii. 727.
- Rugg v. Kingsmill**, i. 407.
 v. Winchester (Bishop of), i. 407.
- Rumsey v. N. East. Rail. Co.**, i. 740.
- Runcorn v. Cooper**, i. 174.
- Rundle v. Little**, i. 561.
- Rushforth v. Hadfield**, i. 677, 743.
- Rushton v. Crawley**, i. 82.
- Rushworth v. Taylor**, i. 500.
- Russell v. Briant**, i. 74.
 v. Cowley, i. 82.
 v. Harford, i. 136.
 v. Palmer, i. 613.
 v. Shenton, i. 305.
- Rutherford v. Evans**, ii. 385.
- Rutland's (Countess of) Case**, ii. 144
- Ruttinger v. Temple**, ii. 501.
- Ryall v. Rowles**, i. 333.
- Ryan v. Clark**, i. 431.
 v. Shilcock, i. 791, ii. 123.
 v. Thompson i. 832.
- Ryde Com. v. Isle of Wight Ferry Co.**
 ii. 687.

Ryder v. Bentham, i. 226.
v. Ryder, ii. 493, 496.

Sabin v. Long, ii. 651.

Sablicich v. Russell, i. 504.

Sacheverell v. Porter, i. 160.

Sadler v. Belcher, i. 539.

v. Henlock, i. 624.

Saffron Hill (Overseers of), *Ex parte*,
i.

Sagrill v. Milward, i. 389.

Sahlgreen's Case, ii. 765.

Saint Devereux v. Much Dew Church,
ii. 507.

St. Albans (Duke of) v. Skipwith, i. 349.

St. Germans (Earl of) v. Crystal Palace
Rail. ii. 301.

Saint Helen's Smelting Co. v. Tipping,
i. 240.

Saint John's Coll. v. Murcott, i. 797.

St. Luke v. Middlesex Justices, ii. 725.

St. Margaret's Rochester (Burial Board
of) v. Thompson, i. 408.

St. Martin's, Birmingham, (Rector of), *Ex
parte*, i. 407.

St. Mary Newington v. Jacobs, i. 396.

St. Pancras Vestry v. Batterbury, i. 65.

St. Paul v. St. Paul, ii. 488.

Salisbury (Marquis of) v. Gt. North Rail.
Co., i.

v. Gladstone, i.
159, 350.

Salisbury v. Metrop. Rail. Co., ii. 687.

Salmon v. Bensley, i. 300.

v. Ward, ii. 418.

Salter v. Metrop. Distr. Rail., ii. 288.

Salters' Co. v. Jay, i. 177.

Sammell v. Wright, i. 589.

Sampson v. Hoddinott, i. 104, 107, 182.

v. Mackay, ii. 668.

v. Smith, i. 315, 318.

Samuel v. Buller, ii. 143.

v. Payne, ii. 17.

Sandeman v. Scurr, i. 599.

Sanders v. Spencer, i. 760.

Sanderson v. Bell, i. 671.

Sandford v. Clarke, ii. 653.

Sandon v. Jervis, ii. 53, 121.

Sandys, *Ex parte*, ii. 736.

Sankey Brook Coal Co. (*Re*), i. 669.

Sarazin v. Hamel, i. 75.

Sarch v. Blackburn, i. 284, 285.

Satherthwaite v. Duerst, ii. 513.

Saunders v. Bate, ii. 628.

v. Edwards, ii. 601.

v. Mills, ii. 334.

v. Musgrave, ii. 162.

v. Newman, i. 182.

v. Oliffe, i. 205.

v. Plummer, i. 748.

v. Saunders, ii. 480.

v. Smith, ii. 686, 689.

Saunderson v. Baker, ii. 128.

Savage v. Brook, i. 64.

Savile v. Jardine, i. 12, ii. 305, 343.

v. Roberts, ii. 79, 80, 85, 94.

Savill v. Barchard, i. 677.

Saville v. Sweeney, ii. 534.

Savin v. Hoylake Rail. Co., ii. 723.

Savory v. Price, i. 80, 83.

Sawin v. Guild, i. 86.

Saxby's Patent, i. 79.

Saxby v. Manchester Rail., i. 214, 244.

v. Easterbrook, ii. 688.

Saxon v. Castle, ii. 80.

Scarfe v. Morgan, i. 509, 670, 674.

Scattergood v. Silvester, i. 517.

Schneider v. Heath, ii. 419, 450.

Scholefield v. Robb, ii. 461.

v. Templer, ii. 438.

Schotsmans v. Lanc. and Yorksh. Rail.
Co., ii. 685, 690.

Schroder v. Ward, ii. 676.

Schuringe v. Dowell, i. 323.

Schuster v. M'Kellar, i. 549.

Schwalbe, The, i. 594.

Scothorn v. South Staff. Rail. Co., i. 738.

Scott v. Craig, i. 280.

v. Dixon, ii. 405, 411, 457.

v. Dub. and Wickl. Rail. Co., i.
42, 609.

v. Hanson ii. 418.

v. Jones, ii. 611.

v. London Dock Co., i. 37, 254,
578, 633.

v. Manch. (Mayor, &c., of), ii. 446,
550.

v. Marshall, ii. 161.

v. Newington, i. 546.

v. Pilkington, ii. 591.

v. Porcher, i. 522.

v. Rayment, ii. 685.

- Scott v. Scott**, i. 539, ii. 482.
 v. Seymour (Lord), i. 54, ii. 591.
 v. Shepherd, i. 9, 14, 629.
 v. Stanford, i. 69.
 v. Stansfield, ii. 100.
 v. Surman, i. 541.
Scott v. Young, *Ex parte*, i. 33.
Scrutton v. Brown, i. 410.
Seagram v. Knight, i. 344, 345.
Seare v. Prentice, i. 612.
Searle v. Law, i. 280, 698.
 v. Lindsay, i. 280, 607.
Sears v. Lyons, i. 15, 470.
Seddon v. Seddon, ii. 492, 503, 508.
 v. Tutop, ii. 594.
Sedgworth v. Overend, i. 624.
Sedley v. Sutherland, ii. 563.
Seixo v. Provezendc, ii. 462, 469.
Selby v. Cryst. Pal. Distr. Gas Co., i. 325.
 v. Greaves, i. 781.
 v. Robinson, i. 163.
Seller v. Seller, ii. 491.
Sellers v. Till, ii. 379.
Selmes v. Judge, ii. 294.
Sells v. Hoare, i. 835.
Selway v. Fogg, ii. 403, 420.
 v. Holloway, i. 769.
Semayne's Case, ii. 120.
Seiple v. Lond. and Birm. Rail. Co., i. 315.
Senhouse v. Christian, i. 140.
Senior v. Medland, ii. 357.
 v. Metrop. Rail. Co., ii. 279.
 v. Pawson, i. 227.
 v. Ward, i. 280, 605, 610.
Serres v. Dod, i. 826.
Sewell, *Ex parte*, ii. 477.
Seymour v. Greenwood, i. 47, 585, 586.
 v. Maddox, i. 278, 306, ii. 580.
Shackell v. West, i. 658.
Shadwell v. Hutchinson, i. 124, 212, 213, 300, 314, ii. 596.
Sharp, *Ex parte*, ii. 426.
 v. Grey, i. 573, 583.
Sharpe v. Brice, ii. 631.
 v. Hancock, i. 95.
Sharrod v. Lond. and N. W. Rail. Co., ii. 553.
Shattock v. Carden, ii. 145.
Shatwell v. Hall, ii. 34.
Shaw, *In re*, i. 534.
Shaw v. Harvey, i. 536, 540.
Shea v. United Assur. Co., ii. 571.
Sheers v. Brooks, ii. 119.
Sheffield Waterworks v. Yeomans, i. 228.
Shelbury v. Scotsford, i. 699.
Shelley v. Westbrook, ii. 497, 498.
Shepherd v. Bristol and Exeter Rail. Co., i. 737.
 v. Harrison, i. 522.
 v. Hills, i. 65, ii. 274, 276.
Sheppard v. Shoolbred, i. 521.
 v. Wakeman, i. 18.
Sherborn v. Wells, ii. 189.
Sheridan's Case, ii. 375, 378.
Sheridan v. New Quay Co., i. 503, 772, 796.
Sherwin v. Swindall, ii. 672.
Shiels v. Gt. North. Rail. Co., ii. 569.
Shilcock v. Passman, i. 615.
Ship v. Crosskill, i. 620, ii. 435.
Shipley v. Todhunter, ii. 380.
Shipman's Case, ii. 765.
Shirley v. Wright, ii. 160.
Short v. Kalloway, ii. 641.
Shower v. Pilck, i. 515.
Shrewsbury's (Earl of) Case, ii. 735.
Shrewsbury v. Blount, ii. 458.
Shrewsbury (Countess of) v. Crompton, i. 364.
Shury v. Piggot, i. 95.
Shuttleworth v. Cocker, ii. 665, 666, 672.
 v. Hernaman, i. 533.
 v. Le Fleming, i. 178.
Sichel v. Lambert, ii. 507.
Sichell's Case, ii. 765.
Sidley's Case, i. 321.
Simmonds v. Gt. East. Rail. Co., i. 681.
 v. South East. Rail. Co., i. 774.
Simmons v. Edwards, i. 535, 541.
 v. Lillystone, i. 429, 498, ii. 579.
 v. Millingen, ii. 21, 23, 27.
Simons v. Gt. West. Rail. Co., i. 681, 731, 733, 771.
 v. Patchett, ii. 463.
Simpson v. Blues, ii. 576.
 v. Dendy, i. 415.
 v. Hartopp, i. 793.

- Simpson v. Holliday**, i. 83, ii. 691.
 v. Lethwaite, i. 441.
 v. Robinson, ii. 383.
 v. Sadd, ii. 591.
 v. Savage, i. 301.
 v. Wells, ii. 193.
Sinden v. Bankes, i. 66.
Siner v. Gt. West. Rail. Co., i. 577.
Singleton v. East. Co. Rail. Co., i. 609.
 v. Williamson, i. 818, 819.
Six Carpenters' Case, i. 387, 804.
Skelton v. Lond. and N. W. Rail. Co.,
 i. 579.
 v. Springet, ii. 501.
Skinner, Ex parte, ii. 497.
 v. Chapman, i. 514.
 v. Lond. Br. &c., Rail. Co., i.
 573.
 v. Shoppee, ii. 662.
Skip v. East. Co. Rail. Co., i. 603.
Skipton Indus. Co-operative Soc. v.
 Prince, ii. 571, 703.
Skipwith v. —, i. 762.
Skull v. Glennister, i. 454.
Skuse v. Davis, i. 454, ii. 46.
Slackford v. Austen, ii. 141.
Sladden v. Serjeant, ii. 609.
Slade's Case, ii. 594.
Slater v. Baker, i. 481, 612.
 v. Pinder, i. 529.
 v. Sunderland (Mayor of),
 v. Swann, i. 480.
Slatterie v. Pooley, i. 838.
Sleat v. Fagg, i. 774.
Sleath v. Wilson, i. 585.
Sleddon v. Cruikshank, i. 355.
Slim v. Gt. North. Rail. Co., i. 770.
Slocombe v. Lyall, i. 431.
Small v. Moates, i. 669.
Smallcombe's Case, ii. 413.
Smallman v. Pollard, ii. 136, 157, 163.
Smart v. Hutton, ii. 117.
 v. Morton, i. 100, 147.
Smeed v. Foord, ii. 635.
Smith's Case, ii. 411.
Smith, Ex parte, ii. 202, 220.
 In re, ii. 732.
 v. Ashforth, i. 805, 835.
 v. **Birm. Gas Co.**, ii. 547, 548.
 v. **Bonsall**, i. 162.
 v. **Brown**, i. 596, 602, 622.
Smith v. Brownlow (Earl of), i. 229.
 v. Carey, ii. 379.
 v. Dearlove, i. 760, 762.
 v. Edge, ii. 671.
 v. Feverell, i. 211.
 v. Goodwin, i. 807.
 v. Gt. East. Rail. Co., i. 285
 v. Harnor, ii. 669.
 v. Hopper, ii. 33, 34, 293.
 v. Hudson, i. 541.
 v. Kenrick, i. 110.
 v. Knowelden, ii. 627.
 v. Lawrence, i. 589.
 v. Lloyd, i. 399.
 v. Lond. and Br. Rail. Co., i. 725.
 v. Lond. and N. W. Rail. Co., ii.
 530.
 v. Lond. and S.W. Rail. Co., i. 369.
 v. London Dock Co., i. 276.
 v. Mayor of London, ii. 704.
 v. Mapleback, i. 781.
 v. Milles, i. 555.
 v. Moffat, ii. 543.
 v. Powdich, i. 35.
 v. Pritchard, ii. 117, 147.
 v. Reese River Mining Co., ii. 413.
 v. Render, i. 359.
 v. Richardson, ii. 373.
 v. Royston, i. 450.
 v. Russell, i. 797.
 v. Shaw, ii. 290.
 v. Shirley, i. 430.
 v. Smith, ii. 287, 492, 556.
 v. Spooner, ii. 361.
 v. Stokes, i. 256.
 v. Sydney, ii. 42.
 v. Taylor, ii. 385.
 v. Tett, i. 474.
 v. Thackerah, i. 20, ii. 290, 599.
 v. Thomas, ii. 371.
 v. Topping, i. 533.
 v. Wiltshire, ii. 233, 290.
 v. Wood, ii. 375.
 v. Wright, i. 804, 808.
 v. Young, i. 501.
Smout v. Ilbery, ii. 407, 436.
Smyth v. Carter, i. 337, 381.
Smythe v. Smythe, i. 345.
Snag v. Gray, ii. 350.
Snead v. Watkins, i. 762.
Snelgrove v. Hart, ii. 546.

- Snelgrove v. Stevens**, ii. 610.
Snell v. Finch, i. 788.
Snook v. Davidson, i. 685.
Snow v. Leatham, i. 505.
 v. Peacock, i. 506.
Snowball v. Goodricke, ii. 162.
Soady v. Turnbull, ii. 561.
Soames v. Edge, ii. 685.
Soane v. Knight, ii. 339.
Solomon v. Lawson, ii. 378, 379, 391.
 v. Vintners' Co., i. 97, 145, 186.
Solomons v. Dawes, i. 503, 690.
Soltau v. De Held, i. 249, 296, 317, 318.
Some v. Barwish, ii. 536, 546.
Somers, *In re*, ii. 276.
Somerville v. Hawkins, ii. 356.
Southampton, &c., Bridge Co. v. Local Board, Southampton, ii. 260, 263, 295, 762.
South Australian Co. v. Randell, i. 642.
Southcote's Case, ii. 141.
Southcote v. Stanley, i. 281, 306.
Southee v. Denny, ii. 350, 627.
Southerne v. Howe, ii. 446.
Southernwood v. Ramsden, ii. 520.
South East. Rail. Co. v. Richardson, ii. 679.
South Essex Reclamation Co., Re, i. 680.
South Yorkshire Rail. Co., In re, ii. 745.
Sowell v. Champion, i. 840, ii. 155, 165, 650.
Sowerby v. Coleman, i. 157.
 v. Prior, i. 349.
Spackman v. Miller, i. 533.
Spark v. Heslop, ii. 642.
Sparry's Case, ii. 591.
Speaker of Victoria Assembly v. Glass, ii. 104.
Spears v. Hartly, i. 669, 677.
Speck v. Phillips, ii. 56, 59, 648.
Spedding v. Nevell, ii. 464.
Speight v. Oliviera, ii. 517.
Spencer v. Lond. & Birm. Rail. Co., i. 318.
Spering v. Spering, ii. 479.
Spill v. Maule, ii. 391.
Spilsbury v. Micklethwaite, ii. 55, 158.
Spokes v. Banbury Board of Health, i. 316.
Spooner v. Brewster, i. 16.
Spring, The, i. 507.
Springhead Spinning Co. v. Riley, i. 22, ii. 310.
Squire, Ex parte, i. 528.
Stace v. Griffith, ii. 391.
Stacey v. Stacey, ii. 494.
Stafford (Marquis of) v. Coyney, i. 327, 455.
Staffordshire, &c., Canal Co. v. Birm. Canal Navigations, i. 184.
Staigh v. Burn, i. 202.
 v. Gee, ii. 36, 43.
Stainback v. Fernley, ii. 411.
Stainton v. Metrop. Board, &c., ii. 297.
 v. Woolrych, ii. 268.
Stallard v. Gt. West. Rail. Co., i. 664.
Stammers v. Yearsley, ii. 48.
Stanford v. Robinson, i. 516.
Stanhope v. Thorsby, ii. 212.
Stannard v. Ullthorne, i. 614.
Stannerd v. Lee, i. 77, ii. 689.
Stansfeld v. Cubitt, i. 531.
 v. Mayor of Portsmouth, i. 312.
Stante v. Prickett, ii. 53.
Staple v. Heydon, i. 138.
Staples v. Accid. Death Ins. Co., ii. 714.
Stapley v. Lond., Br., and S. Coast Rail. Co., i. 83.
Starling v. Turner, i. 50.
Staveley v. Allicock, i. 789.
Stead v. Williams, i. 80.
Steadman v. Hockley, i. 683.
Stebbing v. Met. Bd. of Works, i. 407, ii. 281.
Stedman v. Bates, i. 831.
 v. Smith, i. 419.
Steel v. Prickett, i. 323, 416.
 v. South East. Rail. Co., i. 628.
Steele v. Midland Rail. Co., ii. 288.
 v. North Metrop. Rail. Co., ii. 301.
Stephens v. Elwall, i. 549, ii. 555.
 v. Myers, ii. 3.
Stephenson, Re, ii. 478.
 v. Hart, i. 736, 765.
Stevens v. Adamson, ii. 442.
 v. Benning, ii. 689.
 v. Chapman, ii. 669, 671.
 v. Evans, i. 65.
 v. Jeacocke, i. 65, 67, 514.

- Stevens v. Mid. Rail. Co., ii. 67, 86, 550.
 Stevenson v. Blakelocke, i. 680.
 v. Newnham, i. 526, 807.
 Steward v. Gromett, ii. 65.
 v. Young, ii. 361.
 Stewart's Case, ii. 413.
 Stewart, *Ex parte*, i. 537, 542.
 v. Austin, i. 620, ii. 435.
 v. Gt. West. Rail., ii. 588.
 v. Lond. and N. W. Rail. Co.,
 i. 717, 719, 729, 740.
 v. Smith, ii. 88.
 Stiles v. Cardiff Steam Navigation Co.,
 i. 284.
 v. Nokes, ii. 335.
 Stimson v. Farnham, ii. 145.]
 Stinson v. Browning, i. 256.
 Stockdale v. Hansard, ii. 236.
 Stockley v. Hornidge, ii. 86.
 Stockport Dis. Waterworks Co. v. Man-
 chester (Mayor of), i. 248, ii. 687.
 v. Potter, i. 109,
 242, 248.
 Stockport, &c., Rail. Co., *Re*, ii. 271.
 Stodhard v. Johnson, ii. 662.
 Stoessiger v. South East. Rail. Co., i.
 725.
 Stokoe v. Singers, i. 200.
 Stonard v. Dunkin, i. 522.
 Stone v. Cartwright, i. 302, 625.
 v. Dean, ii. 714.
 v. Jackson, i. 255, 283.
 v. Marsh, i. 55.
 Stoneham v. Lond. & Bright. Rail., i.
 160.
 Stonehouse v. Elliott, ii. 40.
 Storer v. Hunter, i. 362, 538.
 Storey v. Ashton, i. 586.
 Storr v. Crowley, i. 736.
 Story, *Ex parte*, ii. 701.
 v. Richardson, ii. 546.
 Stott v. Stott, i. 117.
 Stourbridge Canal Co. v. Dudley, i. 143.
 Strachy v. Francis, i. 349.
 Strader v. Graham, ii. 661.
 Strafford's Case, ii. 656.
 Stretton v. Gt. West. Rail., ii. 301.
 Strick v. Swansea Canal Co., i. 777.
 Strickland v. Ward, ii. 207.
 Strother v. Barr, ii. 608.
 Stroud v. Watts, ii. 664.
 Stuart v. Crawley, i. 717.
 v. Lovell, ii. 339.
 v. Whittaker, ii. 163.
 Stubley v. Lond. & N. W. Rail. Co., i,
 580.
 Stubbs v. Stubbs, i. 515, 564.
 Studdy v. Studdy, ii. 486.
 Stukeley v. Butler, i. 152.
 Sturgis v. Smith, ii. 566.
 Sturt v. Blagg, ii. 322, 391.
 Submarine Telegraph Co. v. Dickson, i.
 263.
 Suffield v. Brown, i. 135, 206.
 Suggate v. Suggate, ii. 494.
 Sumner v. Bromilow, i. 355, 361, 362.
 Sunbolf v. Alford, i. 762, 763.
 Surgeons' Company's Case, ii. 759.
 Surrey Canal Co. v. Hall, i. 324.
 Sury v. Pigot, i. 208.
 Sutcliffe v. Booth, i. 184, 292.
 v. Surveyors of Sowerby, i. 292.
 Suter v. Burrell, ii. 161.
 Sutherland v. Murray, i. 52.
 Sutton v. Buck, i. 546.
 v. Clarke, ii. 248, 252, 552, 562.
 v. Gt. West. Rail. Co., i. 711.
 v. Johnstone, i. 58, ii. 78.
 v. Ld. Montfort, i. 226.
 v. Moody, i. 513.
 v. South East. Rail. Co., ii. 694.
 v. Wilders, ii. 438.
 Swan, The, ii. 576.
 Ex parte, ii. 623, 764.
 v. Brit. Aust. Co., ii. 622, 761.
 v. Dakins, ii. 220.
 v. North Brit. Austr. Co., i.
 36, 40, 41, ii. 622, 740.
 Swann v. Falmouth (Earl), i. 803.
 v. Phillips, ii. 408, 455.
 Swannell v. Ellis, i. 614.
 Swansborough v. Coventry, i. 148.
 Swayne's Case, i. 164.
 Sweet v. Pym, i. 686.
 Sweetman v. Guest, ii. 187, 189, 212.
 Swinfen v. Ld. Chelmsford, i. 618, ii.
 606.
 Swire v. Leach, i. 796.
 Swithin v. Vincent, ii. 365.
 Sybray v. White, i. 252, 310.
 Syeds v. Hay, i. 496, 564, 737.
 Sykes v. Sykes, ii. 455, 492, 682.

- Sylph, The, i. 602.
 Syme v. Harvey, i. 355.
 Symonds v. Dimsdale, ii. 714.
 Syms's Case, i. 163.
 Syms v. Chaplin, i. 770.
- Taafe v. Downes, ii. 102.
 Tabart v. Tipper, ii. 338.
 Taff Vale Rail. Co. v. Giles, i. 767.
 Tailors of Ipswich's Case, i. 60.
 Tait's Case, ii. 413.
 Tait v. Harris, ii. 563.
 Talbot (Earl) v. Scott, i. 381, 476.
 Talley v. Gt. West. Rwy., i. 741.
 Tancred v. Allgood, i. 547, 554, ii. 129, 136, 155.
 v. Leyland, i. 806, 811, 835.
 Tanistry's Case, i. 156.
 Tanner v. European Bank, i. 693.
 Taplin v. Atty, ii. 161.
 Tapling v. Jones, i. 187, 201.
 Tarleton v. M'Gawley, i. 22.
 Tarpley v. Blabey, ii. 374, 389.
 Tarrant v. Webb, i. 607.
 Tate v. Gleed, i. 799.
 Tattan v. Gt. West. Rail. Co., ii. 669.
 Tatton v. Wade, ii. 408, 455.
 Taunton v. Costar, ii. 11.
 Taverner v. Little, i. 632.
 Taylor v. Fisher, i. 451.
 Taylerson v. Peters, i. 787.
 Taylor v. Ashton, ii. 403, 411, 457.
 v. Blacklow,
 v. Buller, ii. 450.
 v. Cass, ii. 667.
 v. Chester, i. 670.
 v. Chichester & Midhurst Rail.
 Co., ii. 300.
 v. Cole, ii. 11, 48, 604, i. 432, 436.
 v. Gt. Ind. Penins.,
 v. Gt. North. Rail. Co., ii. 676.
 v. Green, ii. 453.
 v. Hawkins,
 v. Humphreys, i. 747.
 v. Lanyon, ii. 135.
 v. Nesfield, ii. 37, 232, 235.
 v. Pillow, i. 74.
 v. Plumer, i. 539.
 v. Robinson, i. 678.
 v. Smith, ii. 53.
 v. Stendall, i. 267.
- Taylor v. Whitehead, i. 139, 455.
 v. Willans, ii. 93.
 Tealby v. Gascoigne, ii. 161.
 Tear v. Freebody, i. 496.
 Tebb v. Hodge, i. 363.
 Tebbutt v. Brist. & Ex. Rail., i. 47.
 v. Selby, i. 215.
 Telford v. Met. Board, i. 304.
 Tenant v. Golding, i. 235, 305, 305.
 v. Goldwin, i. 146, 391.
 Tenham v. Herbert, i. 229.
 Tennant's Case, i. 80.
 Tennant v. Field, i. 809.
 Terry v. Huntington, ii. 217.
 v. Hutchinson, ii. 515.
 Thackthwaite v. Cock, i. 536.
 Thames Conservators v. Hall, i. 594.
 v. Victoria Station
 Co., ii. 276.
 Thames Iron Works Co. v. Patent Der-
 rick Co., i. 671.
 Tharpe v. Stallwood, ii. 543.
 Thaxbie v. Smith, ii. 634.
 Theobald v. Crichmore, ii. 32.
 v. Rail. Pass. Assur. Co., ii. 638.
 Thistlewood's Case, ii. 374.
 Thom v. Bigland, ii. 457.
 Thomas, *Ex parte*,
 v. Chirton, ii. 359.
 v. Daw, ii. 299.
 v. Harries, i. 803, 808, 819.
 v. Harris, i. 803, ii. 646.
 v. Jones, i. 379.
 v. Morgan, i. 312, ii. 456.
 v. Oakley, i. 378, 476.
 v. Philips, i. 519.
 v. Powell, ii. 59.
 v. Rhymney Rail.,
 v. Roberts, ii. 497.
 v. Russell, ii. 93, 94.
 v. Saunders, ii. 43.
 v. Sorrell, i. 132.
 v. Thomas, i. 125, 206, ii. 492.
 v. Welch, i. 83.
 v. Williams, ii. 292.
 Thomlinson v. Brown, i. 200.
 Thompson, *In re*, ii. 190, 218.
 v. Bernard, ii. 346.
 v. Dallas, ii. 668.
 v. Gibson, i. 245, 247, 300, ii
 666.

- Thompson v. Giles**, i. 539.
 v. Hill, i. 268.
 v. Ingham, ii. 218, 573, 706.
 v. Lacy, i. 749.
 v. Mashiter, i. 796.
 v. North-East. Rail. Co., i. 275.
 v. Nye, ii. 389.
 v. Pettit, i. 375.
 v. Ross, ii. 514, 516.
 v. Stanhope, ii. 689.
 v. Thompson, ii. 480, 483, 492.
 v. Trevanion, ii. 618.
 v. Wood, i. 829.
Thomson v. Simpson, ii. 462.
Thorburn v. Barnes, ii. 99.
Thorley v. Kerry (Lord), ii. 306.
Thorn v. Bigland, ii. 437.
Thorne v. Tilbury, i. 553, 699.
Thornewell v. Wigner, ii. 570.
Thornton v. Adams, i. 802.
 v. Pickering, ii. 386.
Thorogood v. Bryan, i. 592, 630.
 v. Robinson, i. 499.
Thorp v. Facey, i. 400, 406.
Thorpe v. Adams, ii. 723.
Thresher v. East. Lond. Water Co., i. 361.
Throgmorton v. Allen, ii. 15.
Thurgood v. Richardson, i. 499, ii. 157.
Tickle v. Brown, i. 193, 442, 444.
Tidman v. Ainslie, ii. 356, 364, 374.
Tighe v. Cooper, ii. 373.
Tilk v. Parsons, ii. 384.
Tilson v. Warwick Gas Light Co., i. 65.
Timothy v. Simpson, ii. 10, ii. 11, 22.
Tindall v. Bell, i. 637, ii. 640.
Tinkler v. Wandsworth District Board, ii. 297, 300, 687.
Tinsley v. Lacey, i. 69, 72.
Tipping v. St. Helens' Smelting Co., i. 244, 317.
Titchmarsh v. Chapman, ii. 701.
Tobacco Pipe, &c., Co. v. Loder, i. 62.
Tobin v. The Queen, i. 549.
Todd v. Flight, i. 265.
 v. Hawkins, ii. 326.
 v. Todd, ii. 486.
Todhunter, Ex parte, i. 529.
Toft v. Rayner, ii. 704.
Tollemacher v. Lond. & S. W. Rail. Co. ii. 27.
Tollit v. Sherstone, ii. 527.
Tomlinson, In re, ii. 500.
Tonson v. Walker, ii. 689.
Toogood v. Spyryng, ii. 331.
Tooke v. Hollingworth, i. 539, 541.
Toomey v. Lond. & Br. Rail. Co., i. 271.
Topham v. Dent, ii. 545.
Torrence v. Gibbons, ii. 519, 520.
Torriano v. Young, i. 340.
Tottenham v. Byrne, i. 415.
Towne v. Lewis, i. 501.
Townley v. Gibson, i. 132.
 v. Jones, i. 615.
Townsend v. Wathen, i. 252.
Tozer v. Child, i. 50, 51, ii. 99.
 v. Mashford, ii. 343.
Tracy v. Open Stock Exchange, ii. 107.
 v. Veal, i. 56.
Traherne v. Gardner, ii. 681.
Treadwin v. Gt. East. Rail. Co., i. 725.
Trelawney v. Coleman, ii. 509.
Trent v. Hunt, i. 788, 811, 812, 831.
Trent Nav. Co. v. Ward, i. 717.
Tripp v. Thomas, ii. 387.
Trismall v. Lovegrove, i. 532.
Trower v. Chadwick, i. 267.
Truscott v. Merchant Taylor's Co., i. 177.
Trust. Brit. Museum v. Finnis, i. 324.
Tubb v. Good, i. 290.
Tubervil v. Stamp, i. 20, 366, 368.
Tuberville v. Savage, ii. 3.
Tucker v. Newman, i. 301, 313.
 v. Turpin, ii. 469.
 v. Wright, i. 550.
Tuff v. Warman, i. 42, 598, 609, 635.
Tufton v. Harding, ii. 134.
Tulk v. Metrop. Board of Works, i. 157.
Tullay v. Reed, ii. 10.
Tullidge v. Wade, ii. 55, 521, 644.
Tullit v. Tullit, i. 511.
Tunney v. Midland Rail. Co., i. 608.
Tunncliffe v. Moss, ii. 384.
 v. Tedd, ii. 47.
Tunno v. Morris, ii. 105.
Turberville v. Stampe, i. 20, 366, 368.
Turner v. Ambler, ii. 68, 93.
 v. Baynes, i. 408, 787.
 v. Cameron, i. 792.

- Turner v. Deane**, i. 681.
 v. Doe, i. 399.
 v. Felgate, ii. 144, 159.
 v. Ford, i. 547, 548, 562.
 v. Horton, ii. 663.
 v. Postmaster-General, ii. 190.
 v. Ringwood Highway Board, i. 328, 456.
 v. Spooner, i. 190, 201, 227.
 v. Winter, i. 83.
 v. Wright, i. 346.
Turnley v. Macgregor, ii. 457.
Turquand v. Marshall, i. 620.
Turrill v. Crawley, i. 762.
Tuson v. Evans, ii. 334.
Tutton v. Darke, i. 791.
Tutty v. Alewin, ii. 349.
Two Ellens, The, i. 670.
Twort v. Twort, i. 380.
Twymah v. Knowles, i. 472.
Twynam v. Porter, i. 682.
Tyler v. Bennett, ii. 665.
 v. Leeds (Duke of), ii. 165.
Tyne Improvement Commissioners v. Gen. Steam Nav. Co., i. 594.
Tyringham's Case, i. 205.
Tyson v. Smith, i. 156, 157.
 v. London (Mayor of), ii. 275.

Udell v. Atherton, ii. 437, 553.
Uhla, The, i. 602.
Umphelby v. M'Lean, ii. 292.
Underhill v. Ellicombe, i. 65.
Underwood v. Hewson, i. 570.
 v. Parks, ii. 388.
Union Bank of Manchester, Ex parte, i. 532, 534.
 Cement and Brick Co., Re, i. 680.
United Service Co., In re, i. 41, 619, 637.
Unity Joint-Stock Bank Min. Association v. King, i. 433.
Upman v. Elkan, i. 86, ii. 469.

Valentine v. Cleugh, ii. 677.
 v. Penny, i. 162.
Vallance, Ex parte, i. 534.
 v. Savage, i. 113, ii. 531.
Valpy v. Manley, ii. 166.
 v. Sanders, i. 527.
Vanderberg v. Truax, i. 14,
Vanderzee v. Willis, i. 679.
Vane v. Lord Barnard, i. 346.
Van Sandau v. Turner, ii. 104.
Van Toll v. South-East. Rail. Co., i. 665, 735.
Vaughan, Ex parte, ii. 218.
 v. Cork and Yough. Rail. Co., i. 609.
 v. Lewis, ii. 757.
 v. Menlove, i. 367, 369, 370, 374.
 v. Taff Vale Rail. Co., i. 369, 374.
Vaughton v. Bradshaw, ii. 47.
Velasquez, The, i. 595.
Veley v. Burder, ii. 697, 702.
Venafra v. Johnson, ii. 64, 185.
Veness, Ex parte, i. 529.
Venezuela Rail. Co. v. Kisch, ii. 412.
Vere v. Cawdor (Lord), i. 559.
Vernon v. Keys, ii. 432.
Verrall v. Robinson, i. 500, 552.
Verry v. Watkins, ii. 522.
Vicars v. Wilcocks, i. 12, ii. 352, 354, 384.
Victor, The, i. 595.
Villiers v. Mousley, ii. 305, 309.
Vine v. Saunders, ii. 557.
Viner v. Cadell, i. 533.
 v. Vaughan, i. 378.
Violet v. Sympson, ii. 229.
Virtue v. Bird, i. 40.
Vivian v. Champion, ii. 535.
Vivid, The, i. 598.
Vizard, Re, i. 524.
Vose v. Lanc. and York. Rail. Co., i. 272, 277, 605.
Vowles v. Miller, i. 420.
Voyce v. Voyce, i. 420.

Waddell v. Waddell, ii. 480.
Wade v. Tatton, ii. 408.
Wadhurst v. Damme, i. 481, 559.
Wadsworth v. Bentley, ii. 593.
Wain v. Bailey, i. 516.
Wait v. Wait, ii. 510.
Waite v. Garston Local Board, i. 64.
 v. North-East. Rail. Co., i. 609.
Wakefield v. Buccleugh (Duke of), i. 100, 159, 228.
Wakeman v. Lindsey i. 812.
 v. Robinson, i. 571, 632.

- Wakeley v. Cooke, ii. 310.
 v. Froggatt, i. 433, ii. 603.
 v. Healey, ii. 379.
- Walker v. Birch, i. 677.
 v. Brewster, i. 250.
 v. Brit. Guarantee Ass., i. 642, 661.
 v. Evans, i. 296.
 v. Gann, ii. 710.
 v. Goe, i. 275, ii. 255.
 v. Jackson, i. 774.
 v. Milner, ii. 431.
 v. Olding, ii. 637.
 v. S. E. Rail., ii. 42, 43, 549.
 v. Ware, &c., Rail. Co., ii. 301.
 v. Willoughby, ii. 137.
- Wall v. Hinds, i. 360.
 v. London and S. W. Railway Co., ii. 680.
 v. McNamara, i. 53.
- Wallace, *Re*, ii. 104.
 v. Carroll, ii. 357.
 v. Jarman, ii. 415, 417.
 v. Woodgate, i. 686, 744.
- Waller v. Drakeford, i. 558.
 v. Holmes, i. 681.
 v. South-East. Rail. Co., i. 608.
- Walley v. M'Connell, ii. 155.
- Wallington v. Wood, ii. 634.
- Wallis v. Harrison, i. 155, 453, ii. 532.
 v. L. and S. W. Rail., i. 743.
- Walmsley, *Ex parte*, ii. 732.
 v. Milne, i. 351, 357.
- Walsham v. Stainton, ii. 64.
- Walshe v. Provan, i. 692.
- Walter v. Selfe, i. 234, 241, 242, 315.
- Walters v. Mace, ii. 378.
 v. Pfiel, i. 267.
 v. Webb, i. 400.
- Walton v. Brown, ii. 661.
 v. Lavater, i. 87.
 v. Walton, ii. 486.
- Wandsworth Board v. Lond. and S. W. Rail. Co., i. 316, 318, 476, ii. 687.
- Wanless v. N. E. Rail., i. 583.
- Wansbrough v. Maton, i. 355.
- Wanstead Local Board, &c., v. Hill, i. 61, 78, 242.
- Warburton v. Gt. West. Rail. Co., i. 608.
 v. Parke, i. 180, 181, 608.
- Warde, *Ex parte*, ii. 765.
 v. Lee, ii. 260, 266.
 v. Lowndes, ii. 744, 761, 764.
 v. Robins, i. 191, 193.
 v. Shew, i. 788.
 v. South-East. Rail. Co., ii. 761.
 v. Ward, i. 193, 197, 202, ii. 485.
 v. Weeks, i. 13, ii. 355, 364.
 v. Eyre, i. 511.
 v. Warde, i. 193, 197, 202, ii. 485, 497, 498.
- Wardell v. Mourillyan, i. 737.
- Warden v. Bailey, ii. 552.
- Wardle v. Brocklehurst, i. 135, 207.
- Ware, *In re*, ii. 285.
 v. Regent's Canal Co., ii. 690.
- Waring v. Waring, ii. 480.
- Warne v. Chadwell, ii. 383.
- Warner v. Riddiford, ii. 13, 40, 54.
- Warr v. Jolly, ii. 330.
- Warren v. Warren, ii. 376.
 v. Webb, i. 429.
- Warrick v. Queen's Coll., i. 157, 191, 229, ii. 612.
- Warwick v. Foulkes, ii. 51, 388.
- Wason v. Walter, ii. 337, 339.
- Watbroke v. Griffith, i. 761.
- Waterer v. Freeman, i. 3, ii. 80.
- Waterhouse v. Jamieson, ii. 413.
 v. Keen, ii. 291.
- Waterlow v. Bacon, i. 219, 228.
- Waterman v. Soper, i. 418, ii. 548.
- Waters v. Monarch, i. 562.
 v. Towers, i. 565.
- Watkin v. Hall, ii. 366, 367.
- Watkins, *Ex parte*, i. 537, ii. 711.
 v. Gt. North. Rail. Co., i. 437, ii. 277, 296.
 v. Lee, ii. 87.
 v. Reddin, i. 256, 320.
- Watling v. Oastler, i. 279.
- Watson v. Ambergate Rail. Co., i. 738.
 v. Bodell, ii. 147.
 v. Charlemont (Earl), ii. 499.
 v. Christie, ii. 56, 389, 648.
 v. Denton, ii. 461.
 v. Maclean, i. 517.
 v. Peache, i. 538.
 v. Poulson, ii. 398.
 v. Russell, i. 524.
 v. Waud, i. 783.

- Watts, *Ex parte*, i. 536.
 v. Fraser, ii. 390.
 v. Kelson, i. 135, 207.
 v. Lucas, i. 294.
- Weall v. King, ii. 563.
- Weatherby v. Ross, i. 201, 227.
- Weatherston v. Hawkins, ii. 331.
- Weaver v. Bush, ii. 9.
 v. Ward, i. 8, 570.
- Webb's Case, i. 321.
- Webb, *In re*, i. 737.
 v. Bird, i. 179, 221.
 v. Cook, ii. 386.
 v. Fairmaner, ii. 36.
 v. Fox, i. 554, 677.
 v. Paternoster, i. 480.
 v. Portland Manufact. Co., i. 16.
- Webber v. Gt. Western Rail. Co., i. 738.
 v. Sparkes, ii. 585.
- Webster's Case, ii. 413.
- Webster v. Watts, ii. 10, 23.
 v. Webster, ii. 493.
- Wednesbury Bd. of Health v. Stephen-
 son, ii. 676.
- Weekly v. Wildman, i. 164.
- Weeks v. Goode, i. 509, 674.
 v. Sparke, ii. 612.
- Weems v. Mathieson, i. 279, 604.
- Welch v. Nash, ii. 195, 217.
- Welcome v. Upton, i. 165.
- Weld v. Hornby, i. 319.
- Weldon v. Gould, i. 675.
- Welfare v. Brighton Rail., i. 36, 254,
 633.
- Weller v. Toke, ii. 231.
- Wellesley v. Wellesley, i. 346, ii. 497.
- Wellock v. Constantine, i. 54.
- Wells v. Gurney, ii. 137.
 v. Head, i. 481, 559, 561.
 v. Ody, i. 221.
 v. Watling, i. 211.
- Welsh v. Rose, i. 790.
- Wenman v. Ash, ii. 311, 323, 375.
- Wentworth v. Bullen, ii. 80.
- West v. Baxendale, ii. 50.
 v. Blakeway, i. 361.
 v. Francis, i. 76.
 v. L. & N. W. Rail., i. 711.
 v. Nibbs, i. 815, 826.
 v. Skip, i. 532.
 v. Smallwood, ii. 45, 234.
- West v. West, ii. 501.
 Riding Rail. Co. v. Wakefield Bd.
 of Health, i. 273, 627.
- Western Bank of Scotland v. Addie, ii.
 412, 438, 454.
- Weston's Case, ii. 765.
- Weston v. Beeman, ii. 77, 85, 93.
 v. Dobniet, ii. 319.
 v. Sneyd, ii. 229, 712.
- Westwood v. Bell, i. 685.
 v. Cowne, i. 813, 841.
- Wettor v. Dunk, i. 253.
- Whaley v. Laing, i. 108, 114, 215, 661.
- Wharton v. Brook, ii. 342.
 v. Naylor, i. 796, ii. 163.
- Whatman v. Pearson, i. 48, ii. 293.
- Wheatley v. Patrick, i. 592.
- Wheeler v. Branscombe, i. 831, 832,
 v. Whiting, ii. 9, 23, 40.
- Whistler v. Forster, i. 523.
- White's Case, i. 756, ii. 740.
- White v. Bailey, i. 399, 547.
 v. Bass, i. 148, 188, 189.
 v. Binstead, ii. 136, 165.
 v. Cohen, i. 120.
 v. Crisp, i. 263, 329.
 v. Gainer, i. 674.
 v. Garden, i. 521, 675.
 v. Gt. West. Rail. Co., i. 771.
 v. Humphrey, i. 662, 735.
 v. Hunt, i. 525.
 v. Morris, ii. 63, 158.
 v. Phillips, i. 263, 276.
 v. R. Ex. Ass. Co., i. 680.
 v. Spettigue, i. 56, 509, 519.
 v. Steele, ii. 258, 677, 697, 703,
 708.
- Whitecomb v. Jacob, i. 541.
- Whitehead v. Bennet, i. 360.
 v. Greetham, i. 615.
 v. Proctor, ii. 110.
 v. Scott, ii. 611.
 v. Taylor, i. 830.
- Whitehouse's Case, ii. 413.
- Whitehouse v. Birm. Can. Co., ii. 243.
 v. Fell, ii. 601.
 v. Fellowes, i. 300, ii. 252,
 274, 290.
 v. Wolverhampton Rail. i
 144.
- Whitelegg v. Richards, ii. 106

- Whiteley v. Adams,
 Whitelock v. Hutchinson, i. 162.
 Whiteman v. King, i. 210.
 Whitfield v. Bewit, i. 511.
 v. Brand, i. 540.
 v. S. E. Rail. Co., ii. 364, 550.
 v. Le Despenser (Lord), i. 31.
 Whitley v. Roberts, i. 789.
 Whitmore v. Black, i. 562.
 v. Greene, ii. 155.
 v. Humphries, i. 398.
 v. Whitmore, ii. 480, 510.
 Whitstable (Free Fishers of) v. Foreman,
 i. 409, 410.
 v. Gann, i.
 411.
 Whittaker v. Jackson, i. 418, 432.
 Whittall v. Campbell, ii. 682.
 Whitten v. Fuller, i. 550.
 Whittington v. Boxall, i. 431.
 Whitworth v. Hall, ii. 81.
 v. Maden, i. 840.
 Wickham v. Hawker, i. 435.
 Wicks v. Fentham, ii. 93.
 v. Hunt, ii. 690.
 Wieler v. Schilizzi, ii. 432.
 Wiffin v. Kincard, ii. 8, 432.
 Wigers v. Cook, ii. 671.
 Wiggett v. Fox, i. 607, 609.
 Wiggins, *Ex parte*, i. 537.
 Wigmore v. Jay, i. 280.
 Wilby v. Elstor, i. 11, ii. 342, 343, 371, 582.
 v. West. Corn. Rail. Co., i. 738.
 Wilcox v. Marshall, ii. 575.
 Wild v. Holt, i. 471.
 Wilde v. Gibson, ii. 405.
 v. Minsterley, i. 98.
 v. Sheridan, ii. 706.
 v. Waters, i. 342.
 Wilder v. Speer, i. 820.
 Wildes v. Russell, ii. 181, 735.
 Wiles v. Woodward, i. 558.
 Wilford v. Berkeley, ii. 507.
 Wilkes v. Broadbent, i. 129.
 v. Hung. Mark. Co., i. 57, 246.
 Wilk's Case, ii. 346.
 Wilkin v. Reed, ii. 630.
 Wilkins v. Bromhead, i. 539.
 Wilkinson v. Fairrie, i. 253.
 v. Haygarth, i. 423, 451, ii.
 547.
 Wilkinson v. Kirby, i. 475, ii. 584.
 v. Proud, i. 100, 170.
 v. Verity, i. 408, ii. 602.
 v. Whalley, i. 552.
 Willans v. Taylor, ii. 65.
 Williams v. Adams, ii. 194.
 v. Allsup, i. 670.
 v. Archer, i. 703.
 v. Baily, ii. 479, 480.
 v. Banks, ii. 71.
 v. Blackwall, i. 288.
 v. Clough, i. 280, 631.
 v. Cranston, i. 766.
 v. Currie, i. 469, ii. 633.
 v. East India Co., ii. 449.
 v. Everett, i. 521.
 v. Eyton, i. 203.
 v. Fitzmaurice, i. 612.
 v. Gardiner, ii. 379.
 v. Gibbs, i. 614.
 v. Glenister, ii. 24.
 v. Golding, i. 267, 612.
 v. Groucott, i. 252.
 v. Gt. West. Rail. Co., i. 740.
 v. Holmes, i. 796.
 v. James, i. 220.
 v. Jersey (Earl of), i. 316.
 v. Jones, i. 369, 626, 833, ii. 1.
 v. Millington, ii. 531.
 v. Morland, i. 107.
 v. Morris, i. 452, 456.
 v. Mostyn, ii. 141, 164.
 v. Pott, i. 398, 400.
 v. Richards, i. 585.
 v. Roberts, i. 801.
 v. Smith, ii. 41, 84, 144, 156.
 v. Stiven, i. 786, 830.
 v. Stott, ii. 379.
 v. Wilcox, i. 222, 293, ii. 585.
 v. Williams, i. 79, ii. 479, 485.
 Williamson v. Allison, ii. 414, 415.
 Willingale v. Maitland, i. 158, 163.
 Willis v. Bernard, ii. 509.
 Willoughby v. Backhouse, i. 836.
 Willoughby v. Horridge, i. 747.
 v. Marshall, i. 806.
 Wills v. Maccarmick, ii. 99.
 v. Wells, i. 562.
 Wilson's (Carus) Case, ii. 181.
 Wilson, *Ex parte*, i. 525, 532.
 v. Anderton, i. 504.

- Wilson v. Barker**, l. 554.
 v. Brett, l. 659.
 v. Fuller, ii. 453.
 v. Halifax (Mayor of), ii. 255, 293.
 v. Lanc. and York. Rail. Co., i. 774, ii. 637.
 v. Merry, i. 607.
 v. Newberry, i. 111.
 v. Newport Dock Co., i. 636.
 v. Peto, i. 214, 300, 623.
 v. Rankin, ii. 437.
 v. Robinson, ii. 338.
 v. Stanley, i. 180, 195.
 v. Towend, i. 315.
 v. Tucker, i. 616.
 v. Tummon, ii. 155, 156, 554.
 v. Willes, i. 129, 162.
Wilsons, *In re*, i. 525, 822.
Wilton v. Girdlestone, i. 499.
Wiltshire v. Cottrell, i. 355.
Wiltshire v. Sidford, i. 418.
Wiltshire Iron Co. v. Gt. West. Rwy., i. 669.
Windham v. Clere, ii. 186.
Windover v. Smith, i. 75.
Wingate v. Waite, i. 103.
Winship v. Hudspeth, i. 180.
Winsmore v. Greenbank, i. 4, 19, 58, 300, ii. 511, 524.
Winter v. Bartholomew, ii. 133.
 v. Brockwell, i. 132, 199, 219.
 v. Henn, i. 508.
Winterbottom v. Derby (Lord), i. 191, 195, 298.
 v. Wright, i. 27, 604, ii. 528.
Winterburn v. Brooks, ii. 49.
Wintle v. Brist. and S. W. Rail. Co., ii. 687.
 v. Freeman, ii. 145.
Wise v. Gt. West. Rail. Co., i. 600.
 v. Metcalfe, i. 348, ii. 560.
Witham, Ex parte, i. 542.
Witham Nav. Co. v. Padley, ii. 45.
Wither v. Dean, &c., of Winchester, i. 386.
Withers v. Henley, ii. 18.
 v. North Kent Rail. Co., i. 272.
 v. Parker, ii. 140.
Witte v. Hague, i. 302.
- Woburn Abbey, The**, i. 595.
Wolf v. Summers, i. 744.
Wolton v. Gavin, ii. 28.
Wontner v. Shairp, ii. 409.
Wood v. Bell, i. 565.
 v. Boosey, i. 72, 73.
 v. Brown, ii. 365.
 v. Chart, i. 69.
 v. Clarke, i. 793, 796.
 v. Gunstone, ii. 358.
 v. Hewett, i. 355.
 v. Lane, ii. 14.
 v. Leadbitter, i. 131, 147, 218.
 v. Morewood, i. 471, 559.
 v. Nunn, i. 802.
 v. Riley, ii. 667.
 v. Sutcliffe, i. 315.
 v. Veal, i. 195, 326.
Wood v. Waud, i. 103, 118, 184.
 v. Wedgewood, i. 453.
 v. Zimmer, i. 80.
Woodgate v. Knatchbull, ii. 146, 154, 161.
 v. Naylor, ii. 487.
Woodger v. Gt. West. Rail. Co., i. 775.
Woodhall v. Voight, ii. 681.
Woodhouse v. Murray, i. 527.
Woodin v. Burford, ii. 453.
Wooding v. Oxley, ii. 23.
Woodley v. Coventry, i. 503.
Woods v. Finnis, ii. 118, 140, 141.
 v. Russell, i. 536.
Woodward v. Gyles, i. 379.
 v. Lander,
Woodyer v. Hadden, i. 325.
Wookey v. Pole, i. 680.
Wooldridge, Ex parte, ii. 571.
Woolen v. Wright, ii. 155, 554.
Woolley v. Clark, ii. 144.
 v. North London Rail., ii. 588.
 v. Scovell, i. 585.
Woolnoth v. Meadows, ii. 360.
Worc. Co. Bank v. Dorch. and Milt. Bank, i. 506.
Wordsworth v. Harley, ii. 289.
Workman v. Gt. North. Rail. Co., ii. 635.
Wormer v. Biggs, i. 704, 816.
Wormwell v. Hailstone, ii. 552.
Worrall Waterworks Co. v. Lloyd, ii. 250.
Worsley v. Stuart, i. 378.

- Worth v. Gilling, i. 312, ii. 629.
 v. Terrington, ii. 48, 52.
 Worthington v. Gimson, i. 207.
 v. Hulton, ii. 744, 746.
 Wotherspoon v. Currie, ii. 469.
 Wray v. Toke, ii. 188, 206.
 Wren v. Weild, i. 49, ii. 360, 362, 374.
 Wright's Case, ii. 413.
 Wright v. Child, ii. 119.
 v. Clements, ii. 365.
 v. Court, ii. 6, 17, 225.
 v. Crookes, ii. 452, 459.
 v. Goodlake, i. 69.
 v. Hitchcock, i. 81, 86.
 v. Howard, i. 107.
 v. Lainson, ii. 158.
 v. Leonard, i. 58, ii. 442, 556.
 v. Pearson, i. 45.
 v. Snell, i. 743.
 v. Tallis, i. 70.
 v. Williams, i. 183, 195.
 v. Woodgate, ii. 333.
 Wrightup v. Chamberlain, ii. 641.
 v. Greenacre, ii. 146, 157.
 Wyatt v. Gore, ii. 371, 373, 389.
 v. Gt. West. Rail. Co., i. 278, 610.
 v. Harrison, i. 97.
 v. White, ii. 76, 77, 177.
 Wyer v. Dorch., &c., Bank, i. 504.
 Wyld v. Pickford, i. 725, 726.
 Wylde v. Radford, i. 679.
 Wylie v. Birch, ii. 145.
 Wynne v. Tyrwhit, ii. 617.
 Wynstanley v. Lee, i. 121, 226.
 Wryley Canal Co. v. Bradley, i. 144.

 Yarborough v. Bank of England, ii. 550.
 Yard v. Ford, i. 25.

 Yarmouth (Great), Mayor of. v. Groom
 i. 25.
 Yates v. Dunster, i. 377.
 v. Jack, i. 190, 227.
 v. Palmer, ii. 701, 711.
 v. Whyte, i. 371, 638, ii. 594, 652.
 Yearsley v. Heane, ii. 139.
 Yeatman v. Yeatman, ii. 484, 486.
 Yellowly v. Gower, i. 336.
 Yeo v. Tatem, ii. 598.
 Yeoman v. Ellison, i. 784.
 York v. Grindstone, i. 760.
 York (Mayor of) v. Pilkington, i. 229.
 York & N. Mid. Rail. Co. v. Milner, ii.
 748.
 v. The Queen,
 ii. 722.
 Yorke v. Grenaugh, i. 673, 762.
 Young v. Cooper, i. 552.
 v. Davis, i. 31, 209, 250, 255.
 v. Edwards, i. 60, 63.
 Young v. Fletcher, i. 527.
 v. Grattridge, i. 287.
 v. Grote, i. 36.
 v. Hichens, i. 23, 515.
 v. Higgon, ii. 36, 233.
 v. Hope, i. 533.
 v. Lambert, i. 687.
 v. Macrae, ii. 341.
 v. Matthews, i. 520.
 v. Spencer, i. 340.
 Yrisarri v. Clement, ii. 310.

 Zetland (Earl of) v. Glover Incorp. of
 Perth, i. 168.
 Zinck v. Walker, i. 539.
 Zouch v. Willingale, i. 782, 788.
 Zunz v. S. E. Rail., i. 731, 738.
 Zychlinski v. Maltby, ii. 682.

INDEX TO THE TEXT.

[The references are to the paragraphs.]

Abatement. See NUISANCE.

Absence,
effect of, under Statute of Limitations, 402.

Accident. See ASSAULT.
injuries caused by, when actionable, 9.
whether a person is liable for the effects of, 228.
non-liability for, unless caused by negligence, 544, 545.

Accord and satisfaction. See PLEA—INJUNCTION.

Accountant,
negligence of, 1302.

Action. See STATUTE OF LIMITATIONS.
can not be brought more than once for the same wrong, 1355.
brought against the wrong person by mistake, not a tort, 12.
several, in respect of same cause, can not be brought in court of coördinate jurisdiction, 1354, 1355.
secus—if one action is in inferior or foreign, the other in a superior court or court in this country, 1354.
or where one action is *in personam*, and the other *in rem*, 1354, 1358.
different causes of, when may be joined in the same suit, 1337.
pleadings in. See DECLARATION—DAMAGE—PLEAS
unfounded. See MALICE.

Act of Parliament. See STATUTE.

Administrator. See EXECUTOR.
when may sue for injuries to intestate's personal property, 1298.

Admiralty Court,
prohibition to, 1453.

Admissions. See MALICIOUS PROSECUTION.
of liability by a party to a cause, 1380.
of defendant in action for conversion, 535.
of under-sheriff or bailiffs, when evidence against the sheriff, 952.
of occupancy in actions for nuisances, 289, 290.
of knowledge of ferocity of animal kept, 290.
to prove malice, 855.
are evidence, although they relate to a deed, lease, &c., not produced, 78a.

Adulteration. See BREAD.

Adultery. See HUSBAND—WIFE.
damages recoverable for, 1268, 1269.
application of, by order of Court of Divorce, 1270.

Advocate,

statements of, in conduct of case, are privileged, 1133.

Agent. *See* BROKER—AUTHORITY—PRINCIPAL—BAILIFF.

receipt of rent by, on behalf of person wrongfully claiming land, 389.

occupation of house by, rent free, for twenty years, does not confer title, 391.

lien of, 614.

Agistment. *See* CATTLE.

lien for, 611.

Air. *See* LIGHT—MILL.

grant of right of, 127, 129.

Alien,

when entitled to copyright, 60.

security for costs by, 1439.

Alimony. *See* WIFE.**Ambassador,**

can not be sued, 1342.

property of, exempt from distress, 724.

Amendment. *See* PLAINTIFFS.

of variances between the declaration and evidence, 1379.

of all defects and errors in civil causes to determine the real question in controversy between the parties, 1379.

instances of, in actions of libel, for false representation, trespass to land, or for keeping a ferocious dog, 1379.

by adding fresh plaintiffs in actions of ejectment, a fresh plea, striking out a count, or altering a declaration or count from one form of action to another, 1379.

of variance in action of slander, 1153.

of nonjoinder or misjoinder of plaintiffs before trial, 1322.

at trial, 1323.

of nonjoinder of plaintiffs after notice or plea in abatement, 1324.

of misjoinder of defendants, 1325.

Amends,

tender of, under statute, 828, 1078.

tender of, by justices, 1028.

within what time to be made, 1329.

by companies, 1074.

plea of tender of, 1081.

Anchorage. *See* PORT.**Animals.** *See* FERÆ NATURÆ.

distinction between, if *feræ*, and if *mansuetæ naturæ*, 261.

injuries from keeping ferocious, 261-265.

injuries from driving ferocious, along a highway, 265.

injuries by ferocious, may be an act of trespass against person who loosed them, 466.

negligence need not be proved in actions for injuries from ferocious, 290.

declarations for injuries by ferocious, 285.

liability for keeping, though not negligently, 285.

effect of plea of not guilty in actions for keeping ferocious, 286.

evidence in actions for keeping ferocious, 290.

damages in actions for injuries from ferocious, 292.

Apothecary,

negligence, 1289.

Appeal. *See* JUSTICES.

costs on, 1426.

Apprentice. *See* MASTER.

inducing to leave his master, is actionable, 1272.

Arbitrator. *See* ARCHITECT.

not liable for mistakes or carelessness in conducting arbitration, without malice or corruption, 883.
neglect by, to hear both parties, or undue bias, will invalidate award, 883.
power of, under Lands Clauses Act, 1056, 1059, 1060.
authority of, determined, if time for making award is not duly enlarged, 1336.
power of, over costs, 1414.
may be examined in action on award in compensation case, 1062.
mandamus to, to assess statutory compensation for injuries caused by construction of railway, 1499.

Archbishop. *See* ECCLESIASTICAL DILAPIDATIONS.

Architect,

employed to determine questions between builder and employer, is not liable for errors of judgment 883.
but may be sued for neglect to perform his functions at all, 883.
fraudulently inducing, to withhold certificate of completion of works, is actionable, 1214.

Area. *See* HIGHWAY—SHAFT.

liability for dangerous state of, 232.

Arrest. *See* CONSTABLE—COSTS—IMPRISONMENT—SHERIFF.

what constitutes, 843, 871.
on Sunday illegal, 1011.
on suspicion of felony, what is reasonable and probable cause for, 841.
for felony, when justifiable without warrant in house of another, 432.
by person other than constable, when justifiable, 803, 820.
for misdemeanor, 804.
of wrong person, 805.
for malicious injuries to property, 807, 822.
of persons committing indictable offense at night, 808.
by servants of railway companies, 817, 832.
of persons as deserters, 818.
of dangerous lunatics, 819.
for preservation of the peace, 809, 811.
breach of the peace, what amounts to, 811.
of persons disturbing divine service, 812.
of vagrants and persons committing acts of public indecency, 813.
under Merchant Shipping Act, 814.
of principal by his bail, 815.
for offenses within metropolis, 816.
of persons suspected of being in possession of government stores.
for a disturbance and refusal to leave a house or shop, 841.
of soldiers, &c., by their superior officers, 841.
by military or naval officers, 1307.
by persons intending to act in pursuance of an Act of Parliament, 822.
on mesne process is abolished, 870.
when allowable in an action, 870.
malicious, when actionable, 870.
by sheriff of person privileged from, as a witness, is not actionable, 870.
who to be defendants in actions for unlawful, 872.
attorney and client, 872.
plea of not guilty in actions for, 875.
evidence in actions for, for plaintiff, 877, 878.
if caused by plaintiff's own disobedience of summons, not actionable, 878.

Artificer. *See* WORKMAN.

Assault. *See* COSTS.

what constitutes, 787.
in self-defense or defense of property, or in obedience to legal warrant, or the result of mere accident, is justifiable, 792, 793, 843.

Assault—Continued.

- in defense of person or property, 793, 797, 844.
- in resistance of forcible entry or to prevent seizure of chattels, 794.
- caused by inevitable accident is not actionable, 835.
- resulting from acts of negligence, 788.
- by handcuffing unconvicted prisoners, 789.
- distinction between, and battery, 790.
- mayhem and wounding, 791, 797.
- in preservation of the public peace, 796, 841.
- by license of person assaulted is not actionable, 835.
- by whipping a horse and causing him to run over a person, 12.
- on persons wrongfully in possession of land, 384.
- by servants of corporation is actionable, 1304.
- liability of corporation to action for, 832.
- malice not a necessary ingredient of, 40.
- who to be plaintiffs in action for, 830.
- declarations for, 834.
- plea of son assault demesne to action of, and evidence thereunder, 844.
- pleas of justification in action of, 838.
- in defense of children, wife, servants, or friends, is justifiable, 839.
- in moderate correction by parents of children, schoolmasters of pupils, and masters of ships, of seamen, &c., is justifiable, 840.
- evidence of, 842.
- damages for, 845, 848.
- where assault by more than one, 846.
- prospective, 847.

Assignees. See LESSEES.
of patent. See PATENT.

Assignment,
of chose in action, notice of, 512.

Attorney,
negligence of, 570, 589, 1361.
retainer of, ceases on recovery of judgment, 569.
has no implied authority to postpone execution, 569.
is not liable for trespasses committed by sheriff in execution of writ, unless he interferes, 937.
or the process is set aside for irregularity, 937.
when liable for unlawful arrest, as well as his client, 872.
liability of, for false imprisonment, if process has been set aside as irregular 831.
otherwise, if for error, 831.
or if judgment be set aside in the exercise of equitable jurisdiction, 831
fraud of, in forging deeds, his employer liable, 1197.
lien of, on alimony money, 1237.
lien of, 618.
charge on property recovered by, 618.

Attorney-general,
may apply for injunction against obstruction of highway, 313.
injunction against public nuisances by, 295, 296.

Avowry. See REPLEVIN.
pleas in bar of, 769.

Auctioneer,
duty of, to disclose facts affecting the title to the property he sells, 1205.
sale by, only conveys such title as the auctioneer has, 1190.
may sue person, who orders him to sell goods which do not belong to him, 1213
may sue for conversion of chattels intrusted to him to sell, but not for conversion of fixtures, 524.
lien of 611.

Auditor,

report of, to company, reflecting on the conduct of the manager, is a privileged communication, and may be published to the shareholders, 1091.

Author. See MANUSCRIPT—COPYRIGHT.

rights of, at common law, 60.

Authority. See FALSE REPRESENTATION—LEAVE AND LICENSE.

false representation of, by vendors, agents, &c., when actionable, 1194, 1198.

abuse of. See MILITARY OFFICER—NAVAL OFFICER.

abuse of, is actionable, 43.

abuse of, renders a person a trespasser, 376.

abuse of, on sale of goods, 52.

Ball. See ARREST.

Bailee. See BAILOR—COMMON CARRIER—DAMAGES—INJUNCTION—JUS TERTII—LIEN.

can not dispute the title of his bailor, 497.

of goods for sale can give a valid title, 494.

negligence of, in keeping, using, or selling the article bailed, 595, *et seq.*

not liable for negligence, if act of bailor has conduced to the loss, 602.

or bailor takes them under his own charge, 607.

may impose conditions upon his receipt of goods, but they must be reasonable ones, 606, 623.

liability of, for loss of goods bailed, 642.

if carried gratuitously, 607.

if for hire, 607.

may set up *jus tertii* against bailor, only upon his (bailor's) authority, or if the bailment was made by a wrongdoer, or thief, or with intent to defraud, 643.

liability of, for parting with goods bailed, 643.

unless he has parted with them before the plaintiffs' title accrued, 644.

conversion of goods by, 475.

has no better title than his bailor 475.

liability of, for delivering to one person property bailed to him by two or more, 630, 632.

when liable in case of theft, 599, 601, 607.

sale of goods by, with knowledge of real owner, 1, 537.

determination of bailment by, 524.

determines the bailment by parting with the goods bailed, 631.

is entitled to authority from bailor before parting with goods bailed to a third person, 631.

may sue for damage to or loss of goods in his possession, 631, 692.

is not liable if he deliver property to his immediate bailor, although the property bailed may belong to more than one person, 632.

may sue for loss, &c., of goods bailed, though he has only a special property in them, 692, 1292.

may sue for conversion of goods, though he has never had possession of them, 533.

may sue for conversion of chattels by wrongdoers, or in some cases by owner, 524.

when goods in possession of, pass to trustee on his bankruptcy, 515, 516.

is not the true owner of goods within reputed ownership clause of Bankruptcy Act, 512.

can not set up title to goods deposited in furtherance of fraud, 496.

remedy for, by interpleader, &c., where goods, the title to which is doubtful, are demanded from him, 475.

power to compel rival claimants to property in his possession to interplead, 633.

declarations against, for loss or damage to goods bailed, 635.

plea of not guilty, 636.

remedy for, in equity, where deposit made in furtherance of fraud, 476.

Bailiff. *See* LANDLORD—SHERIFF.

is liable for making an illegal distress, and has remedy over against the landlord, 746.

may justify distress in name of landlord, though he distrains in his own name, 710, 741.

is liable for refusing to receive rent and expenses after making a distress, 738.

Bailiff of County Court,

is liable to the same extent in the execution of writs as the sheriff, 925. *See* SHERIFF.

duties of, now transferred to registrar, 925.

duty of, to satisfy the landlord's claim for rent, by distraining on goods seized under execution, 927.

can not be sued without the clerk of the court being joined, and on proof of the warrant is entitled to judgment, 934.

not liable as trespasser by reason of any irregularity or informality of warrant under which he acts, but is for any special damage from any irregularity in his mode of executing it, 934, 935.

protection of, by interpleader, where there are rival claimants to property seized, 935.

Bailment,

different kinds of, 595, *et seq.*

distinction between, and sale, 595, *u.*

Bailor. *See* BAILEE—INJUNCTION.

may sue for damage caused by negligence to chattel bailed, 577.

when may sue for conversion of, or injury to, property bailed, 524.

may sue wrongdoer for detention, &c., of, or injury to, goods bailed, 631.

may sue bailee if he parts with the goods, 631.

duty of, to declare the value and nature of goods to which the Carriers Act applies, 659.

liability of, for not disclosing dangerous or very valuable nature of goods bailed, 32, 597, 631, 654, 1206.

can not replevy goods, but must prove his title in action of trespass or for their detention, 754.

B. &c.,

conviction of, for baking rolls on Sunday, 982.

Bal. on,

cent or descent of, when a nuisance, 225.

Bank *See* PUBLIC OFFICER.

assumption of name of, whether actionable, 1202.

Banker,

negligence or neglect of duty by, 573.

liability of, for loss of box left in his custody, 573, 597.

refusal by, to cash his customer's draft, when a tort, 17.

liable for paying forged cheque, 34.

liable only to the person who deposits the money, although the right to it belongs to several, 633.

lien of, 617.

liability of, for delivering to one property deposited with him by two or more, 630.

Bankrupt. *See* BANKRUPTCY—LIQUIDATION—TRUSTEE IN BANKRUPTCY.

title to property of, passes to trustee, 502.

but leaseholds or any onerous property may be disclaimed by trustee, 502.

contracts or dealings with, without notice of bankruptcy, are valid, 503.

transfer of property by, when an act of bankruptcy, 505.

petition of, for liquidation, is an act of bankruptcy, 505.

execution levied on property of, when an act of bankruptcy, 506.

goods in reputed ownership of, when they pass to trustee in bankruptcy or not, 508, 519.

Bankrupt—Continued.

- goods in possession of, as trustee, do not pass to trustee in bankruptcy, 519.
- goods in "apparent possession" of, within Bills of Sale Act, 520.
- may sue for injuries to land in his own occupation, unless the trustees take the lease, 1300.
- remains liable for torts committed prior to or during the bankruptcy, unless judgment has been given, 1320.
- arrest of, in certain cases, 1320.
- property of, fraudulently assigned before bankruptcy, injunction to restrain dealings with, 1446.
- peer, can not sit or vote in House of Lords, 917, n.

Bankruptcy. See NOTICE.

- effect of, on proceedings in an action, 1326.
- on action commenced by bankrupt, 1359.
- on power to distrain, 706.
- malicious proceedings in, when actionable, 867.
- evidence of adjudication of, or other proceedings in, 534.
- judges in, in the country, 641.

Bank manager. See BANKER.

Bank note. See BILL.

Barge,

- owner of, is a common carrier, 650.
- and liable as such, 653.

Barrister. See ADVOCATE.

- not liable for negligence, unless malicious or fraudulent, 576.

Bathing. See SEA-SHORE—INDECENCY.

- indecent, is a public nuisance, 297.
- by-laws for the suppression of indecent, 55.
- right of, at common law, 55.

Baths,

- negligence in management of, 251.

Battery. See ASSAULT.

Bawdy-house,

- keeping, is a public nuisance, 297.
- what is "keeping" of, 247, n.

Beach. See SEA-SHORE.

Bears. See FERÆ NATURE.

Bells,

- ringing of, may be a nuisance, 295.

Bigamy,

- committal of, is actionable, 48.

Bill of lading,

- title by, 500.

Bill of peace,

- to ascertain rights where the persons asserting or contesting it are numerous, 216.
- between lords of manors and tenants of manors, whether freeholders or copyholders, 216.
- does not lie to ascertain public rights, *e. g.*, a public right of way, 216.

Bill of sale,

- title by, 483 n., 499, 513.
- priority as between two holders of, 483 n.
- necessity for registration of, 483 n., 513 n., 520.

Bills,

title to, 500.

when paid off, 490.

conversion of, 478, 479.

false assumption to accept by procuration is actionable, 1211, 1218.

damages in action for conversion of, 540.

Bills of sale act,

when goods are in "apparent possession" of bankrupt within meaning of, 520.

goods in "the apparent possession" of the assignors within meaning of, 483 n.

Birmingham. See SMOKE.**Bishop.** See ECCLESIASTICAL DILAPIDATIONS.

liable for neglecting to perform the duties of his office, 30.

injunction against, to prevent waste, 371.

Board of health,

must be sued in the name of their clerk if the statute so requires, 1079.

liabilities of, as surveyor of highway, 1044.

not liable personally for any injury committed in the execution of Public Health Act, 1045.

mandamus to, to make compensation, 1500.

Board of trade. See PORT—SEA-SHORE.

inquiry by, in cases of collisions of ships causing death or personal injury, 576.

Boats. See CANAL.**Bond.** See SECURITIES.

obligee entitled to possession of, though money paid, 490.

Books. See COPYRIGHT—PRINTER.

exportation or sale of, if protected by copyright, 60.

Boundary. See FENCES.**Boundary-walls.** See FENCES.

property in, 415.

Brawling. See CHURCH.**Bread,**

adulteration of, is a public nuisance, 297.

Brewhouse,

is a nuisance, 217.

Brick-earth,unlimited claim of, *in alien solo*, is bad, 115.**Brick-kiln,**

when a nuisance, 217, 220.

illegality of, adjoining highway, 230.

Bricks. See BRICK-EARTH—BRICK-KILN—CUSTOM.

right of lessees to make or not, 325, 334.

right of tenant for life with regard to, 332.

injunction against burning, 293.

Bridge,obligation to repair *ratione tenuræ*, 188.**Brokers.** See BAILIFF.

negligence of, in purchase of goods, 1198.

lien of, 609, 614, 615, 625.

Brook. See RIVER.**Builder.** See ARCHITECT—CONTRACTOR.

negligence of, in erecting house, 569.

Building. *See* HOUSE—NEGLIGENCE—SUPPORT.

- pulling down or dismantling, is waste, 319.
- fire in, caused by negligence, is waste, 321.
- right to support of land weighted with, 84, 85.
- rights of person who has erected on another's land without opposition, 213.
- ruinous, adjoining highway, is a public nuisance, 297.
- shoring up or removal of ruinous, in London, 266, 268, 272.

Bull. *See* ANIMALS.

Burial. *See* CHURCHYARD.

- Acts of Parliament for regulating, 266.

Bushes,

- property in, is in tenant, 413.

Busts. *See* SCULPTURE.

By-laws,

- under a statute must strictly follow the statute under which they are made, 53, 55.
- imposing penalties for suppression of torts are cumulative upon remedy at common law, 55, 56.
- as to indecent bathing, 55.
- for the suppression of nuisances, 55, 278.
- for the regulation of markets, 57, n.
- in restraint of trade when valid, 57.
- of municipal corporations, 54, 55.
- upon whom binding, 36.
- by public commissioners, local boards, and public companies, 56.
- all restraints imposed by, are illegal, unless under statutable authority, 56.
- of railway companies, must be hung up at every station or wharf, 986.
- may be partly valid, partly not, 59.
- no power to apprehend for breach of, unless given by statute, 56.
- summary convictions under, 54.
- convictions for breaking, 986.

Cabman,

- is not a common carrier, 650.

Calls. *See* MANDAMUS.

Canal. *See* CANAL COMPANY—FIXTURES—WATER.

- injuries from negligent management of, 251.
- injuries from negligent construction of works connected with, 283.
- right to soil of towing paths of, 412.
- license to use boats upon, 132.
- right to use of pleasure boats upon, 96.
- right of riparian proprietor to use of water of, 96.
- as to mines under or adjacent to, 124.
- duty of, to afford equal facilities of carriage to all, 652.
- are liable for penning back polluted water, though they may be authorised by statute to pen back the water so long as it is pure, 1040.
- not liable for leakage of water, without negligence, 1040.
- bound to use every precaution where highway crosses canal by a swing bridge, 1041.
- duty of, to take all reasonable precautions where canal crosses a highway, 251, if canal is in possession of lessee, 251.
- when bound to fence off canal from highway, 251.
- power to make "reasonable" conditions as to receiving and delivering animals or goods, 664, 666.
- special contract with, for carriage under the Canal Traffic Act, must be signed, 665.
- and the signature fairly obtained, 699.
- surplus water of, used by another company, 163.
- summary proceedings against, for contravening the Canal Traffic Act, 691.

Canon. See ECCLESIASTICAL DILAPIDATIONS.

Captain. See MASTER OF SHIP—SHIPMASTER.

Carpenter,
negligence of, in execution of work, 569.

Carriage. See COACH.
injuries from unskillful or reckless management of, 34, 36.

Carrier. See COMMON CARRIER—BAILEE—RAILWAY COMPANY.
does not warrant the absolute safety of goods carried, 607.
unless a common carrier, 584.
duty of, to use due care, whether paid for carriage or not, 1288.
does not warrant the safety of passengers carried, but engages to use due care, 584.
negligence of, 545, 549.
of goods, though not a common carrier, how far liable for negligence or loss of the goods, 607.
who to be plaintiffs in actions against, 692.
when the consignor and when the consignee, 692.
liability of, for negligence to servant, though his master pay the fare, 692
who to be defendants in actions against, 693.
carrier or his servant, 693.
lien of, 609, 613.

Carriers' Act,
articles to which it applies, 656, 661.
only applies to carriers *by land*, 659.
does not apply where goods carried under a special contract, 663.

Casts. See SCULPTURE.

Cattle. See ANIMALS—SHEEP.
right of pasturage for, is a *profit à prendre*, 114.
right to wash or water, on another's land, 115.
right to water or wash, claimable by custom, 133.
trespasses by, 377, 378.
straying on highway or turnpike road, 422, n.
right of passage along highway, but not to remain, 244.
lying in highway, 270, n.
straying from highway, when distrainable as trespassing, 379.
injuries to, while trespassing, 260.
injuries to, from getting on a railway through gates at a level crossing, 248.
injuries to, from falling down unguarded wells and shafts, &c., 228.
pursuit of, on another's land, when justifiable, 376.
injuries from the escape of, though without negligence, 95.
injuries to, from eating poisonous clippings of boundary fence, 95.
by dogs, 35.
from non-repair of boundary or railway fences, 244.
trespass by driving, or striking, 466.
by dogs, in pursuit of, 466.
negligence in delivery of, by railway company, 244.
liability of agisters for negligence in the care of, 604.
negligence by sending small boys in charge of, 259.
sale, or exposure for sale, or otherwise, of diseased, when unlawful, 6, 7, 35.
damage caused by the escape of diseased, 459.
injuries from cutting up diseased, 254.
injuries from negligent management of, if diseased, 35.
importation of, from abroad, 7.
impounded, must be fed, 735.
slaughter of, whether a nuisance, 219, n.

Cattle-gates,
right of, 142.

Cellar. See AREA.

injuries from negligently leaving flap-door of, unsecured, 34.

Certificate. See ARCHITECT—SURVEYOR—COSTS.

of under-sheriff for costs, 1409, 1411, 1415.

of probable cause for seizure of ship or goods under Customs Acts, 543.

Certificated conveyancer,

lien of, 619.

Certiorari,

lies to remove proceedings of justices and all inferior courts who are acting without jurisdiction, or are disqualified to adjudicate by interest, although the writ is expressly taken away by statute, 1005, 1008.

to remove and quash proceedings of inferior court acting without jurisdiction, or to remove proceedings in which the Crown is interested, 892.

although the writ is expressly taken away by statute, 892.

right of Crown to remove cases by, although the writ is expressly taken away by statute, 1004, 1008.

lies to remove judicial, not ministerial acts, 1008.

to quash convictions, orders, &c., of justices, made without jurisdiction, 966 1469, 1471.

although right of appeal exists, 1000.

or writ expressly taken away by statute, 1479.

to remove inquisition before sheriff in compensation case, 1064, 1065, 1067.

to remove actions of replevin from county to superior court, 755.

to remove causes from county court, 1472.

although power of appeal exists, 1473.

to remove cause where inferior court has jurisdiction, when to be applied for 1468.

where it has not, may be applied for after judgment and execution, 1469.

will not be granted where no objection to the jurisdiction was made in the court below, 1048.

unless the want of jurisdiction appears on the face of the proceedings, 1469.

limitation of time for issuing, 1470.

ground on which writ may be applied for, 1471.

when grantable *debito justitie*, 1472.

application for, may be made on affidavits, 1009.

amendment of orders, &c., of justices on return to, 1010.

proceedings on application for, affidavits, notice, &c., 1475.

effect of, in staying proceedings in court below, 1477.

quashing of, where it has improvidently issued, &c., *procedendo*, 1480.

costs on, 1429.

is available in equity, 892.

Cesspool. See SEWER.

is a nuisance, 218.

Cestui que trust. See PARTIES TO ACTIONS—TRUSTEE.

can not sue for injuries to land, 97.

not a tenant at will to his trustee within the Statute of Limitations, 393.

Chancel,

title to, is in rector, though possession is in incumbent, 405.

obligation of rector to repair, 337.

Character,

evidence of, when admissible in actions for a malicious prosecution, 881.

Charts. See MAPS.

Chastity,

reflection upon, when actionable, 1087, 1117, 1124.

Chattels,

lost, are property of finder against every one but real owner, 466.

conversion of, 467, *et seq.* See CONVERSION.

Chattels—Continued.

- on land of another, when may be retaken, 375, 376, 378.
- sale of, without authority, is actionable, 34.

Chattels real. *See* LEASES.**Cheque.** *See* BANKER—BILLS.**Children.** *See* INFANT—NEGLIGENCE.

- cruelty to, may be cruelty to wife, 1252.
- father entitled to custody of, at common law, 1253, 1254.
- subject, however, to the controlling power of the Court of Chancery in case of his misconduct, 1256, 1258.
- and of the Divorce Court, in certain cases, 1251.
- order by Divorce Court respecting custody of, 1251, 1252.
- guardians of, are entitled to custody of, 1254, 1258.
- right of access to, by mother, 1259.
- custody of, mother entitled to, on death, or transportation, of father, 1260.
- obligation of parents to provide for, 1261.
- injuries to, or seduction of, causing loss of service, is actionable by parent, 1274.
- abduction of, a misdemeanor, 1287.

Chimney,

- easement of using, 213.

Choses in action

- are not "goods or chattels" within reputed ownership clause of Bankruptcy Act, 509.
- notice of assignment of, 512, n.

Church. *See* PEW—SEXTON.

- title to, is in rector, but possession in incumbent, 405.
- title to pews in, 417.
- private chapel annexed to, may be the property of a private person, 405.
- right to ring bells of, 405, 405, n.
- brawling in, by persons in holy orders, 1459, 1459, n.
- disturbance in, a misdemeanor, 812.

Church rate,

- all compulsory proceedings for enforcement of, abolished, 984.

Churchwarden,

- right of access of, to church, 405.
- may not remove bones from churchyard without faculty, 405.
- or remove ornaments illegally in church, without sanction of ordinary, 405.
- right of, to communion plate, in case of its conversion by rector, 405.
- can not dispossess person in possession of pew, &c., without notice, 417.
- election of, may be tested by mandamus, 1493.
- mandamus to, to allow inspection of parish accounts, 1504.

Churchyard. *See* TOMBSTONES.

- freehold of, is in rector, though closed under order in council, but possession in incumbent, 15, 405.
- if taken compulsorily under an Act of Parliament, 405.
- removal of bones, &c., from, without faculty, is unlawful, 405.

Chymist,

- negligence of, in compounding hair-wash, 569.

Cistern,

- injuries from bursting or leakage of, to lower stories of house, 95.

Clergyman. *See* INCUMBENT—RECTOR—LIBEL—SLANDER.

- liable for refusing to perform the duties of his office, 30.
- can not be arrested while performing divine service, 914.

Clerk. *See* COUNTY COURT—COURT OF RECORD.

Clerk of Magistrates

has not a freehold office, 1490.
duty of, to draw up minute of conviction or order, 987.

Clerk of Poor Law Guardians

has not a freehold office, 1490.

Clerk of the Peace,

duties annexed to office of, 1489, n.
may be dismissed for misdemeanour himself in his office, 968.
report by, to quarter sessions, is a privileged communication, 1094.

Client. See PLAINTIFF.

Cloak-room. See RAILWAY COMPANY.

Clockmaker,

negligence of, in execution of work, 569.

Clothes,

right to hang and dry, on another's land, 113.

Coach. See COMMON CARRIER.

accidents to, from overturning, &c., 545, 548.
negligence in management of, or carriages, 548, 553.
injuries from negligently or recklessly driving, 583.
overturning, is *prima facie* evidence of negligence, 545.
hirer or borrower of, when liable for negligence in driving, 549, 551.
remedy for passenger by, in cases of collision, when both drivers are in fault 553.
injuries to hired, when chargeable to owner, when to hirer, 597.
proprietor of, is a common carrier, 650.
lien of owner of, on passengers' luggage, 676.

Coachmaker,

lien of, 613.

Coals. See CUSTOM—HIGHWAY—MINERALS—MINES.

grant of, includes right to go on land and erect engines, &c., 119.
grant of *all*, passes the fee, 131.
reservation of, in a conveyance of land, 116.
license to get and carry away, 131.
right to make way for the passage of, 121.
carriage of, along highway, when illegal, 308.

Coffee House,

keeper of, not an innkeeper, 683.

College,

mandamus to warden of, 1496.

Colliery,

statutory regulations for management, ventilation, &c., of, 564, 564, n.

Collision. See COACH—SHIPS.

Colony. See GOVERNOR OF COLONY.

Commissioners. See MANDAMUS.

liability of, for negligence or misconduct in carrying out powers given by statute, 1043, 1306.
unless they entrust the performance of the work to independent contractors, 1043.
liability of, for the creation of unnecessary nuisances in carrying out works, 1043.
in occupation of works for which they receive toll, &c., are bound to maintain the property, so as not to be dangerous to those who use it, 1043.
unless they have demised the works to a lessee, or the duty of repairing is not absolute, &c., 1043.

Commissioners—continued.

- right of to indemnify themselves for expenses incurred in defending proceedings against them, 1046.
- except in case of willful misconduct, gross mistake, &c., 1047.
- can not create a nuisance by a system of drainage, 1050.
- personal liability of, for negligently managing docks, wharfs, &c., 252.
- action against, to be brought, if so directed, against their public officer or clerk, 1306.
- liability of, for the natural consequences of works executed by contract and handed over to them, 580.
- mandamus to, to levy rate to discharge judgment debt, 1520.
- prohibition to, 1454.
- injunction against, 296.
- of Treasury, Customs, or Excise. *See* PUBLIC OFFICERS.

Commissioners of Navigation. *See* CONSERVATORS—STATUTE—WATER.
are not entitled to soil of towing paths and banks of rivers, 442.

Commissioners of Public Works,
liable for arbitrary or negligent conduct, 43.

Commissioners of Sewers,
repair of sea-wall by, 318.

Commissioners of Treasury. *See* PORT—PUBLIC OFFICERS.

Commitment. *See* JUSTICES.

Common. *See* ENCLOSURE ACT—PASTURAGE.

- rights of, 130.
- appendant, 135.
- appurtenant, 134.
- of shack, 137.
- pur cause de vicinage*, 138.
- of turbary, 139.
- of estovers, or right to cut wood, &c., 140.
- in gross, 141.
- right of, claimable by prescription, 149.
- right of, arising from long user, 151.
- interruption in the enjoyment of, 170.
- enjoyment of, to confer right, must be without interruption, but need not be without intermission, 171, 174, 176.
- right of, valid after thirty years' user under Prescription Act, 152.
- indefeasible after sixty years' enjoyment, 152.
- right of, an exception to rule that a profit *à prendre* is not claimable by custom, 134.
- suspension of, by non-user, 176.
- destruction of right of, by unity of ownership, 176, 184.
- except in case of copyholds, 184.
- right of, over land of which lord is only tenant for life, 159.
- inconsistent rights of, between commoner and lord, 144.
- right of lord of manor to enclose, 134.
- ascertainment of right of, by bill of peace, 216.
- injury to, is actionable without special damage, 212.
- taking manure from, is actionable, 192.
- interruption to right of, by erection of rails, 171.
- obstruction to right of, may be abated, 189.
- obstruction of, by fences, how remedied, 134, 144.
- disturbance of, by railway company, 134.
- obstructions to, by a house, gate, or fence, may be pulled down, 267.
- unless the house is in occupation of some one, 383.
- hares or rabbits on, may be destroyed, unless coming from lord's land, 193, 267.
- 380.

Common—Continued.

- trespass by cattle straying from, 378.
- cattle trespassing on, may be distrained by either commoner or lord, 716
748.
- right to distrain beast wrongfully on, 140.
- remedy for surcharge of, by commoners, 193.
- surcharge of, may be remedied by distress, 747.
- surcharge of, by lord of manor, 144, 193.
by commoners, 136.
- declarations in actions for obstructing, 197.

Common Carrier. See CARRIER—CARRIERS ACT—RAILWAY COMPANY—STEAM BOAT COMPANY.

- who is, 650.
- instances of, railway companies, stage coaches or wagons, lightermen, hoy-men, barge-owners, canal boatmen, shipowners, job master, cabmen, &c., 650.
- obligation on, to carry goods for all persons, ready to pay him, 649.
except petroleum, nitro-glycerine, and other "specially dangerous" goods, 649.
- of passenger not obliged to carry goods, and *vice versa*, 649.
- may carry goods that he does not profess to carry, as an ordinary bailee only, 649.
- of passengers, must also carry their personal luggage, 649, 653, 656.
- liability of, for loss of goods, or animals, unless by the act of God, or the King's enemies, 653.
although the loss is occasioned by the misconduct of a stranger, 653.
- can not rid himself of the public duties imposed upon him by stipulating that all merchandise (if he carries merchandise) shall be at the risk of consignor, or that personal luggage of passengers (if he carries passengers) shall be at the risk of owner, 656.
- statutory protection of, in respect of the carriage of gold and silver, title deeds, and other specially valuable articles, unless due notice of their nature be declared, and an increased charge paid, 657, 665.
requisites of notice to be given by carrier, 658.
- liability of, where goods carried under a special contract, 663, 664.
- liability of, for acts of persons employed in doing his work, though not, strictly speaking, his servants, 663.
- liability of, for negligence, although goods carried under a special contract, 664, 666.
- commencement and duration of liability of, 667.
- when liable as warehousemen only, 668.
- delivery of goods by, at place of destination, 668.
if consignee refuse to receive them, 674.
- of passengers only, not liable (except as gratuitous bailee) for loss of luggage, 653.
- may sue consignor of dangerous goods for damage caused by neglect to give notice of their nature, 654.
- is released from liability if the misconduct or negligence of consignor has conduced to the loss or damage, 653, 655.
- acceptance of passengers or goods by, to be conveyed beyond the limit to which he himself carries, 670.
- not liable for goods not actually or constructively delivered into his charge 698
but delivery to his servant or agent is a delivery to him, 701.
- not liable for goods, which the passenger carries in his own hands, 698.
- not liable if goods placed in his cart, &c., without his knowledge, 698.
or delivered to his servant on other terms than those on which he was authorized to receive them, 698.
- when not liable for loss of valuable or fragile articles of the nature of which he has no notice, 34.

Common Carrier—Continued.

- liability of, for negligence or theft of servants, although consignor has omitted to declare value of article carried, 659, 663, 703.
- lien of, 676.
- action against, for not carrying safely, is an action of tort for negligence, and not in contract, 1415.
- declaration against, for refusing to carry, 694.
- pleas in actions against, 696.
- when he may set up *jus tertii* in actions against him for loss of, or damage to goods or not, 692, 697, 701.
- evidence in actions against, for the plaintiff, 698, 702.
- evidence of negligence of, from delivery of short weight, 653.
- damages recoverable in actions against, 702, 704,
 - limited by statute in certain cases if value not declared, 703.
 - delivery in, 703, 704.

Commoner. See COMMON.**Company.** See DIRECTORS—FALSE REPRESENTATION—JOINT-STOCK COMPANY—LIQUIDATION—MANDAMUS—REGISTER—SHARES—STATUTORY COMPENSATION.

- liability of, for the wrongful acts of its directors, managers, &c., 1305.
- prospectus of, to contain certain particulars or to be deemed fraudulent, 1181.
- where it carries on its business within meaning of County Court Acts, 1327.
- acting under Lands Clauses Act, compellable to take the whole of a house, building, &c., if they take part, 1070.
- land severed and not required by (except in a town), vests in proprietor of land severed, whether owner in fee or lessee for a long term, 1069.
- no duty on, to communicate refusal to register transfer to transferee, 1524.
- liability of, to the innocent transferee of forged shares, 1376, 1524.
- in occupation of premises after winding-up order may be distrained on, 725.
- power of tendering amends by, 1074.
- mandamus to, to register shareholder or probate of will, 1520.
- mandamus to, to admit secretary or clerk, 1495.
- security for costs from, 1439.
- injunction to restrain action for calls by, on the ground of false representation or fraud, 1180.

Compensation. See STATUTE—STATUTORY COMPENSATION.

- offer of, how far an admission of liability, 290.
- for mines, under or within a certain distance of railways or canals, 124.

Composition. See LIQUIDATION.**Consent.** See JURISDICTION.**Conservators,**

- of river, rights and liabilities of, 237.

Consignor. See BAILOR.**Consols.** See STOCK.**Conspiracy,**

- action lies for, if malicious, and damage ensues, 850.
- to molest an actor in his profession, 850.
- to institute legal proceedings or obtain conviction of plaintiff, 852.
- to obtain property by forgery, 47.
- to convict a man of felony, 48.
- damages in actions for, 882.
- indictment for, 850.

Constable. See ARREST.

- may take person guilty of assault in his presence into custody, 793.

Constable—Continued.

is not bound to turn intruder out of a house, but he may do so, 793.
 can not arrest without warrant, except for felony, or reasonable suspicion of, 802.
 what is reasonable suspicion, 802.
 not liable for arresting a man on reasonable suspicion of felony, 841.
 not liable for arresting a person by order of another, 802.
 liability of, if assisting another constable in a wrongful arrest, 802.
 may arrest person found committing malicious injury to property, 806.
 or person committing a breach of the peace in his presence, 809, 810.
 or person hindering him from so arresting, 809.
 may arrest persons continuously ringing at a door-bell, or collecting crowd at a person's house, 810.
 powers of, in the Metropolis, 816.
 is not liable for seizing goods on a charge that they were stolen, 766.
 is liable for handcuffing unconvicted prisoners, 789.
 distinction between arrest by, and by private person, for felony, 803.
 statutory protection of, from vexatious actions, 820, 829.
 protection of, where they intend to arrest, &c., in pursuance of an act of parliament, 821, 822.
 limitation of time for bringing actions against, 1029.
 assault on, or on revenue officers, punishable, 809.
 protection of, where he has acted under a warrant, and gives a copy of it on demand, 1035.
 protection of, from liability to action while acting under justice's warrant, 10, 15.
 so long as he does not exceed his authority, *e.g.*, by handcuffing unconvicted prisoner, searching wrong house, 1016, 1017.
 venue local in actions against, 834.
 plea of not guilty by statute in actions against, 1033.
 evidence in actions against, 1035.
 costs in actions against, 1420, 1421.

Contagion. See CATTLE—INFECTION.

Contagious Diseases (Animals) Act, 4.

Contempt of Court,

what is, and committal for, 888.
 before magistrates, 968.
 in not answering a bill in Chancery, 928.
 extortion by sheriff is, 924.
 person guilty of, must be heard in his defense, 1007.
 remedy for imprisonment for, by application to Court of Queen's Bench, 1007.

Contract,

torts founded on, 27, 32.
 torts founded on, how far parties to actions are affected thereby, 32, 1288.
 entered into under false representation or fraud is actionable, though no warranty given, 1219.
 made under a false representation should be repudiated on discovery of the fraud, 1174.
 inducing another to break, is a tort, 17, 41, 1272.
 damages recoverable for, 1286
 costs in actions of tort founded on, effect of County Court Acts on, 1414.

Contractor. See MASTER—NOTICE OF ACTION.

liability of, for negligence in constructing works, &c., 283, 580.
 although the persons employing him may be exempt from personal liability by statute, 1045.

Contribution,

no right of, as between wrong-doers, 1394.

Contributory Negligence, 567, 591:

by consignor of goods, by defective packing or otherwise, 653, 655.
by guests staying at a common inn, 684, 687.

Conversion. See TITLE.

of chattels, what is; See CHATTELS, 467.

mere removal of, without any claim, is not, 467.

removal of, for use of defendant or third person, is, 467.

refusal to deliver goods is, 467.

delivery to third person contrary to orders is, 467.

misdelivery by mistake is not, 467.

sale of goods before stipulated time is, 467.

leaving goods with third person, whereby a lien is created, is, 467.

re-selling goods, sold on credit, before time for payment, is, 467.

wrongful distress is, 467.

obtaining goods by abuse of legal process is, 467.

by sheriff, in selling more goods than necessary, 467.

or in selling goods in possession of bailee or pawnee, 467.

mere negligent dealing with goods is not, 467.

wrongful destruction or damage to goods is, 468.

of fixtures, 469.

of goods by purchasers without title, 470.

when demand and refusal is necessary to prove, 471.

what a sufficient demand and refusal, 471, 472.

of goods not in possession, or under control, of persons from whom they are demanded, 472.

of goods left on premises without consent of occupier, 473.

of goods found, 474.

of goods by public officers, &c., 475.

by servants, 475.

by bailees, 475.

of stolen goods, 493, 494.

of goods, where the property in them has passed, 494.

of goods obtained by fraud, 496.

of goods in hands of bailees, 497.

of goods by railway companies, 477.

of bills and notes, 478, 479.

by one partner, joint tenant or tenant in common, 480.

of trust property, 481, 491.

by persons claiming a lien, 482.

of policy of assurance, 491.

of property of bankrupts, 505.

by owner as against bailee, 524.

of timber or fixtures, 524, 536.

by sheriffs, 533.

of goods in the possession of children, 524.

or bailees or hirers, 524.

of goods that have been distrained, 524.

of goods in possession of servants, 524.

by executor, *de son tort*, 526.

by married women, 526.

of articles pawned, 526.

of cargo of ship, 526.

distinction between and trespass, 528.

of soil by carrying it away, 528.

demand and refusal does not amount to, but is evidence of, only, 529.

liability of corporation for, 1304.

liability of infant for, 1314.

remedy for, by recaption or action, 523.

remedy for, by re-delivery of chattels converted, by order of Court or a Judge, 526.

Conversion—*Continued.*

- action for, or for money had and received at plaintiff's option, if the goods taken have been sold, 522.
- who to be plaintiffs in actions for, 524.
- joint tenants or tenants in common, 525.
- who to be defendants in actions for, 526.
- joint tortfeasors, 526.
- declaration for, 528.
- pleas in action for—
 - not guilty, effect of, 529.
 - not possessed, effect of, 530.
 - of justification, 531.
- evidence in actions for, 532, 536.
- for the plaintiff, 531, 532.
- by admission of defendant, 535.
- for the defendant, 536, 537.
- damages in actions for. *See* DAMAGES, 539, 543.
- effect of judgment for in altering the property, if the judgment has been satisfied, 1357.

Conviction. *See* SUMMARY CONVICTION.

Coparceners. *See* JOINT TENANTS.

- should join in action for injury to reversion, 421.
- possession of, effect of, under statute of limitations, 398.

Copyhold. *See* COMMON—CUSTOM.

- right to support of surface allotted under Enclosure Act, 852, n.

Copyholder,

- may sue for injuries to trees, 421.
- action by, against his lord for refusing to hold a Court for his admission, waste by, when a forfeiture. 338, 340.
- mandamus to admit, or to allow him to inspect court rolls, 1495.

Copyright. *See* BOOKS, 60, 69.

- in lectures, or dramatic or musical compositions, 62, 63.
- in maps, charts, guide books, or directories, 60.
- in books, containing prints, &c., in illustration of the letterpress, 66.
- in prints or engravings, 66.
- in paintings, drawings, and photographs, 67.
- in histories, dictionaries, or articles in magazines, 60, 60, n.
- in dramatized novels, 62.
- in combination of music with words, 62.
- in sculpture, 64.
- in useful, or ornamental designs, 65.
- colonial or international, 60, n.
- aliens, when entitled to, 60.
- none in works founded on fraud, or subversive of morality, 60.
- none in the title of a periodical publication, 60.
- may be obtained in certain portions only of a book or drama, 60, 63.
- in articles published in newspapers, 60.
- registration of, a necessary precedent to action for infringement of, 68.
- assignment of, 62, n, 62.
- rights of assignees, of, 69.
- rights of assignors of, 63, n.
- action for breach of, when to be commenced, 60.
- of design, action for infringement of in county court, 1328.
- interrogatories in actions for breach of, 60, n.
- injunction against infringement of in equity, 1445.
- at common law, 1451.

Cornice,

- overhanging is a nuisance, 217, 415, n.

Cornwall. *See* STANNARIES—TIN.

Coroner,

not liable for acts done in course of judicial duty, 883.

has power to exclude public from inquest, 883.

and is not liable, therefore, for expelling a person from the room where inquest is held, 883.

statements of, at inquest how far privileged, 1135.

prohibition to, 1453.

Corporation. *See* COMPANY—MUNICIPAL CORPORATION.

liability for, in trespass for, seizing goods, 1304.

for wrongful distress, 1304.

for assault or false imprisonment, 832, 1304, 1307.

for negligence in the construction or management of machinery, 1304.

for negligence or wrongful acts of servants, 1041, 1304.

for malicious prosecution or libel, 872, 1304.

for conversion or detention of property, 1304.

for libel published by its direction, 1140.

for negligence in management of baths and wash-houses, 253.

foreign, is not liable for torts, unless committed in this country, 1170, 1171.

ecclesiastical, or eleemosynary, recovery of land by, under Statute of Limitations, 401.

mandamus to. *See* MANDAMUS.

indictment against, 299.

injunction against, 295.

Costs.

causing a person to incur, is a tort, 12.

at common law are damages, but are now given by statute, 1401.

to a plaintiff on demurrer on verdict, 1401.

to a defendant, where the plaintiff, if successful, would have been entitled to them, 1401, 1402.

to one of several defendants acquitted, or against whom a *nolle prosequi* is entered, 1402.

of several defendants defending jointly or separately, 1436.

on pleas puis darrein continuance, 1402.

on stay of proceedings, 1404.

on arrest of judgment, or judgment non obstante veredicto, 1405.

where case dismissed on ground of want of jurisdiction, 1406.

where jury are discharged, and plaintiff discontinues, 1436.

if juror withdrawn, 1407.

in actions of detinue, 1409.

of libel and slander, 1408, 1412.

against executors,

by Crown for duties or penalties, 1424.

on judgments, 1425.

on new trials, 1426.

on appeals from inferior to superior court or to Exchequer Chamber, 1428.

on certiorari or prohibition, 1429, 1438.

on indictments for libel or slander, 1431.

or writ of mandamus or injunction, 1432, 1440.

under Railway and Canal Traffic Act, 1433.

double or treble not now given, 1434.

in compensation cases, 1435.

general, of cause, who entitled to, 1437.

on, or of reference, 1416.

in actions of trespass, after notice, 1419.

against justices or constables, and others intending to act in execution of statutory powers, 1420, 1421.

where plaintiff recovers less than £300 in a case of collision between ships, or action of tort in respect to the carriage of goods in ships in a superior court, 1334.

Costs—Continued.

- of several counts founded on same cause of action, 1340.
- of several pleas founded on same ground of defense, 1345.
- of action up to plea of *puis darrein continuance*, 1351.
- after plea of payment into Court, 1351.
- of proceedings under Railway and Canal Traffic Act, 705.
- of proceedings to compel County Court Judge to perform his duties, 893.
- in ejectment, 1401, n.
- in prohibition, 1463, n.
- on *mandamus*, 1516.
- power of justices to give,
 - under Vagrant Acts,
 - on appeals from justices, 1014, n.
 - of prosecution for non-repair of highway, 1014.
- when certificate necessary to entitle plaintiff to, 1409.
- that action was brought to try a right, 1415, 1440.
- within what time to be granted, 1411.
- that action was fit to be brought in the Superior court, 1412, 1415.
- that trespass or grievance was willful and malicious, 1418, 1419.
- of approval of action in actions against constables and others intending to act under statutory powers, 1421.
- effect of County Court Acts on, 1412, 1416.
- in actions of tort founded on contract, 1414.
- in case of payment into Court, 1434.
- where cause referred, 1415.
- taxation of, 1434.
- needless expense not to be allowed, 1436.
- of particular issues, or abortive issues, 1437, 1437, n.
- security for, 1439.
- in County Court, 1440.
- of prosecutions, 1440.
- security for, in all actions of tort, 759.

Counts. See DECLARATION—COSTS.

County Court. See BAILIFF—COUNTY COURT JUDGE.

- actions in, in what Court to be brought, 1327.
- jurisdiction of, to what actions, and claims to what amount it extends, 1328, 1458, 1460.
- jurisdiction of, depends upon the substance of the action, not its form, 1459.
- copyright of design, 1329.
- friendly societies, 1330.
- where title to land, &c., is in question, 1331, 1332.
- recovery of possession of small tenements, 1332.
- in equity, 1333.
- in Admiralty cases, 1334.
- by consent, or without objection by parties to suit, 1336.
- where plaintiff abandons part of his claim so as to bring it to the amount to which the jurisdiction extends, 1459, 1473.
- in actions of replevin, although title to land comes in question, 755.
- where action in superior court has been brought for same cause, 1354.
- appeal from, in actions of replevin, 755.
- actions brought in superior court of law or equity may be remitted or transferred to, for trial, 1328, 1333.
- judgment in, is a bar to another action for same cause in another court, 1355.
- proof of proceedings in, 954.
- costs in, 1440.
- can not give costs where case dismissed for want of jurisdiction, 1406.
- unless expressly authorized by statute, 1440.
- prohibition to, 1331, 1459, 1461, 1461, n.
- certiorari to remove causes from, 1474.
- appeal from, 1473.

County Court—Continued.

- mandamus to, 1483.
- costs on appeal from, 1427.
- clerk of, how far liable for seizures made under irregular or informal warrant of execution, 934.

County Court Judge. *See* JUDGES.

- how far liable for acts done without jurisdiction, 886, 887.
- must inquire to see if a question of title is really involved, 886.
- may commit for contempt, 888.
- power of, to imprison, 890.
- forms of commitment by, 889.
- are judges in bankruptcy in the country, 889.
- how compellable to act, 893.
- are entitled to notice of action.
- actions against, must be brought in adjoining district, 930.

Court. *See* COURT OF RECORD.

- refusal to obey decree of, is a tort, 39.

Court of Admiralty,

- jurisdiction of, in cases of collision, causing death, 556, 563.
- jurisdiction of, in suits for limitation of liability, 559.
- in cases of collision, 560.
- in cases of negligent navigation, stowage, &c., 562.
- over collisions between ships, caused by negligence, 576.
- and over any claim for damage done by a ship, 576.
- proceedings in, usually *in rem*, 576.
- but are no bar to action at law for damages, 557, 576.

Court of Bankruptcy. *See* BANKRUPTCY—MESSENGER.**Court Baron,**

- Steward of, is a judicial officer, 890.
- prohibition to, 1453.

Court of Chancery. *See* INJUNCTION.

- jurisdiction of, to order delivery up of goods unlawfully detained, 645.
- to award damages for infringement of patent, 74.

Court of Justice. *See* COURT OF RECORD.**Court Martial.** *See* ARREST—MILITARY OFFICER—NAVAL OFFICER.

- officers may be tried by, 43.
- proceedings of, can only be interfered with by Court of Queen's Bench to protect the civil rights of a person, not his military status, 894.
- no action lies for malicious proceedings before, by inferior against superior officer, 861.
- prohibition to, 1453.

Court of Record,

- who are Judges of, 890.
- power of, to commit for contempt, 888.
- Judges of, have power to commit by word of mouth, and without warrant, 800.
- liability of Clerk of, for neglect of duty, 896.

Coverture. *See* PRESCRIPTION ACT.

- effect of, under Statute of Limitations, 403.

Cow-Grasses,

- right of, 142.

Cricket,

- injuries to persons from others playing at, 567.

- Crowd**,
collection of, when a public nuisance, 225, 297.
- Crown.** *See* COSTS—PALACE—EXTENT.
grants by, in derogation of forestal rights, 133.
- Cruelty.** *See* HUSBAND—WIFE.
- Curse**,
penalty for
- Custom**,
what it is, 133.
must be reasonable, and have existed from time immemorial, 133.
to demand a license to fish, 133.
to use water from a spring or well, or to wash cattle, 133.
to erect booths, &c., on waste of manor, 133.
to resort to village greens, &c., for recreation, 133.
to take sand and gravel from sea-shore, 133.
to fish in another's pond, 133.
to take estovers, 133, 140.
right of common claimable by, 140.
to search for tin in Cornwall, 143.
to pass over sea-shore to bathe, 148.
to pass over arable land when crops are standing, 449.
to dry nets on sea-shore, 147.
to dig and get clay, coals, minerals, or to cut timber, 133.
to use water for mining, 160.
by lord of manor to enclose against commoners, 141,
easements acquired by, 113.
- Custom House.** *See* REVENUE OFFICERS.
- Customs**,
commissioners of. *See* PUBLIC OFFICERS.
collector of, responsible for neglect to sign a bill of entry, &c., 30.
superintendent of, is liable for ruining the trade of a merchant, 30.
- Damage.** *See* DAMAGES.
to person or property, though not causing any pecuniary loss, is a tort, 15.
arising from acts lawful in themselves, *e.g.*, lighting a fire or sinking a mine
on your own land, is nevertheless actionable, 19.
when sufficiently connected or not with the wrong to create a cause of action,
or the contrary, 10, 13.
statement of, in declaration, 1339.
under Lord Campbell's Act, 1340.
apportionment of, in Court of Admiralty, in cases of collisions of ships, 567.
injunction against prospective, 293, n.
- Damages.** *See* COURT OF CHANCERY—STATUTORY COMPENSATION.
recoverable in actions of tort, 1382, 1384.
ordinarily and naturally resulting from the wrongful act, are recoverable if
claimed, 1384.
too remote and not naturally resulting from the wrong, 1385.
if more given than claimed, 1382.
if given entire, and one count be bad, 1382, 1399.—
in actions of slander, where some words charged are actionable, and others not,
1382.
in actions for false representation by joint stock company, and the purchase
of shares in consequence, 1383,
in actions of tort founded on contract, 1386.
in actions for false representation or fraud, 1226, 1228.
in actions for false representation of agency, 1388.
where tenant has kept possession after tenancy has determined, and landlord

Damages—Continued.

- has been obliged to pay damages to the tenant to whom he has relet the farm, 1388.
- where plaintiff has paid for services of steam-tug in case of collision caused by negligence of defendant, 1388.
- where plaintiff has resold an article with a warranty, which was warranted to him, 1388.
- in actions of libel or slander, 1164, 1266, 1391.
- for injuries to land whenever act complained of would lay the foundation of a right, though no actual damage proved, 107.
- but not otherwise, 107.
- in actions of trespass to realty, 455, 464.
- after notice, 455.
- for trespass, if willful or after notice, 375.
- in actions of trespass to land—
 - trespasses in dwelling houses, 456.
 - by tenant against landlord for damage in cutting timber, 455.
 - injuries to buildings, 457.
 - digging and carrying away coal, &c., 458.
 - in respect of diseased cattle, 459.
 - if plaintiff only tenant at will or on sufferance, 460
 - if reversion injured as well as occupation, 461.
 - if several co-trespassers, in case of hunting, &c., 462.
 - if tenant holds over, 463.
- in actions of trespass, where several are concerned, 846.
- in actions for conversion, 537, 542.
- if property stolen, 539.
- if action brought by bailee against owner, or owner against bailee, 540
- if plaintiff's property is doubtful, 541.
- for seizures under Customs Act, 543.
- of bills and notes, 540.
- if goods have been delivered up, 541.
- interest in addition to, by statute, 542.
- exceeding the value of the goods, if the natural consequences of the wrongful act, 542.
- in actions for seduction, 1283, 1285.
- in actions for inducing a servant to leave his service, a workman to break his contract, or a married woman to live apart from her husband, 1286.
- in actions for injuries to servants causing loss of service, 1293.
- in actions against justices, 1039.
- in actions against sheriffs, 955, 956.
- in actions for malicious prosecution, 845.
- in actions for malicious prosecution, malicious indictment, or malicious conspiracy, 882.
- in actions for waste, 368, 371.
- for obstructing entry to inspect waste, 370.
- in actions for fall of house from negligence of adjoining proprietor, 282.
- for severance of fixtures, 367
- in actions for unlawful or excessive distress, 783, 786.
- in actions against common carriers or innkeepers, 702, 704.
- in actions of detinue, 645, 647.
- where the whole or part of the property has been delivered up after action, 647.
- where property, *e.g.*, railway shares, the value of which fluctuates, have been detained, 648.
- in actions for negligence, 589, 594.
- if death caused by, 594.
- in actions of assault and false imprisonment, 845, 849.
- in actions for injuries from ferocious animals, 292.
- in actions for nuisances, 291, 292.
- in action by reversioner for a nuisance to demised premises, 292.

Damages—Continued.

- in prohibition, 1462.
- in equity, 1441.
 - for waste already committed, 371.
- in Divorce Court, 1268, 1270.
- apportionment of, between tenant and reversioner, 108, n, 461.
- expense of obtaining legal advice, 1387.
- costs of previous legal proceedings, 1388.
- recovered from one of several tortfeasors is generally an answer to claim against another, 1354, 1355.
 - secus in cases of libel, 1354, 1355.
- expenses, &c., which the plaintiff is liable to pay, though not actually paid, 1389.
- medical expenses, 1390.
- prospective, 1391.
- exemplary, where wrong accompanied with personal insult or degradation, willful malice, &c., 1392.
- mitigation of, 1393.
 - in actions against custom-house officers for seizing goods, 1393.
 - in actions for false imprisonment where defendant had reasonable grounds for suspecting plaintiff, 849, 1393.
 - in action of libel or slander by evidence of bad character of plaintiff, 1393.
 - in action for assault, where plaintiff had libelled the defendant, 1393.
 - in actions of trespass or trover, where defendant has retaken goods sold, fearing they would not be paid for, 1393, 1394.
 - where goods have been seized under void process, though the judgment was regular, 1394.
 - where plaintiff has retaliated upon the defendant, 1397.
 - where plaintiff has been guilty of misconduct, or defendant intended to act rightly, under an Act of Parliament, or supposed authority, 1397.
 - where plaintiff has received full compensation under a contract of insurance, 1395.
- double and treble, in what cases given, 1396.
- excessive, are ground for new trial, 1397, 1399.
 - where plaintiff has himself fixed the amount, and received it, 1397.
- must be assessed jointly against joint trespassers, though all are not equally culpable, 1394.
- too small, are ground for new trial, 1398.
- inquisition of, before sheriff, 1400.
- include costs, 1401. *See COSTS.*

Dams. *See SEA-WALLS.*

Dean. *See ECCLESIASTICAL DILAPIDATIONS.*

Dean and Chapter,
mandamus to, to admit prebendary, 1495.

Death,
negligence causing, is actionable, 575.
action for injury causing, though amounting to a felony 46.
effect of, on proceedings in an action, 1326.

Debt,
imprisonment for, is abolished, 921, n.

Deceit. *See FALSEHOOD—FALSE REPRESENTATION.*
instances of action, for, 1211.
licence obtained by, is a nullity, 447.

Declaration. *See AMENDMENT—VARIANCE—VENUE.*
requisites of, 1338.
venue, 1358.
statement of, special damage, 1339.
several counts, 1340.

Declaration--Continued.

- in actions for injuries to land, 100, 102.
 - for the diversion, obstruction, or pollution of water, 100.
 - for injuries to, the right of support, 101.
 - of waste, 101.
- in actions for obstruction of easements or profits à pendre to a ferry, market, or mill, 197.
- against innkeeper for loss of chattels, 695.
- for nuisances, 284.
- for trespass to land, 423.
- for malicious prosecution, 875.
- for libel or slander, 1141, 1144.
- for seduction, 1281.
- for deceit, fraud, or false representation, 1211, 1213.
- for statutory compensation, 1066.
- for wrongful excavations, &c., 197.
- for obstruction to flow of water through a drain, &c., 197.
- against bailees for loss of, or damage to, goods bailed, 635.
- in actions of detinue, 634.
- against carrier for refusing to carry, 694.
- in replevin, 762.
- for wrongful or excessive distress, 763.
- for distraining and selling goods without notice of distress or appraisement, or for not selling for the best price, 764.
- for negligence, 584.
- for waste, by fire, or otherwise, 364.
- for assault and false imprisonment, 834.
- in trover or trespass to personalty, 528.
- for injuries to the right of light and air, 198.
- in actions where notice of action is necessary, must agree with notice, 834.

Declarations. See ADMISSIONS.

Decoy-Pond,

- driving away wild fowl from, is actionable, 20.
- disturbance of, by firing guns, is a nuisance, 216.

Dedication. See HIGHWAY.

Deer. See GAME—WASTE.

Defendant,

- expenses of, as witness, may be allowed, 1436.

Defendants. See AMENDMENT—PARTIES TO ACTIONS.

- in actions of tort may be sued jointly or severally, unless the action is substantially founded on contract, in which case they must be jointly sued, 1321.
- in actions for injuries to land, 97, 100.
- master or servant, 98.
- in actions for conversion, 524, 528.
- joint tort feors, 526.
- in actions for negligence, &c., in carrying goods, 693.
- in actions for negligence generally, 579, 580.

Demand. See CONVERSION.

Depositions. See JUSTICES.

Desertion. See HUSBAND—WIFE.

Design. See COPYRIGHT.

- registration of, useful or ornamental, 65.

Detinue,

- plaintiffs in actions of, 632.
- declarations in, 634.

Detinue—Continued.

- plea of non-detinet, in action of, 637.
- not possessed in actions of, 637.
- payment into court, in actions of, 641.
- evidence in actions of, for the plaintiff, 642.
- for the defendant, 643, 644.
- damages in actions of, 645, 647.
- order of court or judge, for delivery of goods detained, 645.
- costs in actions of, 1409, n.

Devisee. See TENANT IN COMMON.

- when may sue for injury to land devised, 1207.
- may sue for detention of title deeds, 644.

Dictionary,

- copyright in, 60.

Dilapidation. See ECCLESIASTICAL DILAPIDATIONS.

Directors. See AUDITOR—COMPANY.

- liability of, for false and fraudulent reports, 1305.
- false representations by, to sell shares, &c., 1175, 1180, 1189.
- is a misdemeanor, 1180.
- false representation by, 1175, 1180, 1197, 1210.
- negligence, or neglect of duty, by, 574.

Directory,

- copyright in, 60.

Dissenting Minister,

- has not a freehold office, 1490.
- mandamus to admit, 1495.

Distress. See COSTS—LANDLORD—RENT.

- at common law only a pledge, and may be detained till rent paid, 706.
- there must be a tenancy at an ascertained or ascertainable rent, and distrainor must be entitled to immediate reversion, 706.
- by mortgagee under agreement in mortgage deed, 706.
- no power of, against wrongdoer, *e.g.*, tenant holding over after expiration of term, 518.
- on bankrupt tenant, or by bankrupt landlord, 706.
- must not be repeated vexatiously, 706, 734.
- extent by crown takes precedence of, 706.
- at suit of crown for duties due from bankrupt, 706n.
- for royalties, 707.
- by successor of tenant for life, where tenancy determines on death of such tenant, 707.
- right of may be conditional, *e.g.*, on the landlord doing certain repairs, &c., 708.
- for rent payable in advance, 709.
- illegal, may be resisted by force, and goods retaken till they are impounded, 709.
- after termination of tenancy for rent due before, 710.
- on executors, &c., after the death of tenant, 707.
- on premises after the departure of tenant, 710.
- on away-going crop, 710.
- by executors, 766.
- may be made for six years' arrears, 723.
- on goods or crops seized under an execution, 723.
- on goods of bankrupt tenant in possession of mortgagee under a bill of sale, 726.
- under a licence from debtor to creditor, 727.
- by grantee of tithe or other rent-charge, 728, n.
- on goods fraudulently removed by tenant, 728.
- what amounts to, 729, 736.

Distress—Continued.

- by warehousemen or lodging house keeper, 729.
- abuse of, renders landlord a trespasser at common law, and is actionable, 730, 735.
- when no rent in arrear, is illegal, 731.
- excessive, by seizing more goods than necessary, is actionable, 732.
- although they do not ultimately realise more than the rent and expenses, and although the tenant had the free use of them, 732.
- for more rent than is due, not actionable, unless more goods are sold than is necessary to pay the rent really due, 733, 738.
- after termination of tenancy by notice to quit, revives the tenancy, 710.
- by agents, receivers, cestui que trust, or mortgagor, 711.
- by joint owners, or tenants in common, 711.
- by mortgagees, 711.
- by executors or administrators of landlord, 712.
- right of, may be abandoned by agreement, 713.
- right of, not destroyed by landlord taking a bill or note for the rent, 714, 734.
- wrongful, if rent has been tendered, 715.
- unlawful or excessive, is actionable, though the tenant enters into an arrangement with landlord respecting the things seized, 780.
- time, mode, and place of, 716, 729.
- must be made on land demised, 716.
- on cattle, &c., on common, 716.
- not wrongful, ab initio, because goods not distrainable are seized with others that are, 785.
- does not alter the property, 362.
- affirms the tenancy, 746, 781.
- on goods seized and sold by sheriff to execution creditor, but not removed 911.
- by county court bailiff or registrar, 927.
- by order of justices, 996, 997.
- for non-payment of poor-rate, 997.
- for non-payment of poor-rate, 978.
- what things are liable to, or not—
 - tenant's fixtures, 717.
 - millstones, railway sleepers, &c., 717.
 - beasts of plough, sheep, implements of husbandry and tools, or clothing, &c., in actual use, 717.
 - growing crops, fruit, or other perishable articles, money, &c., 718.
 - trees or shrubs in nursery gardens, 718.
 - property of third persons on demised premises, but in their own possession, actual or constructive, 719.
 - property of third persons, placed on demised premises, with leave of landlord, 720.
 - property of lodgers, 720.
 - property of third person placed on demised premises to be worked on in the way of trade, pawnbroker's pledges, &c., 721.
 - property of guests at an inn, 722.
 - goods in the custody of the law, 723.
 - goods of foreign ambassador, or his servants, or of companies in liquidation, 724.
 - goods left by owner on demised premises in possession of the tenant, and not necessary for the carrying on of tenant's trade, 725.
 - goods mortgaged by tenant, 726.
 - impounding and removal of, 735.
 - removed from pound, may be recaptured, 735.
 - impounded, must be fed, 735.
 - leaving possession of, for a temporary purpose, is not an abandonment of, 736.
- notice of, inventory of things seized, and appraisalment before sale, 742.
- sales of articles not included in, illegal, 742.

Distress—Continued.

- sale of, must be for best price, 743, 764.
- costs and expenses of, 743.
- sale of, 737, 744.
- irregularity in sale is actionable if tenant suffers actual damage, 744.
 - unlawful after tender of rent and expenses, 738, 739, 740.
- surplus goods to be returned to distrainee, wrongful, amounts to a conversion, remedy for wrongful, by replevin. *See* REPLEVIN.
- remedy for unlawful or excessive, or for distraining things not liable to distress by replevin, action of trespass, or trover, according to circumstances, 759.
- plaintiffs in actions for excessive, 760.
 - lodgers, under-tenants, persons who have the actual possession of goods, &c. 761.
- defendants in actions for illegal, 761.
- landlord for bailiff, partners, &c., 761.
- declarations for wrongful or excessive, for selling goods without notice of distress, or appraisement, or for not selling for the best price, &c., 763.
- plea of recovery of goods by replevin in actions for excessive, 774.
- evidence of fact of, 775.
- evidence in actions for unlawful or excessive, 776, 783.
- proof of special damage necessary in actions for irregularity in making, 779.
- payment of rent under, not conclusive admission of title of distrainer, 781.
- damages in actions for unlawful or excessive, 783, 786.
 - landlord can not claim to apply proceeds of goods wrongfully seized in discharge of rent, 784.
- damage feasant, 747, 752.
 - on commons, 747, 749.
 - on unfenced land adjoining highway, 748.
 - or land which person distraining was bound to fence, 773.
 - what things are liable to, horses in use, dogs, nets, pigeons, railway engines &c., 749.
 - tender of amends, 751.
 - impounding of, 751.
 - sale of, to discharge expense of feeding the impounded animals, 752, 753.
 - on beasts wrongfully on common, 190.
 - right of, between one commoner and another, 190.
 - pleas justifying entry to make, or seizure of animals or goods damage feasant, 772.

Ditches. *See* DRAINS.

- repair of, by side of turnpike road, 218.
- adjoining highway, are a public nuisance if choked up, 297.
- boundary, property in, 416.

Divorce. *See* HUSBAND—WIFE.

Dock,

- negligence in the management of, 252.

Dock Company,

- lien of, 624.

Dog. *See* ANIMALS—HOUNDS.

- injuries from attacks of, 261, 263.
- person "keeping," is liable for injuries inflicted by, although not the owner 261.
- injuries by, to horses, cattle, sheep, or game, 35, 35, n., 263.
- attacking a person, may be shot, 263.
- stray, may be detained by police, 261.
- dangerous, may be destroyed by order of justices, 261.
- injury by, to crops, sheep, or cattle, 381.
- chasing of cattle, sheep, or game by, when a trespass or not, 466.

Dog—Continued.

- may be shot, if cattle, sheep, or game, which they are chasing, can not otherwise be preserved, 466, 531, 539.
- reputed mad, duty to keep carefully, 264.
- right of action for injury to, from spears or traps, 227.
- liability of common carrier, or railway company, for escape of, 653.
- may be distrained, damage feasant, 749.

Dog Spears,

- setting of, not illegal, 226.

Drain. See CESSPOOL—SEWER—TENANT—WATER—WATERCOURSE.

- obligation to repair, lies on person using, not necessarily on tenant, 290
- right of repair of, in alieno solo, 118, 121.
- right to use, in common with adjoining proprietor, 118.
- right to use of water from, 163.

Drainage. See WATER.

- statutory powers of, 83.

Drama. See COPYRIGHT—NOVEL.

- unlawful representation of, 63.

Drawings. See COPYRIGHT—PAINTINGS.**Driving.** See CARRIAGE—COACH—HORSES.**Duty.** See TORT.

- breach of, is a tort, 28.
- instances of breach of, by joint stock companies, shareholders, assignees of leases, public officers, bishops, clergymen, lords of manors, postmasters, bailors of chattels, &c., 30, 33.

Duties. See COSTS.

- imposed by statute. See STATUTE.

Dye-house,

- is a nuisance, 217.

Easement,

- how acquired or extended, 113.
- when may be acquired over land let on lease, 151, 156.
- presumption of grant of, from long user, 151.
- what may be claimed under prescription Act, 153.
- user of, must be without interruption, but need not be without intermission, 171, 174, 176.
- of recreation and amusement on village greens, 115.
- of towing on river or canal, 412.
- of using your neighbor's chimney, 213.
- of support. See SUPPORT.
- not extinguished by destruction of house or mill to which they are attached, if house or mill rebuilt, 187.
- extinguishment of, when purpose for which it was granted, ceases to exist, 177
- can not be created, but may be destroyed, by license, 177.
- extinguishment of, by unity of possession of the dominant and servient tenements, 130, n. 176, 184, 187.
- revival of, which has been extinguished by unity of ownership, 185, 186.
- transfer of, *et seq.* 130.
- reservation of, on sale, *et seq.* 118.
- of necessity, when they pass by sale of land to which they are appurtenant 118.
- effect of valuable consideration having been paid for enjoyment of, 157.
- declarations for obstructions to, 197.
- injunction to prevent disturbance of, 213.

Eating House,

- keeper of, must be an innkeeper, 683.

Eaves. *See* CORNICE—REVERSIONER—WATER.
right to use of water from, 163.

Ecclesiastical Dilapidations. *See* FIXTURES.
liability of rector, archbishop, dean, &c., to repair and rebuild buildings, chancel, &c., 337.
but not for internal decoration, 337.
rights of same persons to make alterations, substitute new buildings for old, &c., 337.
and to alter cultivation of glebe, plough up grass land, &c., 337.
rights of same persons over mines, and to cut down timber, 337.
law as to, so far as buildings are concerned, how altered by the 34 and 35 Vict. c. 62, 337.
for non-repair of buildings or fences, but not for state of agricultural land, 1317.
negligence in valuing for, 572.

Ecclesiastical Court,
prohibition to, 1453, 1457.

Ejectment,
can not be joined with another cause of action,
when may be brought in County Court, 1331, 1332.
costs in action of, 1402, n.
injunction in actions of, 1450.

Election. *See* SHERIFF.

Electric Telegraph Company,
liability of for mistakes in transmission of messages, 27.

Embankment. *See* SEA-WALL—WATER.
erection of, when actionable, 4.

Emblements,
statutory provision as to, where tenancy determines on death of tenant for life, &c., 707.

Enclosure. *See* ENCLOSURE ACT.
right of, by lord of manor, 134.

Enclosure Act. *See* COPYHOLD.
rights of lords of manor, and allottees, under, to surface and minerals respectively, 215.
rights of lords of manor to game, &c., under, 116.
title to highways laid out under, 452.

Encroachment. *See* TENANT.

Engravings. *See* PICTURES—PRINTS.

Entries. *See* EVIDENCE.

Entry. *See* INDICTMENT—NUISANCE—STATUTE OF LIMITATIONS.
sufficient against person not entitled to land, 445.
by landlord justifiable if premises vacant, otherwise not, 795.

Escape. *See* SHERIFF.

Estoppel,
as between landlord and tenant, 983, 1332.
as between distrainer and distrainee, 706.
as between tenant and receiver of Court of Chancery, 781.
as between plaintiff and defendant, 537.
as between bailor or owner and bailee of goods, 537, 643.
as between execution creditor and execution debtor, 909.
as between judgment debtor and sheriff, 922, 923.
as between the sheriff and the owner of goods, not the defendant, seized in execution, 907.

Estoppel—Continued.

- as between principal and agent, 388.
- as between patentee and assignee or licensee of, 75.
- as between a person representing a certain state of facts as true, and the person who has acted upon such representation, 1376.
- as between company and innocent transferee of forged shares, 1376, 1524.
- must be pleaded, but if not pleadable may be relied on at trial, 427.

Estovers,

- common of, 140.
- grant of, 129.
- claim of, in a royal forest, 133.

Etching. See PICTURES.**Evidence,**

- in actions for injuries from non-repair of drains or sewers, 290.
- in actions for injuries from dangerous excavations, or fall of ruinous buildings, 290.
- in actions for injuries from non-repair of party walls or fences, 290.
- in actions for negligent management of buildings, railways, canals, or docks, 290.
- in actions for injuries to workmen from dangerous premises, defective ladders, &c., 290.
- in actions for injuries to guests from dangerous premises of host, 290.
- in actions for injuries from ferocious animals, dogs, &c., 290.
- in actions for illegal arrest, for the plaintiff, 877, 878.
- in actions for malicious prosecution, for the plaintiff, 877, 880.
 - oral, of what took place before the magistrates, 877.
 - of malice, and want of probable cause, 880, 881.
 - of malice from want of probable cause for a prosecution, 853.
 - of want of probable cause from malice, 853, 863.
 - of malice from admission of defendant, 854.
- in actions for malicious prosecution, for the defendant, 881.
- in actions against justices—proof of malice and want of probable cause, 1034.
- in actions of libel or slander, for the plaintiff, 1147, 1163.
 - of malice, 1156, 1157.
 - in actions against newspapers, 1145.
 - for the defendant, 1163.
 - under plea of not guilty, 1144.
- in actions for false representation or deceit, 1216, 1225.
 - of contract with railway company, by production of ticket only, is not sufficient, 651.
 - of fraud by an agreement, though unstamped, 1219.
- in actions for seduction, 1282.
- in actions for injuries to land, 105.
- for the plaintiff in actions for waste, 366.
- in actions of trespass to land, for the plaintiff, 441, 446.
 - for the defendant, 446, 453.
 - under plea of not guilty, 424.
 - under plea of liberum tenementum, 387, 446.
 - under plea of leave and license, 447.
 - of public right of way, 451.
- in actions against carriers, for the plaintiff, 698.
 - of felony by servants of carrier, 700.
- in actions against constables, 1035.
- in actions of assault, for the plaintiff, 842.
 - for the defendant, 844.
 - under plea of not guilty, 825.
 - under plea of son assault demesne, 844.
- in actions against sheriffs, for the plaintiff, 945, 950.

Evidence—Continued.

- for the defendant, 953.
- in actions of detinue, for the plaintiff, 642.
 - for the defendant, 643, 644.
 - in mitigation of damages, 648.
- for plaintiff in actions for nuisances, 290.
 - of occupation, 290.
 - for defendant, 291.
 - under plea of not guilty, 291.
- for the plaintiff under plea of not guilty in actions for obstructions to case-ments or profits à pendre, 203.
- under plea traversing right stated in the declaration, 201.
- for the plaintiff in actions for conversion, 532, 535.
 - of conversion by admission of defendant, 535.
- for the defendant, 536, 538.
- in actions for false imprisonment for the plaintiff, 843.
 - signing charge sheet, 831.
- for the defendant, 769, 822.
 - under plea of not guilty by statute, 836, 837.
- in actions for unlawful or excessive distress, for the plaintiff, 776.
 - of tenancy, 781, 782.
 - of fact of distress, 775.
- for the defendant, under plea of not guilty "by statute," 771.
- of malice from distraining upon a bankrupt for poor rate, 854.
- of manorial customs, boundaries, 1377.
- of title and seizin by receipt of rent, declarations of deceased tenants, &c., 106, 386, 443, 1378.
- of title to sea-shore, 406.
- of ownership of ship by production of ship's register, 586.
- of title of trustees in bankruptcy, executors, administrators, or nominal parties, 534.
- in actions for negligence, for the plaintiff, 585.
 - of negligence from the very occurrence of the accident or loss of the goods, 546, 586, 607.
 - from loss of goods by theft, 663.
 - in case of goods on board ship being injured by oil, 664.
 - from delivery of short weight, 653.
 - for the defendant, 589.
- in Court of Divorce, 1259, 1268.
 - of marriage, 1265, 1267.
- of proceedings in county court, 954.
- of adjudication or other proceedings in bankruptcy, 534, 534, n, 1299.
- primary and secondary, 1370.
 - best to be produced, 1370.
 - except in cases of admission of person against himself, 1370.
 - and cases of appointment to an office, such as constable, trustee of turnpike-road, excise officer, &c., where it is sufficient as against a wrong-doer to prove that they were acting as such, though their appointment was by deed or writing, which is not produced, 1370.
- notice to produce writing, &c., necessary to let in secondary evidence of its contents, 1371.
 - except in case of duplicate originals, notices affixed to freehold, or where the action is brought for the detention of the writing or document itself, 1371.
- hearsay**, when admissible,
 - entries of deceased persons against their interest or in the exercise of their duties, 1373.
 - declarations accompanying an act, 1375.
 - by agents or servants in the course of a wrongful act done in obedience to master's orders, 1375.
 - by one of several wrong-doers in actions for negligence, 1375, 1376.

Evidence—Continued.

when the adverse party in a suit is estopped from giving, to contradict his own representations, 1376.
depositions of witness too ill to attend, 1381.
in mitigation of damages. *See* DAMAGES.

Excavation. *See* DECLARATION—MINES—SUPPORT.

on a man's own land to build a house, 220.
unfenced, by side of highway, is a nuisance, 222.
illegality of, adjoining highway, 230.

Excise,

commissioners of. *See* PUBLIC OFFICERS.

Execution. *See* SHERIFF.

right to issue may be exercised, though it be done maliciously, 862.
for a larger sum than due, when actionable, 865.
abuse of, to obtain something not authorized by the process of law, *e.g.*, the delivery up of a ship's register, is actionable, 861, 871.
property may be taken away to avoid, 539.
against company in liquidation is void, 724.
suffering, when an act of bankruptcy, 505, 506.
title to property under, in case of bankruptcy of execution debtor, 506.

Execution Creditor. *See* JUDGMENT CREDITOR.**Executor,**

has constructive possession of testator's goods from the time of the death, 533.
right of, to fixtures against heir, 340.
against reversioner, 340.
not liable at common law for torts committed by their testator, although, if the tort be beneficial, or injurious to the estate, an action of contract may be brought against them, 1315.
but are made liable by statute for injuries to real or personal property committed by testator within six months of his death, 1316.
of prebendaries, incumbents, &c., liability of, for ecclesiastical dilapidations, 1317.
not liable in equity for negligence of their testator, 1315.
liability of, for their own wrongful acts, *e.g.*, in detaining or converting property, or committing waste, 1318.
when, may sue for injury to land devised, 1297.
or to personal property of testator, 1297.
can not sue for injuries to person, or personal character of testator, unless the cause of action is founded on contract, 1297.
but may sue for negligence causing death of testator, 575, 1297.
damages recoverable in such case, 594.
distress by, 712.
of tenant may be distrained upon, 710.
character of, need not be proved unless it is specially denied, 534.
costs in actions against, 1423.
security for costs from, 1439.

Executor de Son Tort,

liable to administrator for conversion of goods of deceased, 526.

Exposure. *See* INDECENCY.**Extent,**

takes precedence of landlord's claim to rent, 910.
maliciously issuing, when actionable, 865.

Factor. *See* BAILEE—BROKER.**Factory.**

statutory regulations for management of, 564, n, 564.

Fair. See MARKET.

- interference with, how far a tort, 22.
- injunction against holding, 296.
- unlawful within Metropolitan Police District, 133. n.
- may be abolished by Home Secretary, 133, n.

False Imprisonment. See ARREST—COSTS—IMPRISONMENT.

- what amount, to imprisonment, 799.
- constructive, 799.
- unlawful detainer, 802.
- need not necessarily be malicious, 40.
- arrest by constables, with or without warrant, 802, 803.
- by private persons, 803.
- for misdemeanor, 804.
- of wrong person, 805.
- if such person has caused the arrest by his own misrepresentations, 805.
- for malicious injury to property, or willful and malicious trespass, 806
- 807.
- of persons committing indictable offenses at night, 808.
- for breach of the peace, 809, 811, 841.
- during affray, 810.
- of persons disturbing divine service, 812, 841.
- of vagrants and persons committing acts of public indecency, 813.
- under Merchant Shipping Act, 814.
- of principal by his bail, 815.
- for offenses within Metropolitan, 816.
- of persons suspected of being in possession of Government stores, 816, n.
- by servants of railway companies, 817, 1304.
- of persons as deserters, 818.
- of lunatics, 819.
- by person assisting a constable in arresting, &c.; secus if he merely makes a statement to a constable, or lays a complaint before a magistrate upon which the constable arrests, or the magistrate issues a warrant, 831, 835, 1032.
- on void writ, though not set aside, if issued contrary to express provisions of statute, 921.
- under void writ, is a justification to the sheriff, but not to the client or attorney who issued it, 921.
- by order of corporation, 1304.
- by order of court martial, 841.
- plaintiffs in actions for, 830.
- if two or more are imprisoned, 830.
- defendants in action for, 831, 832, 1032.
- all persons ordering, &c., or assisting in the imprisonment, or giving information which causes the imprisonment, 831, 843.
- or subsequently ratifying the act, 833.
- signing charge-sheet is *prima facie* evidence that person signing ordered the imprisonment, but is not conclusive, 831, 843.
- attorney and client, if legal process has been set aside as irregular, 831.
- otherwise, if for error, 831.
- or if judgment be set aside in the exercise of equitable jurisdiction of the Court, 831.
- corporations, railway companies, &c., 832.
- persons ratifying an arrest committed by their agents or servants, 833.
- declarations for, 834, 843.
- pleas in —not guilty, 835.
- not guilty by statute, 836.
- previous hearing, and dismissal by magistrates, 837, 844.
- imprisonment for preservation of discipline, or the safety of a ship, 840.
- that felony had been committed, and that defendant had reasonable cause of suspecting the plaintiff, 841.
- that plaintiff would not leave defendant's house or shop, 841.

False imprisonment—Continued.

evidence in actions for, for plaintiff, 843.
for the defendant, 844.

damages in actions for, 845, 848.

where plaintiff remanded by magistrate, 845.

money paid to obtain release, &c., 848.

evidence in mitigation of, 849.

Judgment recovered in action for, is no bar to action for malicious prosecution, 849, 1355.

Falsehood. See FALSE REPRESENTATION.

causing damage is actionable, 38.

no action lies for, without intention that another should act upon it, 1174.

False Pretenses. See INDICTMENT.

to obtain money by, is actionable, 49.

False Representation. See FALSEHOOD—FALSE PRETENSES—FRAUD—WIFE.

when actionable, 20, 1174.

causing loss of marriage is actionable, 17.

by which a person is induced to enter into a contract, is actionable, though the contract is in writing, and no warrant is given, 1219, 1222.

but the contract must be repudiated on discovery of the fraud, 1174.

made without knowledge of its untruth, but without belief of its truth, 1174, 1177, 1184.

unintentional deception, 1175.

made for another to act upon, is actionable if damage ensues, 1175, 1208.

by directors, promoters, or officers of public company, 1172, 1180, 1210, 1217, 1305.

by directors, whether the company liable, 1180, 1192, 1210.

of right of lien, 38, 1176, 1211.

respecting the conduct, credit, &c., of third persons, whether individuals or members of a partnership or company, 1178, 1211.

fraudulent breach of warranty, 1181.

obvious defects, 1181.

statements made before sale, whether by auction or otherwise, 1183.

that designs of goods were copied from registered patterns, 1211.

by a vendor, or others, where the means of knowledge lie peculiarly or exclusively within their reach, 1184, 1189.

respecting matters which lie as much within the knowledge of one party as the other, 1185.

amounting merely to expressions of opinion and belief, *e.g.* respecting the credit, &c., of a third person, 1186.

to sheriffs, as to the ownership of goods, proposed to be taken in execution,

by vendors on sale of real property, 1188.

of title on sales of real property, 1189.

of title on sales of personal chattels, 1190.

except where a man does not sell as owner, *e.g.*, sheriff or auctioneer, 1190.

by manufacturers of the quality of the articles they make (or get made) and sell, 1191.

by vendors of an article wanted for a special purpose, 1192.

to absent purchaser, 1193.

on sale of goods by sample, 1194.

by railway companies as to the time of their trains starting, 1195, 1211.

of authority by vendors, agents, &c., 1196, 1198, 1211, n. 1388.

by landlords in ordering distress, 1198, 1211.

by agents with intent to deceive principal, 1196, 1211.

when principal is liable for, 1197, 1209.

by company, who have registered a forged transfer, 1524.

by counterfeiting trade marks, 1199, 1211, 1224.

by vendors of articles with trade-marks upon them, or upon which any description of the place, country, &c., where the articles were made, is marked, 1201.

False Representation—Continued.

- by vendors of hops, 1201.
- by name of bank, 1202.
- by provision dealers, 1203.
- by married women or infants, 1204, 1314.
- by concealment of defects, 1205.
 - although goods sold "with all faults," 1207.
- of facts which it is a person's duty to disclose, 1205.
 - dangerous nature of articles bailed, 1205.
- made to A. to be communicated to B., or which are communicated to B., 1208.
- plaintiffs in actions for, 1208.
- defendants in actions for—
 - principal and agents, 1204.
 - joint-stock companies, 1210.
- declarations in actions for, 1212, 1213.
- plea of not guilty in actions for and evidence thereunder, 1215.
- evidence in actions for—
 - of the false representation, 1216.
 - of the representation having been made to the plaintiff, 1217.
 - that the plaintiff relied on the representation and not upon his own judgment, 1218.
 - of fraud and falsehood on a written contract, though no warranty is given in such contract, 1219.
 - of unsoundness in horse, 1221.
 - manifest defects—vice, &c., 1222.
 - in case of counterfeit trade-marks, 1224.
- damages for, 1226, 1228, 1388.
- remedies for, in equity, 1225.
 - by bill to compel a person to make his representation good, 1226.
 - by injunction in case of fraud, counterfeit trade-marks, &c., 1232.
- indictment for, 1229, 1230.
- money paid under may be recovered, 1179, n.

Father. See CHILDREN.**Felony.** See FALSE IMPRISONMENT—JUSTICES.

- is a tort, but criminal proceedings must be taken before civil, 46.
- effect of, on title to goods, 493, 494.
- accusation of, is slanderous, 8.
- conspiracy to charge a person with, is actionable, 49.
- arrest for, when justifiable without warrant in house of another, 432

Feme Covert. See COVERTURE—MARRIED WOMAN—WIFE.**Fences.** See BOUNDARY WALL.

- lessee or tenant must preserve and repair, 325, 422.
 - and may cut wood for, 329.
- liability of tenant for non-repair of, 196.
- cuttings of, belong to tenant, 413.
- duty of railway company to maintain, 244.
- trespass by cattle from want of, or defective, 378, 379.
- injuries to cattle, &c., from non-repair of, 243.
- right to repair of, by one adjoining proprietor against another, 113, 166.
- servitude of repairing injuries is destroyed by unity of ownership, 184.
- right of action for injuries caused by non-repair of, 212.
- boundary, property in, 416.
 - property in trees in, 413.
- cutting of boundary, 376.
- right of proprietor of boundary to let poisonous clippings fall on adjoining property, 95.
- declaration in action for non-repair of, 197.
- evidence in action for non-repair of, 216.

Feræ Naturæ,

keeping animals, liability for, 35.

Ferry,

interference with, how far actionable, 22, 24.

owner of, is entitled to compensation under the Lands Clauses Act, if ferry interfered with, 24.

declaration in action for obstructing, 197.

Ferryman,

duties and liabilities of, 680.

lien of, 613.

Fire,

lit on one person's land, but spreading to another's, is actionable, 19.

injuries by, to house, caused by negligence, may be waste, 321.

illegality of, adjoining highway, 230.

liability for, of landlord on demised premises, 353.

of tenant, on demised premises, 353.

if fire spreads to adjoining premises, 353, 354.

if fire caused by guest, servant, or stranger, 353, 357.

if spreading of fire caused by sudden tempest, &c., 353.

if fire caused by use of dangerous engine, *e.g.*, steam engine, furnace, &c., 355.

if arising from pure accident or negligence, 354.

if caused by negligence of servant, 357.

if caused by explosion of gunpowder, gas, &c., 358.

of railway companies from fires spreading to adjoining property, 355.

caused by sparks from railway engine,

insurance against, how far it affects right to sue for damage caused by, 361, 369.

right of tenant or reversioner to sue for injuries caused by, 363, 369.

when damages caused by, may be recovered from water company, 59.

declarations for negligently keeping, 364.

evidence in actions for injuries caused by, 366.

assessment of damages for injuries caused by, where several persons interested, 369.

and generally, 369.

Fireworks,

injuries from, when and how far actionable, 3, 313.

near or on highway illegal, 230.

Fish. *See* FISHERMEN—FISHERY.

right of fisherman to, when caught, 487.

interference with, when nearly netted, is a tort, 487.

rights of lessees with regard to, 325.

Fishermen,

rights of rival, 23.

Fishery. *See* LICENCE—SALMON.

right of, in the sea, 147.

right of, on sea-shore, 406.

right of, in a navigable or non-navigable river, 147.

oyster and mussel, 147, n.

rights of riparian proprietors to, 147

right of several, 141.

grant of right of, 129. —

grant of several, in freshwater lake, 407.

merger of several, 406, n.

right of, not claimable by custom, 133.

right of, when a profit à prendre, 114.

right of, where channel of river has altered, 209.

Fishery—*Continued.*

- right to have weir for purposes of, 209.
- ascertainment of right of, by bill of peace, 216.
- nets impeding, when illegal, 272.
- destruction of, by fouling the water, is a nuisance, 217.
- statutable regulations for the management of the pilchard, 40.
- removal of obstructions to, under Salmon Fishery Acts, 273.
- licence of, from Board of Conservators, 273, n.

Fixtures,

- removal of, as between heir and executor, 340.
 - as between executor of tenant for life, or in tail, and remainderman, 340.
 - as between landlord and tenant, *et seq.*, 340.
 - as between outgoing and incoming incumbent, 340.
- in case of trade, or buildings accessory to matter of a personal nature, 340, 345.
- agricultural, 342, 343.
- agricultural, not removable at common law, 340.
 - removable by statute, 343.
 - or custom,
- landlord's, what are, 341.
- tenant's, what are, 342, 349.
 - ornamental or domestic, *e.g.*, mirrors, conservatories, doors, grates, &c., 242, 342, 344.
 - trade, *e.g.*, brewery, coal mines, canals, cider mills, salt pans, dyer's vats, &c. 340, 342.
- right to remove abandoned, by contract, 347.
- removal after expiration or forfeiture of term, 348.
- removal of, by purchasers, mortgagees, or assignees of tenant, 349.
- removal of, is waste, 320.
- removal of, is actionable by reversioner, 421, n.
- right to, when severed, 533.
- wrongfully severed, vest in landlord, 363.
- damages recoverable for severance of, 367.
- conversion of, 470.
- are not distrainable, 717.
- sale of, by auctioneer, only gives right of removal, 524.
- sale of, by sheriff, may be restrained by injunction, 910.
- are not "goods or chattels" within reputed ownership clause of Bankruptcy Act, 509.
- must be taken with house, &c., under Lands Clauses Act, 1052.

Flats. See SUPPORT.

Flood. See WATER.

Floors. See SUPPORT.

Food,

- selling of unwholesome, is actionable, 1203.

Footpath. See HIGHWAY.

- right of ploughing up, 233.
- through wood, in several directions, not a highway, 301.
- right of, includes ordinary accompaniments of foot passengers, 301.
- right of, whether consistent with existence of gate across, if gate allowed to go to decay, 302.
- prescriptive user of land adjoining by tenants of houses, 310, 313.
- right of adjoining owner to make carriage-way across, 384.
- is included in proof of carriage-way, 449.

Force,

- any invasion of another's rights by, is actionable, 17.

Forcible Entry. See ASSAULT.

Forge. See NOISE.

Forgery. *See* BANKER—COMPANY.

inducing a person to commit, is actionable, 41.
 conspiracy to procure property by, is actionable, 49.
 action to recover money procured by, 47.

Fountain,

penalty for fouling water in, 276.

Fraud. *See* CONTRACT—DECEIT—FALSE REPRESENTATION.

any injury or invasion of another's right by, is actionable, 17, 20, 38.
 effect of on title to goods, 496, 498.
 goods obtained by, property in, does not pass, 467.
 goods obtained by, are not in reputed ownership of bankrupt, 517.
 effect of, under statute of limitations, 402.
 evidence of, by unstamped agreement, 1219.
 indictment for, 1229, 1232.
 injunction to prevent, *et seq.*, 1231.
 interference by Court of Chancery to prevent, where goods in possession of bailee, 476.

Fraudulent Preference. *See* BANKRUPT.**Freehold Office.** *See* OFFICE.**Friendly Societies,**

remedy for disputes between members of, 58.
 disputes between members of, referred to justices, may be appealed from to Superior Court, 1004, n.
 jurisdiction of County Court in cases of, 1331.

Fuller,

lien of, 611.

Funds. *See* STOCK.**Gambling House,**

keeping, is a public nuisance, 297.

Game. *See* DECOY-POND—GROUSE.

title to, 486.
 when killed, is the property of the person on whose land it falls, 15.
 right of lord of manor to, on common, 142.
 right of lord of manor to, under Enclosure Act, 116.
 right to, under a reservation in a conveyance of land, 117.
 rights of lessees with respect to, 325.
 right to shoot and carry away is a profit à prendre, 114.
 destruction or chase of, by dogs. *See* DOG, 35, n., 263.

Games. *See* GAMBLING HOUSE.

on highways illegal, 230.

Gaoler,

liabilities of, for detaining the wrong man in prison, if he has notice of it, 928.
 when must discharge a person committed for contempt of Court of Chancery, 928.

Garnishment,

right of, at common law, 633.

Gas. *See* GAS—WORKS.

injuries caused by explosion of, 33, 358, 581.

Gas Works,

injury to view from erection of, 5.
 remedy for nuisances arising from, 275.
 injunction against injury arising from, 293.

- Gates.** *See* FENCES—HIGHWAY—RAILWAY.
 across public highway may be cut down, 270.
 unless legally there, 234.
 locking of, across a way, is actionable by the reversioner, 195, 197.
 erection of, across private way, or carriage way, whether actionable, 207.
- Glanders,**
 sale of horses affected with, when unlawful, 6, 7.
- Glass,**
 manufactory is a nuisance, 217, 219.
- Glebe.** *See* ECCLESIASTICAL DILAPIDATIONS.
- Goats,**
 sale of diseased, when unlawful, 7.
- Goods.** *See* CHATTELS.
- Governor of Colony,**
 abuse of authority by, is actionable, 42.
 is liable for trying a civilian by court-martial, 43.
- Grant.** *See* CROWN.
 easements acquired by, 113.
 right to use of water by, 91.
 no man may derogate from his own, 128.
- Grass,**
 sale of, implies right to cut, 119.
- Gravel.** *See* MINERALS—SAND—SEA-SHORE.
- Groins.** *See* SEA-WALLS.
- Grouse,**
 driving away, when actionable, 20.
- Guardian,**
 right of, to custody of children, 1254.
- Guest,**
 injuries to, from dangerous premises of host, 258.
- Guide Book.** *See* DIRECTORY.
- Gun,**
 accidents from, 582, 584.
 injuries from bursting of, when actionable, 38.
 liability for accidents arising from use of, 544.
 firer of, is liable for fire caused by, 353.
 firing of, near decoy-pond a nuisance, 217.
 letting off, on or near highway illegal, 230.
 false warranty of, 1174.
- Gun Powder,**
 liability for injuries caused by explosion of, 358.
 injuries to servants from explosion of, 254.
 keeping of, when a public nuisance, 297.
- Habeas Corpus,**
 to test the validity of a commitment by judge of inferior court, 892.
 to test the legality of a commitment by justices, 1011.
- Hackney Coachman.** *See* CABMAN.
- Harbor.** *See* PORT.
- Hares.** *See* COMMON.
- Hay,**
 fires arising from heating of, 354.

Health,

overcrowding houses, or carrying infected persons through public streets, so as to endanger, is a public nuisance, 297.

Hedges. *See* FENCES.**Heir-at-law,**

when may sue for injuries to inheritance, 1297.
 when may maintain trespass on land descended, 444.
 can not maintain trespass before entry, 419.
 may sue for detention of title deeds, 631.
 right of, to fixtures, 340.

Highway. *See* FOOTPATH—STATUTORY COMPENSATION—SURVEYOR OF HIGHWAYS—TURNPIKE ROAD WAY.

title to soil of, 409.
 if created under Enclosure Act, 409.
 title to waste land adjoining, 411.
 user of land of, between carriage and footway by tenants of adjoining houses, 308.
 title to land adjoining, between road and fence, under Enclosure Act, 452.
 soil of, remains in owner, subject to right of passage by public, 384.
 right of persons, cattle, &c., to pass along, but not to remain, 244.
 right of free passage by carriages, &c., along, free from interruption, 234.
 use of locomotive steam engines on, 231.
 right of, *primâ facie* extends to whole space between fences, 313.
 occupation roads are not, 303.
 roads up to houses, and nowhere else, may or may not be, 304.
 of necessity, where no other road exists, 311.
 dedication of, 300, 308.
 dedication of, may be inferred from acts, although no intention to dedicate exists, 302.
 obstruction of, once a year, &c., or by bar, &c., is inconsistent with dedication, 302, 304.
 dedication of, though owner not known, 302.
 notice of intention to dedicate to be given to surveyor of highway, 315.
 no particular time of enjoyment necessary to prove dedication of, 304.
 tenant or lessee can not dedicate, 306.
 but consent of landlord may be inferred under certain circumstances, 306.
 dedication of, over land vested in commissioners, or others, by statute, for a particular purpose, 307.
 once dedicated to public, is dedicated for ever, 310.
 limited dedication of, 451.
 dedication of, subject to right in adjoining owners of depositing goods, thereon, 313.
 limited dedication of, *e.g.*, for all purposes except carriage of coal, or subject to certain inconveniences and risks, *e.g.*, gates, door-steps, cellar-flaps, open areas, &c., 233, 309.
 liability of parish to repair, unless washed away by sea, or relieved by order of magistrates, 315, 317.
 proof of, by evidence of repairs by parish, 312.
 liability to repair, by adjoining owner, 411.
 liability to repair *ratione clausuræ*, 316.
 repair of, by district highway board, 317.
 remedy for non-repair of, by indictment against the parish, 1044.
 repair of railway bridges over, and their approaches, 247.
 repair of damage done to, by railway during construction, 247.
 obstructions in, by erecting gates, building bridges, houses, &c., 234.
 obstruction of, by gates, when legal, or not, 309.
 railway gates across are not actionable, 1040.
 obstruction to, when actionable at suit of individual, 279.
 liability for obstructions of by persons, or public companies who employ independent contractors, 283.

Highway—*Continued.*

trespasses on, by deposit of rubbish, building bridge, &c., 384.
 removal of obstructions to, when legal, 270.
 gates placed across, may be cut down, 270.
 cattle lying in, 270, n.
 cattle straying on, 313.
 cattle straying from, when distrainable as trespassing, 379.
 obstructions in, must not be recklessly ridden, or driven over, 567
 obstruction of, by boughs of trees, &c., a public nuisance, 297.
 trees overhanging, may be cut, 266.
 penalties on playing games on, obstruction of, or allowing filth to flow on, 230.
 action or indictment for obstructions in, 33.
 penalty for encroachments, deposit of rubbish, &c., on, or removing turf from, 313.
 nuisances in, whether highway be for carriages, horses, or foot-people, are indictable, 298.
 obstruction of, by corporation or railway company, is indictable, 299.
 when crossed by canal. *See* CANAL.
 when crossed by railroad. *See* RAILWAY.
 fences between, and canal, 251.
 ditches of, choked up, are a public nuisance, 297.
 ruinous houses adjoining, are a public nuisance, 297.
 railway running alongside of, how far actionable, 1040, 1042.
 nuisances adjoining, dangerous pits and excavations, steam-engines, lime-kilns, letting off fireworks, &c., 230.
 negligent quarrying stone near, is indictable, 232.
 offensive manufactures adjoining, are a public nuisance, 297.
 collection of crowds in, is a public nuisance, 297.
 obstruction of, by beer barrels, logs of timber, unloading coals, &c., when a public nuisance, 297.
 coal holes in, when legal, 297.
 openings in, when legal, 297.
 steam engines on, are a public nuisance, 297.
 telegraph posts, or tramways on, are indictable, 313.
 carriage of infected persons along, is a public nuisance, 297.
 unfenced sewers, ditches, or areas alongside of, 232, 233.
 obstructions in, or near, legalized by prescription, must not be increased, 233.
 injuries from falling into unfenced holes, areas, &c., adjoining, 228, 260.
 conditional user of, by public, may be stopped, if conditions not complied with, 300.
 deviation from, if highway stopped, 300.
 stoppage of, gives right to pass over adjoining land, 434.
 deviations from, if highway out of repair, 450.
 proof of, 451.
 closing of, under an Act of Parliament when actionable, 1041.
 declarations for injuries from unfenced holes, &c., adjoining, 284.
 mandamus to restore, if illegally diverted by railway company, 1499.
 injunction against obstruction of, must be at suit of Attorney-General, 313.

Highway Board,

powers and duties of, 317.

Histories,

copyright in, 60.

Hops,

warranty on sale of, where bags marked with name of grower, place of growth, &c., 1201.

Horn,

blowing of, when a nuisance, 224.

Horses. *See* CATTLE—GLANDERS—HOUNDS.

liability for accidents arising in riding or driving, 544.

Horses—Continued.

- injuries from unskillful or neglectful management of, 34, 36.
- unavoidable accidents arising in management of, 585, 589.
- liability for leaving unattended in a street, 582.
- liability for negligent attendance of, 35.
- negligence in breaking in in the street, 554.
- exposure of glandered, is a public nuisance, 297.
- implied authority to warrant, by servants of horse-dealer or private person, 1209.
- what is unsoundness in, 1221.
- public notices on sale of, are binding on purchasers, 1220.
- injuries to, which have escaped, through defect of fences, 212.
- injuries to hired, who responsible for, 597.
- injuries to, by dogs. *See* DOG. 35.
- wrongful detainer of, can not claim the expense of his keep in mitigation of damages, 648.
- lien for training or keeping, 611.

Hospital,

- mandamus to master of, 1496.

Host. *See* GUEST.**Hounds,**

- damage caused by horses following, 462.

House. *See* AIR—BOUNDARY WALLS—BUILDING—COMPANY—FIRE—FIXTURES—HEALTH—LIGHT—PARTY WALLS—SUPPORT—TENANT.

- possession of key of, effect of, 442.
- negligence in pulling down, 241.
- non-repair of, by joint tenants or tenants in common, 242.
- non-repair of adjoining, remedy for, 242.
- repair of, when upper and lower stories belong to different people, 126.
- injuries from things falling from, into the street, 228.
- overhanging cornice of, 415, 11.
- injuries to visitors, servants, or family, from dangerous state of, 258.
- alterations in, by tenant, are actionable, 16.

House Bote. *See* ESTOVERS.**Hoyman,**

- is a common carrier, 650.
- warrants the safety of goods carried, 597.
- loss of goods by, 681.

Hundred,

- liability of, for damage caused by riot, 418.

Hunting. *See* HOUNDS.**Husbands. *See* CHILDREN—FATHER—WIFE.**

- liability of, for torts committed by wife before or during coverture, 1313.
- and must therefore be jointly sued with her, 1313.
- except in case of divorce, judicial separation, or a protecting order, 1313.
- of executrix or administratrix is liable for waste, 1313.
- liability of, for trespass by wife, 377.
- not liable for false representation by wife, 1204.
- not liable for acts of wife after a judicial separation, 1241.
- but is for her subsistence, unless alimony duly paid, 1242.
- when may sue for injuries to real property or chattels real of the wife, 1294.
- when for injuries to person, or personal property, 1294.
- may join causes of action accruing to himself with causes accruing to himself and wife, 1337.
- when to sue alone, and when wife to be joined in actions of replevin, 760.
- can not sue his wife for false representation that she was single, 51.
- right of, to restitution of conjugal rights, 1236.

Husbands—Continued.

- right of, to judicial separation on ground of adultery, cruelty, or desertion, 1337.
- cruelty, what amounts to, 1238, 1239.
- desertion, what amounts to, 1240.
- when entitled to dissolution of marriage, 1243, 1249.
- if wife a lunatic, 1243.
- willful neglect, &c., conducing to adultery of wife, 1245.
- connivance or toleration of adultery, 1246.
- condonation of adultery, 1248.
- competency of, to give evidence in cases of adultery, 1262.
- may claim damages in Divorce Court from co-respondent, 1265.
- application of the damages by order of the Court, 1270.

Idiocy. See PRESCRIPTION ACT—LUNACY.

- Effect of, under Statute of Limitations, 402.

Illness. See WITNESS.

Imprisonment. See DEBT—FALSE IMPRISONMENT.

- each continuance of, is a fresh cause of action, 1361.
- for non-payment of penalties, 277.
- for debt is abolished, 921, n.
- with certain exceptions, 996.

Inclosure Act. See ENCLOSURE ACT.

Incumbent. See RECTOR.

- is entitled to possession of church and churchyard, though freehold in rector, 405.
- injunction against, to prevent waste, 371.

Indecency. See ARREST—BATHING.

- by exposure of person, when a public nuisance, 297.

Indictment,

- against parish for non-repair of highway, 316, 1044.
- for public nuisances, *et seq.* 297.
- for nuisances arising from gasworks, 275.
- for obstruction in thoroughfare, 50.
- for the obstruction of a right of way, 195.
- for nuisances in carriage-way, bridle paths, or footpaths, 298.
- against corporation or railway company, 299.
- for placing telegraph posts on highway, 313.
- for placing tramways on highway, 313.
- for negligent quarrying of stone near highway, 232.
- for obstructions in navigable rivers, by wharfs, sunken vessels, &c., 235, 314.
- for abduction of unmarried girls or women, 1287.
- for conspiracy, 850.
- for forcible entry, 383.
- for non-repair of ruinous house, 240.
- for fraud, false representation, or obtaining money or goods by false pretences 1229, 1230.
- for libel or slander, 1171, 1173.
- costs on, 1431.
- for pound breach, 735.
- preferring of, unfounded, when actionable or not, 882.
- malicious, is actionable, 860.

Infancy,

- effect of, under Statute of Limitations, 402.

Infant. See CHILDREN—PRESCRIPTION ACT.

- when liable in tort, 1352
- liability of, for all torts except where the cause of action is substantially

Infant—*Continued.*

- founded on a breach of contract, 1314.
- not liable for false representation, 51.
- e.g.*, that he is of age, &c., 1204.
- is not liable as an innkeeper, 682.
- when may sue for conversion of goods in his possession, 524.
- property of, in reputed ownership of bankrupt, 512.
- illegitimate, is not entitled to benefit of Lord Campbell's Act, 575, n.
- injuries to, from negligence, 34.
- injury to, while traveling by railway, 545.
- injuries to, while trespassing on railway, or climbing on a cart, 567.
- may sue by *prochein ami*, 1296.

Infection. *See* CATTLE—GLANDERS—HEALTH.**Infringement.** *See* PATENT.**Injunction.** *See* BANKRUPT—BILL OF PEACE.**In Equity**—

- against continuance of wrongful act, 1442.
- instances of, 1442.
- to avert threatened injury, 1442.
- against commission of trespass, 465.
- to restrain disturbance of graveyards, &c., 1519.
- to restrain infringement of access to public river, 1442.
- to restrain infringement of patent right, 1446.
- damages for, 1441.
- to restrain infringement of copyright, 1445.
- lectures, private letters, mss., maps, dramatic or musical compositions, sculpture, paintings, designs, &c., 1445.
- to restrain sale of chattels, 1446.
- to restrain sheriff from selling landlord's fixtures under an execution, 910.
- to restrain execution on goods of company in liquidation, 908.
- to restrain action or execution against a railway company that has filed a scheme of arrangement with its creditors, 908.
- to prevent disturbance of rights incident to the possession of land, 109.
- to restrain the diversion of water, 110, 1448.
- to prevent obstruction to repair of watercourse on another man's land, 112.
- to prevent obstruction to light, 214.
- to prevent disturbance or easements granted by parol, 213.
- to prevent disturbance of right of support, 215.
- against fouling stream or canal, burning bricks, smoking chimneys, offensive trades, interference with light, or storage of inflammable materials, 293.
- against noise, by ringing bells, 295.
- against public nuisances, created under statute, in excess of statutory powers or otherwise, 296.
- against public nuisances, by Attorney-General, 296.
- or private persons, if individual damage sustained, 296.
- for obstruction of highway must be in name of Attorney-General, 313.
- to prevent waste, 371, 374.
- against tenants or lessees from digging minerals, injurious cultivation, altering premises, &c., 371.
- against tenants for life, or lessees for lives, mortgagors or mortgagees in possession, 371.
- against one tenant in common at suit of another, 371.
- against incumbent or bishop, 371.
- at suit of infant in ventre sa mere, contingent remainderman, or executory devisee, 371.
- if committed by stranger, 371.
- although the title is in dispute, 371.
- if permissive only, 371.
- if all the injury has been done, 371.

Injunction—Continued.

- at suit of one partner against another, 371.
 - if acquiesced in, or delay in coming to the court, 372, 373.
 - at suit of one party, for himself and all others interested, 374.
 - to restrain a company from exceeding its statutory powers, 1443.
 - to prevent unnecessary injury from the execution of statutory powers, 1084.
 - to restrain public boards, commissioners, &c., from doing acts in excess of statutory powers, 1084, 1086.
 - to restrain nuisances created in the exercise of statutory powers, *e.g.*, the pollution of a river by sewage, 1085.
 - to restrain commissioners, &c., from creating a nuisance in executing drainage works,
 - to prevent misuse by companies and others of land acquired under statutory authority, 1050.
 - to restrain exercise of statutory power till a condition precedent, *e.g.*, the payment of compensation has been complied with, 1086.
 - to restrain waterworks company from taking stream till compensation paid, or security given, &c., 1052.
 - to restrain an application to Parliament for a private act, 1086.
 - to prevent fraud, 1231.
 - to prevent the fraudulent use of trade-marks, names, &c., 17, 1232.
 - unless the trade-mark itself contains a material misrepresentation, 1232.
 - against bailee, to prevent his parting with goods marked with a counterfeit trade-mark, and against bailor, to prevent action for non-delivery, 1232.
 - to prevent manufacture of counterfeit labels, 1232.
 - to restrain action for calls on the ground of false representation or fraud, 1180.
 - against magistrates, corporations, or commissioners, 296.
 - interlocutory, for protection of property, 296.
 - not granted merely to protect title, 296.
 - not granted to stop a mere temporary nuisance, 220.
 - will not be granted when the act complained of has been done, and nothing remains but to assess the damages, 1449.
 - on application for, legal right of applicant to be decided by court or jury, but an issue may be directed, 1449.
 - against railway companies to enforce compliance with Railway and Canal Traffic Act, 705.
 - to enforce right of stoppage in transitu, 1446.
 - to prevent injury from the effects of intimidation by trades unionists, 22.
 - against publication of libel, 1089, n.
 - to restrain railway company from setting up plea of accord and satisfaction, 1353.
 - against payment of alimony pendente lite, 1237, n.
 - against patentee from threatening legal proceedings, if he has no intention to follow them up, 1147, n.
 - against prospective damage, 293, n.
 - suspension of, in certain cases, 293.
 - enforcement of, by sequestration, 293.
 - what acquiescence will preclude grant of, 294.
 - where land has been purchased with knowledge of existing nuisance affecting it, 294.
 - although plaintiff is more injured by others than by defendant, 294.
 - effect of delay in application for, or acquiescence in the wrong maintained of, 1447.
 - costs on, 1432, 1440.
 - under Railway and Canal Traffic Act, 1433.
 - in county court, 1332.
- At Common Law—**
- notice of claim for, may be endorsed on writ of summons, 1454.
 - but can not be pleaded to, 1450.
 - or claimed *ex parte*, after commencement of action, 1450.

Injunction—Continued.

- to compel a wrongdoer to pull down a building which interferes with right to light, 1450.
- not granted in actions of ejectment, 1450.
- to restrain infringement of patent right, or copyright, photographs, &c., 1451.
- against erecting a jetty in a navigable river, 407.
- any proceeding in disobedience to, is void, and parties liable to attachment, 1452.

Inn,

- obstruction of access to, along highway or navigable river, is a tort, 279.

Innkeeper,

- who is, 683.
- duty of, to provide shelter, &c., for guests, 682.
- who are guests, 684, 687.
- duty of, to protect guest from robbery, 684.
- unless committed by guest's own servants or friends, or by his default, 684, 686.
- or the guest takes upon himself the exclusive charge of the goods, 684.
- not absolved from liability by delivering the key of his bedroom to guest, 684.
- liable for all goods committed to his charge, though placed outside the inn, 684.
- not liable for accidental fire, 684.
- nor for injuries to guest's horses from horses of other guests, 684.
- limitation of liability of, by statute, 685.
- lien of, 609, 613.
- on goods but not person of guest, 688.
- may retake goods on which he has a lien on fresh pursuit, 688.
- can not sell horse of guest for the expense of his keep, except in London, 626.
- can not rid himself of public duty imposed upon him by providing that he shall not be responsible for the luggage or goods of guest, 656.
- declaration against, for loss of goods, 695.
- damages recoverable in actions against, 704.

Inspection,

- of report of railway officials and medical men to the company, and generally, 1353, n.

Inspectors. *See* SALMON.**Insurance.** *See* POLICY.

- effect of, on actions for negligence, 593, 1395.
- fact of, does not take away right to sue for injuries from waste caused by fire, negligence, riot, &c., but plaintiff sues as trustee for insurer, 361, 369.

Interest. *See* JUDGES—JUSTICES—SHERIFF.**Interpleader.** *See* BAILEE.

- protection by, to sheriff, 909.
- does not apply to claims for rent, 909.
- is available for execution creditor as well as sheriff, 909.
- right of, to bailee, where several persons claim goods in his possession, 633.
- order in case of, made without jurisdiction, but without objection by parties, is valid, 1336.
- protection to persons by, in case of mandamus, 1512.

Interrogatories,

- in action for malicious prosecution, 877, n.
- in cases of copyright, 60, n.
- in patent cases in Chancery, 1445, n.

Intimidation. *See* MENACES.

- injunction to prevent, by trades-unionists, 22.

Iron,
manufacture of, adjoining highway illegal, 230.

Irrigation. See WATER.

Jeweler.
negligence of, in execution of work, 529.

Jobmaster,
is not a common carrier, 650.
liable for negligence of servant let out with horses to a third person, 551.

Joinder. See ACTION.

Joint Stock Company. See COMPANY—SHAREHOLDER—SHARES.
duty of, to register shareholder, 28.

Joint-Tenants. See PARTNERS.
of deeds or chattels, who entitled to possession of, 629.
can not sue co-tenant for detention of goods, 642.
rights of survivor of, 1290.
one may distrain unless others dissent, 711.
avowries by, for distress made by agent or bailiff, 768.
possession of, effect of, under Statute of Limitations, 398.
engaged in wrongful act are jointly and severally liable, 362.
of chattel should join in actions for negligence, 578.
each of several, may sue wrong-doer for detention of chattels, 632.
should join in actions for conversion of property, 525.
must sue jointly for injuries to land, 98, 1300.
e.g., for waste, 363.
for nuisance, 282.
for injury to reversion, 421.

Journey's Accounts,
writ of, 1362.

Judge. See COURT OF RECORD—SLANDER.
not responsible for acts done in course of judicial duty, 883.
e.g., for slander, in reference to a matter before him, 883.
but is for slander in respect of matters into which he has no jurisdiction to inquire, 883.
disqualification of, on account of interest, 885.
is liable for acts done without jurisdiction, 884.
unless he has prima facie jurisdiction, and the facts depriving him of it are not brought to his knowledge, 886.
who is a, so as to be exempt from liability to actions, 890.
duties of, can not be delegated to a clerk, and if they are, the clerk is liable for any illegality committed, 891.
but not for his ministerial acts, 895, 926.
proceedings of inferior, without jurisdiction, may be removed by certiorari into Court of Queen's Bench, and quashed, 892.
validity of commitment by inferior, may be tested by habeas corpus, 892.

Judgment. See EXECUTION.
recovered, when a bar to a second action for same cause in the same or another Court, 1355, 1358.
effect of foreign, in rem, 1355, n.
effect of, in altering the property, 539.
effect of, in actions for conversion, in altering the property in the goods converted, 522, 530, 1357.
how proved, 945.
costs in action on, 1425.

Judgment Creditor,
no duty imposed on to assist the Sheriff to execute a writ of execution, 898,

Judgment Creditor—*Continued.*

remedy for, by interpleader, where he has interfered in an execution, and rendered himself liable to an action, 909.

Jurisdiction,

when obtainable by consent, or non-objection of parties to the proceedings, 1336.

for acts done without, judges are liable, 884.

Juryman,

not liable in tort for a wrong indictment or wrong verdict, 883.

Jus tertii,

when bailee may set up, 643.

may be set up by pawnee against pawnor who has obtained goods without title, 613.

when carrier can or can not set up, in actions against him for loss of or damage to goods, 692, 696, 701.

may be set up under plea of not possessed, 639.

Justices. *See* CERTIORARI—CONSTABLE—JUDGES—MAGISTRATES—QUARTER SESSIONS—SLANDER.

jurisdiction of, at Quarter Sessions, 960.

under particular statutes, 960.

e.g., to order accommodation works to be made by railway or other company, 1063, 1084.

can not act judicially out of their county, but may ministerially, 960.

jurisdiction of, does not depend upon truth or falsehood of the facts, or the sufficiency or credibility of the evidence, 960.

may act, if residing in adjoining county, 961.

concurrent jurisdiction of, in boroughs, 961.

borough, jurisdiction of, under Municipal Corporation Act, 962.

power of summary conviction by, 963.

for felony, 963.

jurisdiction of, to inquire into a case which has been substantially decided previously in the County Court, 1355.

power of, to issue search warrant, 965.

can not act if interested, 968.

but may act in matters relating to poor law, local board of health, &c., although rated to the poor, or to the fund of local board, 968.

and may adjudicate on complaint or prosecution ordered by themselves in the discharge of a public duty, 968.

and may commit for contempt of Court, 968.

what amount of interest disqualifies, 968.

wrongful detainer by, to answer charges not then made, 969.

can not force a settlement upon complainant under threat of conviction, 969.

or remand a person without inquiring into charge, 969.

acts of, though not duly qualified, are not void, 970.

may adjourn hearing if defendant or prisoner misled by defect in summons, &c., or by any variance between summons, &c., and evidence, 971.

commitment by, must be in writing, 972.

and for a definite period, 971.

statutory forms of, 840.

of prisoners for trial, depositions how to be taken, 971.

not liable for correctness of charge, or for erroneous judgment, 973.

convictions by, on their own view, 974.

must have information or charge to give them jurisdiction, 975.

and the information must be on oath to justify a warrant to arrest, 975. 977.

but not necessarily on oath to justify a summons to appear, 977

requisites of information or complaint, 977.

within what time to be made, 978.

proceedings thereon, service of summons, &c., 979.

drawing up convictions or orders, 987.

Justices, &c.—Continued.

- power of, to issue warrants to apprehend material witnesses, 979.
- can not hear a complaint before time allowed by summons has expired, 979.
- must have some evidence of offense charged to justify conviction, 979, 982, 983.
- can not justify a commitment for one offense by a conviction for another, 979.
- nor alter the charge to agree with the evidence, 979.
- must hear the accused, 979.
- and all the evidence, 1483.
- can not convict on a charge not brought before them, 980.
- but when once a charge is laid, may compel its being proceeded with, 981.
- convictions by, in excess of jurisdiction, 982.
- ouster of jurisdiction of, by claim of title, 983.
- if there is colorable ground for it, and the claim itself is legal, 983.
- how far protected in the exercise of a discretionary power, 984.
- can not refuse to act because they think the law unjust, 984.
- invalid convictions by, upon by-laws, 986.
- warrant commitment, or conviction by, must show their authority on the face of them, 988.
- and describe correctly the offense or subject-matter of complaint, 989.
- and single out the offender, 990.
- and show that the offence was committed within the jurisdiction of the justices, 991.
- orders and adjudications by, must show jurisdiction on the face of them, *e.g.*, that the act was committed in the county, and the adjudication by justices acting in and for the county, &c., 992.
- adjudications, &c., of, under statute, must show all things necessary to bring the case within the statute, 992.
- statutory forms of commitment by, 993.
- immateriality of mere surplusage, 994.
- are protected by conviction until quashed, 995.
- distress or commitment by order of, 996, 999.
- for non-payment of poor-rate, 997.
- for non-payment of costs by complainant on dismissal of charge, 998.
- can not commit for an indefinite period, 996.
- commitment by, for non-payment of money, 996.
- appeal from, to Quarter Sessions, 996, 1002.
- on ground of excess of jurisdiction as well as erroneous judgment, 1001, 1022.
- orders, &c., of, made without or in excess of jurisdiction, may be treated as void, and action brought, although right of appeal exists, 1001, 1022.
- must generally stay execution pending appeal, 1002.
- except in bastardy cases, 1002.
- appeal from, to Superior Court on case stated, 1004.
- decisions of, at Quarter Sessions which can not be reviewed by certiorari or mandamus, 1006.
- committal by, for contempt of Court, 1007.
- quashing convictions, &c., of, by certiorari, 1005, 1011.
- proof by affidavits, 1009.
- amendment of orders, &c., on return to, 1010.
- legality of commitment by, may be tested by writ of habeas corpus, 1011.
- may order expense of county litigation to be defrayed out of county funds, 1013.
- power of to give costs, 1014.
- liability of, for acting maliciously, and without reasonable cause, but not for erroneous judgment, ignorance, or negligence, 964.
- liability of, for acts done without or in excess of jurisdiction, after conviction quashed, 966.
- unless they have a prima facie jurisdiction, and the facts, depriving them of jurisdiction are not brought to their notice, 967.

Justices, &c.—Continued.

- how far liable for wrongful ministerial acts, 985.
- liable for omission of clerk to make minute of conviction or order, 987.
- exemption of, from liability, where a defective conviction or order has been confirmed on appeal, 1003.
- in actions against, for acts within their jurisdiction, malice and want of probable cause must be proved, 1019, 1021.
- in actions against, for acts without jurisdiction, conviction, &c., must first be set aside, 1019, 1024.
- except where they have acted corruptly, or in abuse of their office, 1021.
- may object to being sued in the County Court, 1023.
- actions against, must be brought within six months, 1025.
- time how calculated, 1025.
- venue local in actions against, 834.
- are entitled to a month's notice of action, 1026.
- requisites of notice, 1027.
- time how calculated, 1029.
- tender of amends by, 1028.
- liability of, where one justice has committed, and another signs the warrant, 1031.
- plea of not guilty by statute in actions against, 1033.
- evidence in actions against—proof of malice and want of probable cause, 1034.
- damages in actions against, 1039.
- costs in actions against, 1420.
- how compellable to act, 1012.
- prohibition to, 1454.

Key,

- possession of, not evidence of possession of house, 442.

Labels. *See* INJUNCTION.**Lake,**

- title to soil of, 407.
- grant of several fishery in, 407, n.

Land. *See* SUPPORT,

- title to, by long possession, 388, 403.
- excavations on one's own, how far lawful, 19.

Landlord. *See* DISTRESS—ENTRY—LESSOR—MASTER—REVERSIONER—TENANT.

- when responsible for nuisance on land demised, 283.
- liability of, for nuisance, although he has parted with the land, 282.
- when liable or not for nuisance on demised premises, from dangerous excavations, fall of ruinous buildings, &c., 290.
- not liable for repair of drains or sewers on land demised, 284.
- liability of, for non-repair of house demised, as between himself, his tenant, and third person, 240.
- may cut trees on land demised, but must make compensation to tenant for damage, 455.
- may sue for conversion of timber or fixtures severed from inheritance, 533.
- is not prejudiced by the acquiescence or admissions of his tenant, 211.
- acquiescence of, in dedication of highway, when to be inferred, 305.
- not, as a rule, prejudiced by his tenant not opposing use of easements, &c., 151, 156.
- acquiescence of, in user of easements, may be presumed in certain cases, 151, 158.
- is entitled to his rent in priority to an execution, but not to an extent, 910, 927.
- not liable to mortgagee of tenant's goods for not returning to him instead of tenant surplus goods after distress, although he has had notice to do so, 726.

Landlord—*Continued.*

is entitled, as against mortgagee under a bill of sale of tenant's goods, to more than a year's rent in case of tenant's bankruptcy, 726.

liability of, to person whom he directs to distrain, if distress be wrongful, 1198, 1211.

Lease. *See* LEASES.

right of lessee to deed of, although term expired, 490.

assignment of, for benefit of creditors, vests lease in assignee, and renders him liable, if he has acted, for the rent, 502.

Leases,

are not "goods or chattels," within reputed ownership clause of Bankruptcy Act, 509.

Leave. *See* INJUNCTION—LICENSE.

Leave and License. *See* PLEA.

plea of, in actions for trespass to land, 428.

evidence under plea of, 203, 447.

Lectures,

unpublished are the property of the lecturer, 21.

copyright in, 61.

injunction against publishing, without author's consent, 1445.

Legal process. *See* EXECUTION.

Lessee. *See* LEASE—TENANT.

is liable to lessor for removal of soil, 528.

right of, to minerals, 382.

with right of renewal, how to obtain compensation for land taken under statutory power, 1059.

right of pre-emption of, to superfluous land taken under statutory authority 1069.

duty of assignee of, to pay rent, perform covenants, 29.

duty of, to obtain landlord's consent to assignment, 29, 11.

for lives, injunction against to prevent waste, 371.

Lessor. *See* LANDLORD—REVERSIONER—TENANT.

may sue lessee for removal of soil, 528.

Letters,

property in, 492.

posting of, is prima facie evidence of their receipt in due course, 1147.

damages in actions for detention of, 646.

injunction against publishing, without leave of writer or his personal representative, 1445.

Level Crossings. *See* RAILWAY—RAILWAY COMPANY.

accidents at, 248, 547.

Libel. *See* COSTS—SLANDER.

distinction between, and slander, 1087, 1088.

publisher of, can not defend himself by giving up the name of the utterer, although such utterer may be the plaintiff, 1089, 1147.

what writings are actionable as, 1089.

anything tending to make a man ridiculous or contemptible, 1089.

but not to say that a man has acted in bad taste, &c., 1089.

or mere puffs between rival tradesmen, 1089, 1115.

illegality of the transaction to which the libel relates is an answer to action for but not fraud ultra the transaction, 1089.

malice is implied in, 1090.

privileged communications, *i.e.*, communications fairly made, in the belief of their truth, by one person to another in the discharge of some public or private duty, whether legal, moral, or social, 1091, 1100, 1153.

in course of judicial proceedings, 1092.

I *del—Continued.*

- by military officer on his subordinate, 1092, *u.* 1094.
- on opera singer,
- petitions to the Crown or Parliament respecting conduct of magistrate, military or other public officers, 1093.
- reports by public officers in the discharge of their duty, *e.g.*, the report by a clerk of the peace to magistrates in quarter sessions, 1094.
- pastoral letters from clergymen, 1095.
- communications to bishop respecting the conduct of a clergyman, 1096.
 - respecting the character of a person proposing marriage, 1097.
 - between friends to prevent an injury, 1098.
 - by persons having an interest in the subject-matter of the communication, *e.g.*, notice of the commission of an act of bankruptcy given by a creditor whose interests are involved, 1099.
- reports of auditors, communication of, to shareholders, 1091, 1143.
- reckless and inconsiderate communications, 1100.
- answers to inquiries made by plaintiff himself, or by others than plaintiff, in discharge of some duty, 1101.
- giving characters of servants or governesses, 1103.
- imputing incompetence in particular transaction is not answered by evidence of general competence, 1103.
- comments in excess of the privilege, 1104.
- privileged communications addressed to wrong person by mistake, 1105.
- reports of trials, 1106.
 - of proceedings before magistrates, 1107.
 - of speeches in Parliament, 1108.
 - of proceedings at public meetings, &c., 1109.
- Parliamentary papers, 1108.
- by member of House of Commons, 1108.
- leading articles, reviews, and criticisms in newspapers, 1110.
- remarks by one newspaper, &c., on another, 1111.
- criticisms upon handbills and advertisements, 1112.
 - upon sermons or clergymen, 1113.
 - upon the acts of public men, 1114.
 - by one tradesman on the goods of another, 1115.
- every publisher of, is as liable for as original libeler, 1140, 1354.
- every fresh publication of, is actionable, 1355.
 - what is publication of, 1147.
- action for, can not be brought in, but may be remitted for trial to, County Court, 1328.
- consolidation of actions for, 1138.
- plaintiffs in actions for, 1139.
- defendants in actions for, joint or separate, 1140.
 - corporations, 1140, 1304.
- declarations for, 1141, 1143.
- particulars in action of, 1147, *n.*, 1163, *n.*
- plea of not guilty in actions for, and evidence thereunder, 1144.
- plea of apology, and payment into Court in actions against newspapers or other periodical publications, 1145.
- plea of the truth of the libel, 1146.
- pleas of justification, where several libels are charged in distinct counts, 1348.
- evidence in actions for, for the plaintiff, 1147, 1162.
 - proof of publication, 1147.
 - letters written to a man's wife, or by a man's daughter, &c., 1147.
 - in newspapers, 1148.
 - libelous songs—printed placards, &c., 1151.
- application of libel to plaintiff, 1152.
- defamatory sense of words, where meaning doubtful, 1153, 1154.
- of malice, 1156.
 - of subsequent libels to prove malice, 1156.

Libel—*Continued.*

- of the profession or trade, &c., of the plaintiff, and that the words were written of him as such, 1161.
- evidence in actions for, for the defendant, 1162, 1164.
- of the truth of the charge or accusation, 1163.
- damages recoverable in actions for, 1164, 1167.
- mental suffering, &c., 1392, 1393.
- evidence of apology in mitigation of, 1168.
- costs, 1408, 1412, 1418.
- of the judge's direction to the jury in actions of, 1169.
- arrest of judgment, or setting aside verdict in actions of, 1170.
- indictment for, 1171, 1173.
- costs on indictment for, 1431.
- injunction against publication of, 1089, n.

Liberum Tenementum,

- effect of plea of, in actions for trespass to land, 426.
- plea of, is no answer to action for assault, 426.
- evidence under plea of, 387, 446.

License. *See* AUTHORITY—LEAVE AND LICENSE.

- to do an act implies everything necessary to the performance of it, 447.
- by wife, child or servant, whether valid against husband, father, or master, 447
- to sell furniture, 447.
- to enter and remove furniture goods, &c., 447.
- to fish, 116, n.
- not claimable by custom, 133.
- to enter house, means by the door only, 447, 454.
- to put goods on another's land, 116.
- to shoot and carry away game killed, 116.
- to cut down timber, 116.
- to raise and carry away mines, &c., 131.
- to use way to church, market, &c., 130.
- to open window overlooking land of licensor, 127.
- to go on another's land, effect of, 116.
- to make drain, &c., on another's land, 116.
- to go on land, implied from grant of trees, crops, &c., 130.
- of right of way, or passage with boats on a canal, 132.
- implied from owner to finder of goods lost to keep them, unless demanded by owner, 467.
- to seize chattels is merely personal, and can not be assigned over, 728.
- of pleasure extends only to licensee, but of profit extends to servants of licensee, 430.
- to enjoy easement or profit à prendre prevents it from being enjoyed as "of right" under Prescription Act, 173, 204, 436, 437.
- to company to enter on land scheduled can not be revoked, 1053.
- coupled with an interest, or that has been acted on and expense incurred, is not revocable, 177, 201, 213, 428.
- otherwise it is, 201.
- is revoked by transfer of property, 447.
- revocation of, may be shown under a traverse of the right stated in the declaration, 201.
- will not suffice for the creation, but will for the destruction of an easement 177.
- obtained by misrepresentation or deceit, or on a misunderstanding, is a nullity 447.

Licensees. *See* PATENT.

Lie. *See* FALSEHOOD.

Lien,

- of agisters of cattle, 612.

Lien—Continued.

- of common carriers, 676.
- of rail or steamboat company for charges of food for animals carried, 649.
- of publishers, 614.
- of agents acting for undisclosed principal, 614.
- of factors and brokers, 615, 616, 625.
- of bankers, 617.
- of attorneys or proctors, 618.
- of unpaid vendor of chattels who has not parted with possession, 609.
- of lenders of money upon deposit of title deeds or other securities, 609, 613.
- of innkeepers, common carriers, shipowners, salvors, brokers, auctioneers, &c., 609, 613.
- of shipwrights, printers, and other workmen, who have repaired or bestowed labor on goods, 609, 612, 614.
- of vendor of land sold to railway company for costs of arbitration, 1086, n.
- of coachmaker, 613.
- of coach proprietors, 676.
- of dock companies, 623, 624.
- of innkeepers, 688.
- of livery-stable keeper, 612.
- of pawnbrokers, 609, n.
- of warehousemen, 612.
- of ferrymen, 613.
- of town clerk or steward of manor, 618.
- of certificated conveyancers, 619.
- of shipmasters or shipowners, 620.
- for freight, 621, 626.
- of consignees, 622.
- maritime, 611, n.
- particular or general, 610, 614.
- may exist, though arising out of an immoral consideration, 609.
- by express contract, 623.
- by custom of trade or express agreement, 611, 614, 623.
- can not exist if at variance with the express or implied conditions on which property was received, 612, 614.
- or on goods deposited for a particular purpose, 612, 614, 618.
- can not exist if no work has been done upon chattel deposited, 612.
- or be claimed, generally speaking, for an antecedent debt, 612, 614.
- or for goods sold on credit, 612.
- not destroyed, though remedy for recovery of debt be barred by Statute of Limitations, 609.
- is destroyed if bill or note taken for debt, 612, 618.
- can not be obtained against the will of the owner, 483.
- wrong-doer can not obtain, 539.
- wrong-doer can not create, against true owner, 613, 617.
- when a servant may create, as against his master, 613.
- is lost by abandonment of possession, 626.
- is extinguished by tender of debt or charges due, 628.
- put an end to by wrongful sale, 482.
- can not be assigned or transferred, 626.
- distinction between, and pledge to secure repayment of money, 626.
- seizure by sheriff of property subject to, 626.
- statutory power of sale under Merchant Shipping Act in discharge of, 627.
- conversion of property by person claiming right of, 482.
- effect of liquidation on, 609, n., 618, n.
- must be specially pleaded, 640.
- right of, may be set up under a plea of not possessed, 530.
- false claim or representation of, when actionable, 38, 1176, 1211.

Light. See AIR—STATUTORY COMPENSATION.

- right to natural amount of, 169.

Light—*Continued.*

- right to, acquired by unfinished house, 169.
- right of, only belongs to houses, and not to open yards or gardens, 206.
- grant of right of, 128.
- right to, under Prescription Act, 152.
- right to, how obtained by prescription, 167, 169.
- must be over land of another, 167.
- enjoyment of, subject to rent, 167.
- right to, over land let on lease, 151.
- right to, is determined by the size of the window, exclusive of mullions or other partitions in it, 214.
- right of obstruction of, where windows are enlarged, 269.
- what diminution of, is actionable, 208.
- partial obscuration of, for a long period, does not entitle a person totally to destroy, 294.
- right to, suspended during unity of possession, 168.
- right to, is extinguished by unity of ownership, 184.
- right to, destroyed by an obstruction erected by permission of the possessor of the easement, 177.
- abandonment of right to, by permission given to adjoining owner to do something, involving expense, which will interfere with it, 213.
- abandonment of right of, by overt acts indicating intention to abandon, but not by mere non-user, 178.
- right of, when lost by alteration in windows, 178.
- obstruction of, by tenant is actionable, 195.
- by reversioner when actionable, 196.
- by stranger is actionable, 196.
- interruption in the enjoyment of, 170.
- obstruction of, is a nuisance, 222.
- obstruction of, is an injury to the reversioner as well as tenant, 195.
- obstruction to, may be removed though on another's land, 266.
- obstruction of, not allowable under Metropolitan Act, 208.
- declaration for injury to right of, 198.
- by reversioner, 198, 212.
- injunction to prevent obstruction to, or interference with, 214.
- what diminution of, sufficient to justify an injunction, 214.
- damages for obstruction of, in Court of Chancery, 214.
- interference with, may be restrained by injunction at common law, 1450.

Lighterman,

- is a common carrier, 650.

Lime-Kiln,

- is a nuisance, 217.
- illegality of, adjoining highway, 230.

Limitations. *See* STATUTE OF LIMITATIONS.**Lions.** *See* ANIMALS.**Liquidation,**

- title of trustee under, 503, n.
- distinction between, and composition with creditors, 503, n.
- filing petition for, is an act of bankruptcy, 505.
- effect of, on distress, attachment, or execution, 724.
- effect of, on execution, 908.

Liquidator. *See* OFFICIAL LIQUIDATOR.**Livery.** *See* SERVANT.**Livery Stable Keeper.** *See* HORSES.

- is not a common carrier, 650.

Local Board. *See* MANDAMUS.

- by-laws made by, 56.

Local Board of Health,

can not pollute river, &c., by pouring in town sewage, 1049.

Locomotive. *See* STEAM ENGINE.**Lodgings.** *See* DISTRESS.

keeper of not an innkeeper, 683.

liability of keeper of, for loss of lodgers' goods, 690.

London. *See* METROPOLIS.

statutory powers for removal of dangerous buildings, in, 266, 274.

Lord Mayor's Court,

prohibition to, 1453, 1460.

Lord of Manor. *See* BILL OF PEACE—COMMON.

is the owner of the soil of the common, 144.

right of, to hares, &c., on common, 144.

may sue for injuries to trees, 421.

may sue a stranger for trespass in seizing estrays or wrecks, 533.

right of, to enclose, 134.

right of, to work mines, under an Enclosure Act, 215.

right of, to game under Enclosure Act, 116.

duty of, to hold court, 30, . . .

mandamus to, to admit copyholder, 1495.

Luggage,

what is,—deeds carried by an attorney, rocking-horse, bedding, chronometer, &c., 649.

Lunacy. *See* IDIOCY.**Lunatic,**

can not sue or be sued for divorce, but may for judicial separation, 1244,

dangerous, may be arrested, 819.

statutory provisions for detention, 819.

Machinery,

are "goods and chattels" within reputed ownership clause of Bankruptcy Act, 510, 514.

Magazine,

copyright in articles published in 60, n.

no copyright in title of, 60.

Magistrates. *See* JUSTICES.

may remand a prisoner by word of mouth, and without warrant, 800.

duty of, to grant certificate of dismissal of case of assault, if applied for, 837.

injunction against, 296.

Malice. *See* MALICIOUS PROSECUTION.

causing damage is actionable, 40.

not a necessary ingredient in a tort, 40.

is implied in libel or slander, 1090.

in the assertion of a legal right, *e.g.*, in bringing action, is not actionable, 863

unless brought in the name of a pauper or insolvent, 864.

in levying executions for larger sums than is due, 865.

in issuing extent at suit of Crown, 866.

in petitioning for adjudication of bankruptcy, 867.

in causing search or distress warrant to issue, 854, 859.

in petitioning for adjudication in bankruptcy, 867.

in abuse of legal process, 868.

in detention of judgment debtor, 869.

in making arrest, 870.

in discharging a soldier, 861.

Malice—Continued.

- in obtaining a warrant of distress for poor-rate against a bankrupt, 854.
- evidence of, 40, 878.
 - from admissions of defendant, 854.
 - in action of libel or slander, 1156.
 - in actions against newspapers for libel, 1145.
 - in actions against justices, 1034.
- want of probable cause is evidence of, 853.
 - but evidence of malice is not evidence of want of probable cause, 853, 863.

Malicious Prosecution. See COSTS—MALICE—PEACE.

- is a tort, if with malice and want of probable cause, 852.
- what is evidence of malice and want of probable cause, 853, 863, 880.
 - by persons who manifest a consciousness of the innocence of the accused, 854.
 - by persons who put the criminal law in motion to obtain payment of a debt, or restitution of goods, 854.
- under advice of counsel, 855.
- by persons bound over to prosecute, where the proceedings originated from malice in the first instance, 855.
- by persons after they have obtained knowledge of the innocence of the accused, 855.
- by complaint of felony, &c., made to a magistrate, upon which the magistrate issues a warrant, 856, 859.
- by continuance of proceedings commenced without a person's knowledge, 857.
- by causing search-warrant to issue, 859.
- by preferring indictment, 860.
- before court-martial, 861.
- by proceedings in bankruptcy, 867.
- conviction, unreversed, or adjudication in bankruptcy, is an answer to an action for, 858, 867.
- liability of corporation for, 872.
- action for, can not be brought in, but may be remitted for trial to, county court, 1328.
- who to be defendants in actions for, 872.
 - persons prosecuting through an agent, 872.
 - railway company, 872.
- action for, a bar to a criminal information on the same subject-matter, 873.
- declarations in action for, 874.
- pleas in actions for, not guilty, 875.
 - of justifications, 876.
- interrogatories in action for, 876, n.
- evidence in actions for, for the plaintiff, 877, 881.
 - proof of prosecution and acquittal, 879.
 - proof of malice and want of probable cause, 880, 881.
- evidence in actions for, for defendant, 881.
 - oral evidence of admissions of plaintiff before magistrates, though not taken down in writing, are admissible in actions for, 973, n.
- damages recoverable in actions for, 882.
- signing charge-sheet, and appearing to support charge, is not necessarily the commencement of, 1328.
- not barred by a recovery of judgment in an action of a false imprisonment, 849, 1355.

Mandamus,

Prerogative writ of—

- object of, 1481.
- issue of, is discretionary with court, 1481.
- to enforce statutory, corporate, or public duties, 1482.
 - unless their performance has become impossible, 1483, 1484.

Mandamus—Continued.

- to mayor and burgesses, lords of manor, and others, to hold courts, 1482
1483.
- to judges, magistrates, &c., to hear and adjudicate, and generally to perform the duties of their office, 1483.
- to quarter sessions, recorders, justices, and judges of inferior courts, 1483.
except county courts, 893, 1483.
- to justices, to grant a certificate of dismissal of case of assault heard before them, 837.
- to ministerial officers, to compel them to perform their duties, *e.g.*, to a gaoler, to receive a prisoner; to trustees of a charity, to deliver up keys; to corporations, to permit inspection of minute-books, &c., &c., 1484.
although the time prescribed by statute has elapsed, 1484.
- to Crown, 1484, 1486.
- to overseers or clergymen, to bury a pauper, 1485.
- where there is another remedy at law equally effectual, 1486.
- to public officers of the Crown, to pay over money, 1486.
- to compel surrender of public documents by persons who have obtained them in their official capacity, *e.g.*, town-clerks, overseers, clerk of company, &c., 1487.
- to restore or admit a person to a freehold office, *e.g.*, parish clerk, clerk of the peace, &c., 1488.
freehold office, how forfeited, or vacated, 1489.
- to restore to offices held at will, will not be granted, 1490.
instances of such offices, 1490.
- to medical counsel to restore name of medical man to the register, 1492.
- to test the validity of an election, *e.g.*, of churchwardens, 1493.
- to elect churchwardens, sexton, or organist, 1494.
- to compel institution to public office, where a person has been duly elected, or appointed, *e.g.*, a churchwarden, parish clerk, or sexton, prebendary, dissenting minister, &c., 1495.
but not to private offices, *e.g.*, secretary of company, vestry clerk, &c., 1495.
or to a presentative benefice, 1495.
- to admit copyholder, 1495.
- to joint-stock companies to compel them to perform their duties, 1496, 1499.
to register shareholder, 1496.
to admit director, 1496.
to register probate of will, or transfer of shares, 1496.
to make calls to discharge a debt, 1497, 1498, 1506.
to restore a highway illegally diverted, 1499.
to make compensation, and to take the necessary steps for ascertaining it, 1061, 1499.
to allow inspection of register, 1496.
- to chartered companies and corporations—
to admit a member, 1496.
to produce books at public meetings, 1496.
to affix common seal, 1496.
to allow inspection of corporate records, by-laws, &c., 1496.
- to commissioners, local boards, &c., to levy rates to discharge a debt, 1498.
to make compensation, 1500.
- to court of quarter sessions, 1501.
- to churchwardens to allow inspection of parish accounts, 1504.
instances where it will not be granted, 1484.
- will not be granted where a visitor has been appointed by the founder, 1491.
- effect of delay in application for, 1501.
- previous demand of performance necessary, 1505.
- is in effect a civil action, 1511.
- proceedings in, 1502.
in case of election to corporate offices in borough, 1503.
requisites of writ, 1505.

Mandamus—*Continued.*

- in case of impossibility of performance, or alternative performance, 1505.
- objections to, if appearing on the face of it, may be made at any time, 1513, 1519.
- persons, to whom directed, 1506.
- corporations, lords of manor, &c., 1505.
- service, 1507.
- return, 1509.
- impossibility of performance, 1510.
- pleas, or demurrer, to, 1511, 1514.
- interpleader order, 1512.
- error on, 1514.
- damages and costs, 1511, 1514.
- costs, 1432, 1483, n.
- judgment, non obstante veredicto, 1516.
- action or information for false return to, 1517.
- attachment for disobedience to, 1518.

In an action :—

- in what actions may be claimed, 1517.
- but may be claimed separately, 1519.
- lies, whenever a duty is imposed by statute on a public company, &c., in the performance of which the plaintiff is interested, 1520.
- instances of, registration of probate and admission of executor on register, registration of shareholder, &c., 1520.
- to local board, or commissioners, to levy a rate, 1520.
- can not be brought to enforce mere payment of debt or damages, 1519.
- for instance, for the salary, expenses, &c., of a clerk of commissioners, 1521.
- declaration, pleadings, and judgment, 1519, 1522.

Manor. See COMMON—LORD OF MANOR—PASTURAGE—STEWARD.

claim by customary tenants of, to turbary, 115.

Mantrap,

setting, a misdemeanor, except in a dwelling-house, 226.

Manuscript,

can not be used, copied, or published, without the consent of the author, 21.

injunction against publishing, without consent of the author, 1445.

Maps,

copyright in, 60,

Market,

- interference with, how far actionable, 22, 25.
- obstruction to public, is a nuisance, 222.
- tolls at, on the stall, or article sold, 26.
- must be reasonable, 26.
- sale of horses by auctioneer in, 26, n.
- right to erect stalls in, an easement only, 384.
- by-laws for the regulation of, 56, n.
- declaration in action for obstructing, 197.

Market overt. See SALE.

Marriage. See HUSBAND—WIFE.

- legally, is the voluntary union of two persons for life to the exclusion of all others, 1243, n.
- loss of, caused by slander, is actionable, 27.
- loss of, from fraudulent misrepresentation, is actionable, 17.
- effect of, on proceedings in action, 1326.
- how proved, 1265, 1267.

Marriage Settlement,

powers of the Divorce Court over, 1251.

Married Woman. *See* WIFE.

false representation by, that she is a feme sole, is not actionable, 1204.

Master. *See* PRINCIPAL.

liability of, for acts of servant, 36, 37, 234.

not liable for acts of servants not appointed by himself, but by some third person, *e.g.*, a contractor, 36.

liability of, for negligence of servant in ordinary course of employment, 559, 579, 588, 1309.

in case of jobmasters, 550.

in causing explosions of gas, fires, &c., 357.

is entitled to indemnity from the servant for the latter's negligence, 37.

liability of, for wrongful acts of servants, workmen, or persons acting by his direction, 1312.

for trespass or injuries to land committed by servant, 98, 105, 422.

trespasses committed by servant in charge of cattle, &c., without authority 377.

in the creation of a nuisance, 283.

for conversion of property by his servant, 526.

for illegal distress by bailiff, or servants, 761.

when estopped from denying authority of servant, 1312.

how far liable for injury to his servant, in the course of his employment, 564.

duty of, to take reasonable precautions for security of his servants, 254, 256.

bound to protect his servant from latent dangers known to him, but not to his servant, 564.

bound to comply with statutory regulations for safety of servants or workmen, 564.

not liable for injuries to servants from dangerous employments, if danger is known to the latter, 255, 256.

unless duty, *e.g.*, of fencing machinery, be imposed by statute, 56.

how far liable for injury to one servant (or any one helping him gratuitously) from negligence of another, 257, 565.

may sue for injuries to his servant, 1293.

when entitled to sue for assault on servant,

may sue for the loss of service of servant through tortious act of another, 1272, 1280.

unless such act be a breach of contract, and the contract is not with him, 1272.

e.g., for loss of luggage, sent by his servant by railway, as the contract is not with him, 1288.

may lawfully chastise his apprentice, 840.

Master of Ship. *See* SHIPMASTER.

may be liable for negligent navigation though owner is not, 556.

duty of, in case of collision, 556, 558.

negligence of, 556, 563.

non-observance of statutory or Admiralty regulations, 558.

damage to cargo, 560.

goods damaged on the voyage, 561.

negligent stowage, 562.

warrants the safety of goods carried, 597.

lien of, 620.

Mayor. *See* SHERIFF.

is liable for refusing a poll at elections, 40.

duties of, at elections, 41.

Meat. *See* FOOD.

diseased, 266, n.

Medical Council,

mandamus to, 1492.

- Menaces,**
injuries caused by, are actionable, 20, 22.
- Mesne Profits,**
action of trespass for, 464.
- Messenger,**
under search-warrant of Court of Bankruptcy, may break open house, &c., 929.
- Metropolis.** See ARREST—LONDON.
- Metropolitan Building Act.** See LIGHT—PENALTY.
no duty imposed by, of protecting adjoining house, when your own is pulled down, 241.
- Military Officer,**
is liable for abuse of authority, 43.
but not for acts done by command of superior officer, 43.
can not be sued for bringing a subordinate officer before a court-martial, 51.
arrest by, when actionable, 1307.
quartered abroad, security for costs by, 1439.
- Mill.** See HOUSE—WATER.
right of water flowing to, 160.
right to have grain ground at, 197.
alteration of premises by lessee of, by altering right of water, or changing nature of mill, is waste, 325.
is not entitled to wind to work its sails, 206.
carrying on, may be a nuisance, 224.
interference with, by Metropolitan District Board, 1051.
declaration in action for obstruction of, 197.
- Miller,**
lien of, 611.
- Minerals.** See MINES.
right of lessee in respect of, 382.
wrongfully severed, vest in landlord, 362.
injunction against getting, by lessees or tenants, 371.
- Mine-Owner,**
liability of, for acts of persons appointed by his agent, manager or steward, 36.
- Mines.** See COAL—MINERALS—SHAFT—SUPPORT.
grant of right, 129.
on demise of, right to support of service is implied, 85.
right to take when a profit à prendre, 114.
rights of rector with regard to, 337.
rights of lessees with regard to, 325.
tenants for life, 328.
right to search for, &c., can not be claimed under Prescription Act, 153.
title to, not barred by non-user for twenty years, 390.
under railways, 215.
right to compensation for severance of, 124.
sinking of, is lawful, until it injures your neighbor's land, 19.
trespasses in, 382.
injuries from defective state of shaft of, 257.
injuries to, from water from adjoining mines, 94.
water descending into from another mine in the natural course of drainage is not actionable, 1049.
water flowing from. See WATER—WATERCOURSE.
- Minor.** See CHILDREN—INFANT.
- Misdemeanor,**
committal of, is actionable, 49.
accusation of, is slanderous, 8.

Misjoinder. *See* AMENDMENT.

Misrepresentation. *See* FALSE REPRESENTATION.
license obtained by, is a nullity, 447.

Model. *See* SCULPTURE.

Mortgagee. *See* FIXTURES.
rights of entry of, under Statute of Limitations, 404.
may distrain under an agreement in mortgage deed, 706, n.
when may distrain for rent previously paid to mortgagor, 711.
in possession, injunction against, to prevent waste, 371.

Mortgagor. *See* OWNER.
not a tenant at will to the mortgagee within the Statute of Limitations, 393.
may distrain in name of mortgagee, 711.
injunction against, to prevent waste, 371.

Mother. *See* CHILDREN—WIFE.

Municipal Corporations,
by-laws made by, 54, 56.

Musical Composition. *See* COPYRIGHT.
unlawful representation of, 63.

Mussel. *See* FISHERY.

Name,
assumption of, is not actionable, except where it is connected with a trade,
business, periodical publication, &c., and is assumed for the purpose of
fraud, 1232, 1232, n.

Naval Officer. *See* MILITARY OFFICER.
is liable for abuse of authority, 43.
but not for acts done in pursuance of command of superior officer, 43.
can not be sued for bringing a subordinate officer before a court martial, 51.
not liable for negligence of subordinate officer in carrying out his orders, 30,
558.

Navigation. *See* COMMISSIONERS OF NAVIGATION—CONSERVATORS—NEGLIGENCE
—SHIPS—WATER.

Navigation Company. *See* CANAL COMPANY—RIVER.

Negligence. *See* WASTE.
distinction between, and inevitable accident, 544.
torts founded on, 33.
must be proved affirmatively, 33.
"gross," meaning of, 33, n.
creates no cause of action, unless it involves some breach of duty, 1338.
where damage caused by, is partly also caused by neglect of a third person, 33
of common carrier. *See* COMMON CARRIER.
of bailor in not disclosing dangerous nature of goods bailed, 654, 1206.
of coach proprietors, 545, 548.
in the construction of buildings to which the public are admitted by payment,
284.
of persons erecting race stands, &c., 548.
in driving, 549, 553.
in breaking horses in the street, 554.
of foot passengers, 555.
in navigation of vessels, 592.
liability for, though plaintiff is insured, 593.
of owners or masters of ships, 551, 563.
non-observance of statutory or Admiralty regulations, 558.
if naval officer is on board and navigates the ship, 558.
causing damage to cargo, 560.
goods damaged on the voyage, 561.

Negligence—Continued.

- of naval officers, 558.
- of masters causing injury to their servants, 564.
- of one fellow-servant causing injury to another, 257, 565.
- of telegraph companies in the delivery of messages, 607.
- of contractors and sub-contractors, 283, 580, 581.
- in leaving dangerous articles in places where injury is likely to occur, 582
- in leaving horses unattended, 582.
- of skilled workmen, professional men, chymists, &c., 569.
- of building owner under Metropolitan Building Act, 569.
- of attorney and solicitors, 570, 575, 589, 1361.
- of partners, 570, n, 583.
- of surveyors and valuers, 572.
- of bank-managers or bankers, 573.
- of directors, 574.
- of ferrymen, 579, 680, 681.
- of consignors or bailors of chattels, 32, 33.
 - duty to give notice of dangerous or fragile nature of chattels consigned or bailed, 32, 33.
- of bailors and bailees, 595, 607.
- of accountants, 1302.
- by Metropolitan District Board, 1051.
- of clerk of court of justice, 896.
- of sheriff in the execution of writ, 897.
- in dealing with goods in possession of consignee or bailee, 467.
- in the management of gas, 358.
- of broker or agent on purchase of goods, 1196.
- of railway companies. *See* RAILWAY COMPANY.
 - in delivery of cattle, 244.
 - in the management of stations, 245.
 - in the management of gates at level crossings, 248, 249.
 - by sending small boys in charge of cattle, 259.
 - in not keeping accommodation gates across railway closed, 250, 259.
- in the management of canals, docks, wharfs, &c., 251.
- in the performance of work under powers of an Act of Parliament, 1041, 1045.
- of board of public works, trustees, commissioners, contractors, and others, in the performance of work under a statute, 1043, 1045.
- action lies for, though the injury is done by persons acting under an Act of Parliament, 1079.
- in the management of guns or horses, 544.
- in concealing the dangerous nature of things bailed to be carried, 544.
- of carriers of passengers for hire, 545, 549.
- in quarrying stone near highway, 232.
- of innkeepers. *See* INNKEEPER.
- in running against telegraph cables at the bottom of the sea, 236.
- in pulling down houses, 241.
- by corporations, 1304.
- contributory by the plaintiff, 33, 34.
 - what is, 589.
 - disentitles injured or killed persons from recovering, 565, 567, 575.
 - if an immediate co-operative cause of the injury sustained, 568, 589.
 - must be direct, and not remote or indirect, to be an answer to the action, 34, 35.
 - by a mere child, 34.
 - is provable under plea of not guilty, 286.
- assault resulting from acts of, 788.
- master responsible for servants, 579, 586.
 - but not for that of contractor employed by him, but exercising an independent employment, 579, 581.
- of servant, liability of master for, 550.

Negligence—Continued.

- causing fires. *See* FIRE.
- causing burning of house is waste, 321.
- where death is caused by, 575, 586, 594.
- jurisdiction of Admiralty in cases of collision between, or damage caused by:
 - ships arising from, 576.
- plaintiffs in actions for, 577, 631.
 - joint owners, &c., 578.
- defendants in actions for, 579, 584.
 - contractor and sub-contractor, 580, 581.
 - joint proprietors, or wrong-doers, 583.
- declaration in actions for, 584.
 - against bailees, 635.
- pleas in actions of, not guilty, 585.
 - contributory negligence admissible in evidence under, 585.
 - or inevitable accident, 585.
- evidence of, for the plaintiff, 586.
 - prima facie proof of, from very occurrence of accident or loss, 33, 355, 545, 546, 607.
 - loss by theft is prima facie evidence of, 663.
 - prima facie evidence of, in case of goods on board ship injured by oil, 664.
 - need not be proved in actions for injuries from ferocious animals, 290.
- evidence of, for the defendant, 589.
- damages recoverable for, 590, 593.
 - expense of employing steam-tug, medical expenses, 1388, 1390.
 - all reasonable consequences of, but not unreasonable and unexpected consequences, 35.

Nets,

- right of landing, how acquired, 151.
- right to hang and dry on another's land, 113.
- custom to dry on seashore, 147.
- impeding navigation of river, or passage of fish illegal, 272.

New Assignment, 1366.**Newspaper. See LIBEL—MALICE.**

- copyright in title of, and articles published in, 60, 61.
- shares in, in reputed ownership of bankrupt, 510.
- bill of discovery against publisher of, to ascertain the name of proprietor, 1149.

New Trial. See DAMAGES.

- costs on, 1426.

Nitro-Glycerine,

- carriage and manufacture of, 649.

Noise. See INJUNCTION.

- making of, when a public nuisance, 297.
- by forge or workshops, 217, 224.
 - unless a prescriptive right has been obtained, 224.
- nuisances arising from, not actionable by reversiorer, 282.

Non-Joinder. See AMENDMENT.**Notes. See BILLS.****Not Guilty. See EVIDENCE—PLEAS.**

- plea of, operates as denial of breach of duty or wrongful act, 1343.
- in actions against master for negligence, of his servant, 1343.
- in actions for slander, where the words are not actionable without special damage, 1353.
- in actions of libel or slander, and evidence thereunder, 1144.
- in actions for the obstruction of easements and profits à prendre, 195.
- in actions for nuisance,

Not Guilty—*Continued.*

- in actions against bailees for loss of, or injury to, chattels bailed, 636.
- in actions against carriers for loss of, or damage to, goods, 697.
- in action for seduction, and evidence thereunder, 1281.
- in actions for false representation, and evidence thereunder, 1215.
- in actions of trespass to land, 425.
- in actions for waste, 366.
- in action for assault, 835.
- and evidence thereunder, 835.
- in action for malicious arrest, malicious prosecution, or malicious proceedings in bankruptcy, 875.
- evidence necessary by plaintiff under plea of, 203.

Not Guilty by Statute,

- effect of, in actions for the obstruction of easements and profits à prendre, 200.
- in actions against justices or constables, 1033.
- in actions of trespass, or on the case for an unlawful distress, 771.
- in actions for assault and false imprisonment, and evidence thereunder, 836.
- not available to railway, gas, or other companies, local boards of health, &c., except under a special Act, 1080.
- not allowable under local statutes, 1344.

Notice,

- of distress, 741.
- to abate a nuisance, when necessary, 280.
- if nuisance is on land of another, 266.
- to adjoining proprietor, before pulling down ruinous houses in London, 268.
- of special damage, 542, n.
- requisites of, under the Carriers Act, 657.
- of act of bankruptcy, what sufficient, 50.
- of assignment of chose in action, 5122.

Notice of Action. *See* DECLARATION.

- who entitled to, 1023.
- gas companies, railway companies, toll or tax collectors, revenue officers, and land tax commissioners, 1075.
- contractors under local board of health, for Metropolis Local Management Act, 1076.
- surveyors of highway, highways boards, &c., 1077.
- constables and others, intending to act under an Act of Parliament, 821, 823.
- persons acting in execution of Larceny Act, or Metropolitan Police Act, 823.
- county court judges, 930.
- county court bailiffs, 933.
- justices, 1026.
- may be given before the conviction is quashed, 1026.
- requisites of, 1028.
- to be given one month before, 826.
- what particulars must be contained in, 827.
- tender of amends after, 1077.
- defense of want of, must be specially pleaded, 1080.
- proof of, 1083.

Notice to produce. *See* EVIDENCE.

Notice to quit,

- waiver of, by distress, 710.

Notice to treat,

- is binding as a statutable agreement, 1059, n.

Novel,

- dramatising of, whether an infringement of copyright in the novel, 62.

Nuisance,

- what it is, and instances of, 217.

Nuisance—Continued.

- corrupting water with gas refuse, 71.
- carrying on noxious trade, 71, 71, n.
- turning out diseased cattle, &c., on unenclosed land, 71.
- exposing diseased cattle, &c., for sale, 71.
- caused by construction or maintenance of gasworks, 1041.
 - penalties and remedies for, 275.
- steam threshing machines, 230, n.
- keeping ferocious animals, 261, 265.
- keeping pigs, 54.
- non-repair of sewers, drains, and water-courses, 218.
- on highways, 230, 234.
- adjoining highways, dangerous excavations, steam engines, lime-kilns, letting off fireworks, 230.
- ringing bells, 295.
- necessarily created under an Act of Parliament is not actionable, 1040.
- public, is actionable if special damage sustained, otherwise not, 279, 297.
- inducing a person to create, is actionable, 41.
- every person guilty of creating of, by himself or his servants, is liable for, 283.
 - unless works ordered do not necessarily create a nuisance, and an independent contractor is employed, 283.
- every person ordering the act producing, is liable for, 283.
- where several join in creating, 266, n.
- all persons liable for, are liable jointly as well as severally, 283.
- when reversioner liable for, 195, 222.
 - although he has parted with the land, 222.
- tenant always liable for, 222.
 - liability for, though no longer in possession of land, 281.
- tenant and landlord, when responsible respectively for, 283.
- liability of infant for, 1314.
- no answer to action for, to say that the trade is carried on in a fit place, and is a benefit to the public, 219.
- continuing, 1072.
 - is a fresh injury, 281.
 - and actionable so long as it continues, 292, 1356, 1361.
- abatement of, in case of commons, 267.
 - removal of ruinous buildings in London, 266, 268.
 - where limited right is exceeded, 269.
 - by pulling down house,
 - under statutory powers, 266.
 - by order of magistrates, 266.
- notice to abate, when necessary, 280.
- when an entry justifiable on another's land to abate, 266.
- abatement of, no defense to an injury already suffered, 280.
- expense of removal of, how recoverable, 266.
- penalties for the suppression of, 71.
- by-laws for the suppression of, 54, 278.
- who to be plaintiffs in actions for, 282.
 - joint-tenants or tenants-in-common of property affected, 282.
 - who to be defendants in actions for, 283.
- declarations for, 284.
- effect of plea of not guilty in actions for, 286.
- evidence in actions for, for the plaintiff, 290.
 - for the defendant, 291.
- damages recoverable in actions for, 292.
- prohibition formerly issued against public, 296.
- indictment for public, 297.
 - instances of, 297.
 - in carriage-ways, bridle-ways, or footpaths, 298.
- injunction against, 293, 296.

Nuisance—*Continued.*

- e.g.*, the pollution of a river by sewage, 1085.
- if created under statute, 296.
- public, injunction must be at suit of Attorney-General, 296.
- if land purchased with knowledge of, 294.
- if acquiesced in, 294.
- if only temporary,

Occupation,

- evidence of, in actions for nuisance, 290.

Occupier. *See* TENANT.

Offer. *See* COMPENSATION.

Office,

- freehold, what is, how forfeited, &c., and instances of, 1489.

Officer. *See* NAVAL OFFICER.

Official Liquidator,

- may sue directors for losses occurring through their misconduct, 574.

Omnibus. *See* HIGHWAY.

- liability of proprietor of, for loss of luggage, 653.
- "nursing" by rival omnibus is actionable, 1304.

Omnibus Proprietor,

- liable for the acts of his servants in course of his employment, 36.

Opera. *See* COPYRIGHT—MUSICAL COMPOSITION.

Optician.

- negligence of, in execution of work, 569.

Outfall. *See* DRAINAGE—WATER.

Overhanging. *See* CORNICE—TREES.

Owner,

- mortgagor is, for repaying expenses incurred in repair of sea-wall, 318.
- who is, under a building agreement, or Public Health Act, for repaying paving expenses, 318, n.
- meaning of, in Metropolitan Building Act, 268, 274.

Oysters. *See* FISHERY.

- right of taking on sea-shore, 406.
- obstructions caused by, in bed of navigable river, 235.

Packed Parcels. *See* RAILWAY COMPANY.

Paintings. *See* COPYRIGHT.

- sale of, when it passes right to copy, &c., 67.

Palace,

- no execution can be levied in, 908.

Parent. *See* CHILDREN.

- may sue for injury to his child, or seduction of his daughter, if loss of service caused thereby, 1274.
- absence of daughter from parent's house, 1275.
- under a pretended hiring, 1276.
- if daughter a married woman, 1277.
- if his own misconduct has conducted to the seduction, 1275.
- may lawfully chastise his child, 840.

Parish,

- can only act by vestry meeting, and poll, if demanded, 1044.
- liability of, to repair highway, 315, 317.
- boundary of, where highway separates it from another parish, 409, n.

Parish Clerk,

has a freehold in his office, 1488.

Parliament. *See* LIBEL.

hindering a person from voting at an election of members for, is a tort, 40.
imprisonment by order of colonial, 888, n.

Parson. *See* RECTOR.**Particulars,**

in action of libel, 1147, n, 1163, n.
of breaches of patent, 74, n.

Parties. *See* DEFENDANT—PARTIES TO ACTIONS—PLAINTIFF.

to actions of trespass to land, 421, 422.
to actions of tort founded on contract, 1288.
to suits in equity for the prevention of waste, 374.

Parties to Actions. *See* AMENDMENT—PARTIES.**Plaintiffs:—**

joint tenants and tenants in common against their co-tenants, 1289.
joint tenants and tenants in common against third persons, 1302.
partners, 1302.
trustee and cestui que trust, 1291.
bailee of goods, 1292.
master and servant, 1293.
husband and wife, 1294.
infants, heirs-at-law, devisees, and personal representatives, 1297.
trustees of bankrupts, 1299, 1302.
bankrupts, 1300.

Defendants:—

joint or several, 1321.
tenants in common, 1303.
corporations, 1304, 1305.
trustees and commissioners of public works, 1306.
military and naval officers, 1307.
master and servant, 1308, 1312.
principal and agent, 1309, 1312.
husband and wife, 1313.
infants, 1314.
executors and administrators, 1315, 1318.
trustees in bankruptcy, 1319.
bankrupts, 1320.

Partners. *See* JOINT TENANTS—PARTIES TO ACTIONS—TENANTS IN COMMON.

negligence of, 570, n.
when liable for wrongful or negligent act of co-partner, 583, 1321.
not liable for illegal distress made by co-partner in name of firm, 761.
conversion or destruction of goods by, 480.
when estopped from denying authority of co-partner, 1376.
may sue jointly for libel or slander, 1140, 1302.
conspiracy by agent of, to procure share of partnership at an undervalue, 850.
injunction to prevent injury by, to partnership property, 371.

Party Wall. *See* BOUNDARY WALLS—METROPOLITAN BUILDING ACT.

injuries from non-repair of, 242.
injuries from pulling down, 567.
in London, how regulated, 415.

Passenger. *See* MASTER OF SHIP—RAILWAY—SHIPMASTER.

smuggling by, on board ship, is a tort, 14.
who is, within meaning of Merchant Shipping Act, 556, n.

Pasturage,

right of sole and several, 130, 141.

Patent. *See* PATENT RIGHT.

- duration of, 71, 71, n.
- what a publication of, 72, n.
- true and first inventor only entitled to grant of, 72.
- must be both new and useful, 72, 73, 76.
- subject-matter of, what is, 73.
 - method or process may be, 73.
 - combination of processes may be, 73, 75.
 - can not be taken out for principle, but may for a principle coupled with the mode of carrying it into effect, 73.
 - for an improvement on an existing patent, 74.
- specification of, 73.
 - provisional or complete, 73, n.
 - disclaimer of, 71.
- remedies for infringement of, by action or injunction, 74.
- infringement of, by sale, user, importation, or transmission only through the country, 74, n.
- particulars of breaches of, 74, n.
- remedies for infringement of, by assignees and licensees, 75.
- pleadings, want of novelty or utility, 76.
- slander of title to, 1137.
- held in common, in whom it vests on decease of one tenant in common, 1290.
- in reputed ownership of bankrupt, 511.
- injunction against infringement of, damages for, and account of profits in equity, 1445.
- at common law, 1450.

Patent right. *See* PATENT.

- does not exist at common law, 72.
- what it is, 72.
- is not valid against the Crown, 72.
- assignment of, 72, n.

Pauper,

- security for costs by, 1439.

Paving. *See* OWNER.

- expenses of, when recoverable by vestry, 58.

Pawnbroker. *See* BAILEE.

- duties of, with regard to the article pawned, 597.
- action against, for recovery of stolen property, 46.
- lien of, 609, n, 613.

Payment into Court,

- in what actions allowable, 1351.
- in actions of detinue, 641.
- in actions of replevin, 770.
- by constables and others entitled to protection when acting in pursuance of statute 829.
- effect of, in actions of tort, as to the admission or non-admission of the cause of action stated in declaration, 1369.
- costs on, effect on, of County Court acts, 1414.

Peace,

- maliciously summoning a person to be bound over to keep, is actionable, 851.

Penalties. *See* BY-LAWS—COSTS.

- on nuisances, &c., arising from construction or maintenance of gas works, 275.
- on encroachments, deposit of rubbish, &c., on, or removing turf from, highways, 313.
- on obstructions; or persons suffering filth to flow on highway, 230.
- on sinking pits, erecting windmills, steam engines, &c., adjoining highway or turnpike-road, 230.

Penalties—Continued.

- on persons playing games, letting off fireworks, guns, &c., near highway, 230.
- for fouling water in well, fountain, or pump, 276.
- for non-consumption of smoke, 277.
- on masters of vessels throwing rubbish, &c., into navigable river, 272.
- on leaving open accommodation gates across railway, 250.
- on servants for negligently or carelessly causing fires, 357.
- on publishing lectures without consent of lecturer, 61.
- on unlawful importation or sale of books, 60.
- for the unlawful representation of dramatic or musical compositions, 63.
- for the piracy of prints and engravings, 66.
- for the piracy of useful or ornamental designs, 65.
- on the copying, &c., of paintings, drawings, and photographs, 67.
- for selling pirated copies of sculpture, &c., 64.
- for the use of counterfeit trade-marks, 70.
- under Metropolitan Building Act, for not making good injury done to adjoining owner, 241.
- on building owner, who damages adjoining buildings in London, 569.
- under by-laws of railway company, 986.
- for the commission of nuisances are cumulative on remedy by action, 71, 569.
- given by statute when a cumulative, exclusive, or alternative remedy to that given by common law, 59, 70, 569.
- recovery of, before justices, 266, n.
- imprisonment for non-payment of, 277.
- distress or imprisonment for non-payment of, 996, 998, 996, n.

Perjury,

- inducing a person to commit, is actionable, 41.

Permission. *See* LICENSE.

- user of easements or profits by, will not raise presumption of grant, 151.

Personalty. *See* CHATTEL—CONVERSION—TRESPASS.**Petroleum,**

- carriage and storage of, 649, 649, n.

Pew,

- title to, 417.
- title to, by prescription, 150.

Photographs. *See* PRINTS.

- copyright in, 67.
- can not be copied without the consent of the owner, 21.
- on sale of, whether copyright in passes, 67.

Pictures,

- can not be copied without the consent of the painter or owner, 21.

Pigeons. *See* PIGEON SHOOTING.

- rights of lessees with regard to, 325.
- remedy for crops injured by, 380.
- damage feasant may be shot, 749.

Pigeon Shooting,

- when a nuisance, 225.

Pigs. *See* CATTLE—PIGSTYE.

- keeping of, not necessarily a nuisance, 54.
- keeping, in London, 219, n.
- sale of diseased, when unlawful, 7.

Pigstye,

- is a nuisance, 217, 219.

Pilchards. *See* FISHERY.

Piles.

injuries from, in bed of navigable river, 236.

Pilot.

employment of, when compulsory, 556.

Pipes. See DRAINS.

Pirate. See SALE—SHIP.

Pistols. See GUNS.

Pit. See SHAFT.

Plaintiffs. See AMENDMENT—EVIDENCE—PARTIES TO ACTIONS—TRIAL,

joint or several, in actions of tort, 1302.

in actions for negligence, 577, 631.

in actions of detinue where the property belongs to two or more, 632.

in actions for conversion, 524.

joint tenants or tenants in common, 525.

in actions of trespass to land, 97.

in actions for consequential injuries to land, 97.

tenant or reversioner, 98, 101, 108.

joint tenants or tenants in common, 98.

in actions for assault, 830.

if two or more are assaulted, 830.

in actions for false representation, 1208.

in actions against carriers, 692.

in actions for false imprisonment, 830.

if two or more are imprisoned, 830.

in actions of replevin, 760.

in actions against sheriffs, 936.

misjoinder of, will not prevent judgment for plaintiff entitled to succeed, 1321.

non-joinder or misjoinder of, may be amended, or judgment given in favor of those entitled, 1302.

are liable for trespasses committed by the sheriff or his officers in the execution of a writ, if they interfere, or give wrong directions, otherwise not, 937.

or the process is set aside for irregularity, 937.

if residing abroad, or in Scotland or Ireland, security for costs from, 1439.

expenses of, as witness may be allowed, 1437.

Pleadings. See DECLARATION—LEAVE AND LICENSE—NOT GUILTY—NOT GUILTY BY STATUTE—PLEAS—VENUE.

in case of patents, 76.

Pleas. See NOT GUILTY—NOT GUILTY BY STATUTE.

to the jurisdiction, 1342.

requisites of special, 1348.

puls darrein continuance, 1349.

payment into court, 1351, 1369.

infancy, 1352.

accord and satisfaction, 1353.

pendency of another action for the same cause in a different court, 1354.

judgment recovered, 1355, 1356.

bankruptcy of plaintiff, 1359.

Statute of Limitations, 1361.

not guilty in actions for injuries to land, 102.

in actions of trespass to land, 424, 434.

in justification of trespass, 447.

leave and license, 446, 447.

liberum tenementum, and evidence thereunder, 387.

entry to abate a nuisance, 266.

entry to levy distress, 772.

equitable, 428.

Pleas—Continued.

- in actions for trespass to goods, cattle, &c.—seizure of the goods, cattle, &c., damage feasant, 773.
- in actions for excessive distress, a previous recovery of the goods, in an action of replevin, 774.
- in actions for nuisances, *e.g.*, fouling water, &c., not guilty, 286.
 - evidence under, 291.
 - leave and license, 103.
 - prescriptive right to obstruct water by throwing in cinders, &c., 287.
 - prescriptive right to divert water, 102.
 - prescriptive right to carry on offensive trade, 289.
 - of obstruction of watercourse, damaging defendant's land, 288.
- in actions for waste, 365.
- of not guilty in actions for negligence, 585.
 - contributory negligence admissible in evidence under, 585.
 - or inevitable accident, 585.
- in actions of trover—
 - not guilty, effect of, 529.
 - not possessed, 530.
 - of justification on ground that plaintiff's goods were on defendant's land, or that his dog was chasing defendant's sheep, &c., 531.
- of son assault demesne in action of trespass, 793.
- of not guilty in action against sheriff for escape, 941.
- in replevin, 765.
- equitable, 481, 1363.
- of justification must be specially pleaded, 102, 529.
- several, when allowable with or without leave of court or judge, 1345.
- to be construed distributively, 1365.

Pledge. *See* BAILEE—PAWNBROKER.

Plough,

- right to turn on another's land, 113.

Police. *See* CONSTABLE.

Policy,

- equitable owner of, entitled to possession of, 491.

Poll,

- right of every voter to demand, 40.

Poor-Rate,

- distress for non-payment of, 978.

Port.

- right of public anchorage in, 406
- limits of, may be altered by the Commissioners of Treasury, 406, n.
- shingle on shore of, not to be taken if forbidden by Board of Trade, 406.

Possession,

- is sufficient title against a wrong-doer, 532, 537.
- constructive, 533.
- slight evidence of, sufficient against wrong-doer, 442.
- of heir, against wrong-doer, 444.

Postmaster,

- duty of, to deliver, and liability for non-delivery of, letters, 31.

Postmaster-General. *See* POST OFFICE.

- not responsible for neglect of subordinate officers, 30.

Post Office,

- officers of, responsible for their own neglect to perform their duties, 30.

Poultry,

- trespasses by, 377.

Pound. See DISTRESS

action or indictment for breach of, 735.

keepers of, not liable for detention of animals impounded, although distress wrongful, 753.

Prebendary,

mandamus to admit, 1495.

Pre-emption. See COMPANY.

Prescription. See PRESCRIPTION ACT.

title by, *et seq.* 149.

must be laid in tenant of fee, 149.

incorporeal hereditaments only claimable by, 149.

easements acquired by, 113.

allowed to supply the place of a lost grant, 150.

title to pews by, 150.

water by, 161.

right by, to carry on offensive or noisy trade, or to foul or obstruct water, 221, 224, 288.

right to use of, or to pollute water by, 92, 287.

what interruption of enjoyment prevents acquisition of title by, 170.

title by, not lost by mere non-user, 171, 174.

pleas of, 103.

in actions for trespass to land, 433, 442.

Prescription Act, *et seq.* 152.

what profits or easements may be claimed under, 153.

enjoyment to gain title under, must have been "of right." and not by permission, &c., 156.

what is an interruption within meaning of, 152, 171, 174.

what admissible evidence under, 152.

periods of infancy, idiocy, coverture, and tenancies for life, &c., excluded from computation of time under, 152, 174.

except in case of light, 167.

pleadings under, in actions for trespass to land, 433, 442.

Principal,

when liable for the fraudulent act of his agent, 1197, 1209.

when liable for wrongful acts of agents, 1310.

subsequent ratification, 1319.

when stopped from denying authority of agent, 1376.

Printer,

duty of, to print his name and place of business on first and last sheets of book printed, 1147.

lien of, 611, 614.

Prints,

infringement of copyright in, 66.

copying of, by photography, is unlawful, 66.

Privileged Communications. See LIBEL—SLANDER.

Privy. See TENANT.

is a nuisance, 218, 222.

Privy Council,

power of, as to importation of animals from abroad, 7, n.

Probate

mandamus to register, 1496.

Proctor,

lien of, 618.

Profit a prendre,

what it is, and how claimable, 114.

Profit a prendre—Continued.

- to cut down and carry away trees, corn, &c., 130.
- claim of, must not be unlimited, 115.
- not claimable by the inhabitants of a parish by custom, 133.
- presumption of grant of, from long user, 151.
- what may be claimed under Prescription Act, 153.
- right to take, valid after 30 years' enjoyment under Prescription Act, indefeasible after 60 years' user, 152.
- enjoyment of right of, must be continuous, but user need not be, 171, 174, 176.
- when may be required over land let on lease, 151, 158.
- extinguished by unity of possession of dominant and servient tenements, merger of, by unity of possession, 130, n.
- transfer of, 130, *et seq.*
- declarations for obstructions to, 197.

Prohibition,

- object of, to restrain acts done without jurisdiction, and to what courts it runs, 1453.
- lies, whenever act sought to be prohibited is a judicial act, by whomsoever done, *e.g.*, an order by Church Building Commissioners stopping up a foot-path through a churchyard, &c., 1453.
- before judgment, 1454.
- after judgment and execution, 1455, 1459.
- to the ecclesiastical Court, 1457, 1459.
- to the County Court, 1331, 1459, 1463, n.
- to coroner, 1453.
- to the Lord Mayor's Court, 1460.
- not taken away by appeal, 1457.
- formerly issued against public nuisances, 296.
- ancient writ, of against waste, 359.
- proceedings in, 1461, 1467.
- application for, operates as a stay of proceedings, 1463.
- damages—costs, 1430, 1461, n.
- setting aside writ of issuing out of Chancery, 1466.

Promissory Notes. *See* **BILLS.****Prosecution.** *See* **COSTS—MALICIOUS PROSECUTION.****Prospect.** *See* **VIEW.****Prospectus.** *See* **COMPANY—DIRECTORS.****Protection Order.** *See* **WIFE.****Provisions.** *See* **FOOD.****Public Commissioners.**

- by laws made by, 56.

Public Company. *See* **COMPANY**

- by-laws made by, 56.

Public Health. *See* **CORPORATION—OWNER.**

- acts relating to, 266.

Public House,

- owner of may eject persons acting in a disorderly manner, 793.

Public Officer. *See* **MAYOR—MILITARY OFFICER—NAVAL OFFICER—SHERIFF.**

- duty of, to perform ministerial functions, 30.
- not liable for neglect of subordinate officers, 30.
- conversion of goods by, 475.
- can not sue for remuneration imposed by statute, unless expressly given, 77.
- character of, need not be proved unless it is especially denied, 534.

Public Works. *See* **COMMISSIONERS OF PUBLIC WORKS.**

Publisher,
lien of, 614.

Pump. *See* WATER—WELL.
grant of right to use, implies right to repair, 118.
penalty for fouling water in, 276.

Quarry,
negligence in management of, near highway, is indictable, 232.
obligation to fence, 228.

Quarter Sessions. *See* JUSTICES.
prohibition to, 1453.
mandamus to, to hear appeal, 1501.

Quo Warranto,
where an office is full, but has been usurped by intruder, 1495.

Rabbits. *See* COMMON—GAME.
title to, when killed, or in a warren, 486.
remedy for crops or grass injured by, 380.

Race Horses. *See* HORSES.

Race-Stands,
injuries from falling of, 548.

Railway. *See* RAILWAY COMPANY.
mines under, 215.
mines under, or adjacent to, 124.
trees overhanging, 414, n.
injuries to person going to, on business, 258.
injuries to children trespassing on, 567.

Railway Company. *See* COMMON CARRIER—COMPANY—SHARES—STATUTORY COMPENSATION.

- not liable to an action for nuisances necessarily created in carrying out the powers of their Act, 1040.
- duty of, to make accommodation works, such as gates, fences, culverts, &c., 1084.
- disturbance of right of common by, 134.
- are liable in trespass for taking a man's land without previous performance of the statutory conditions, 1086, n. 1546 N
- liability for damage done to highway during construction of, 247.
- negligence of, in not making culverts, &c., to carry away waste water, 1041.
- duty of, to maintain fences against adjoining owners and their cattle, but not against persons or cattle trespassing, 244.
- liability of, for dangerous state of their line, though the person injured is conveyed in the carriage of another company, 693.
- liability of, for ruinous or insecure bridges, viaducts, embankments, &c., except in case of extraordinary floods, &c., 246.
- duty of, to maintain bridges, with their approaches, &c., over highways, 247.
- duty of, to maintain gates at level crossings, of a certain size, and to keep them always closed, except for the passage of persons, cattle, &c., across the line, 248.
- not bound to keep accommodation gates closed, 250.
- negligent management of stations by, 245.
- not bound to fence their own yards, &c., 244.
- not liable for the negligence of contractors employed by them, 580.
- but will be for the natural consequences of work properly performed by contractor, and handed over to them, 589.
- are common carriers, 650.
- not liable for necessary nuisances in the carrying on the traffic, but are for unnecessary ones, *e.g.*, noises unnecessary made near a highway, setting fire to property by sparks from the engine, &c., 1042.

Railway Company—Continued.

- fires caused by, spreading to adjoining property, 355.
- negligence of, or of its servants or agents, 545, 547.
 - in stopping at stations, 545.
 - in not repairing bridges, &c., 546.
 - in passing level crossings, 547.
 - causing injury to servants in their employ, 565.
- duty of, to take reasonable precautions for the security of its servants, 254.
- not bound at its peril to provide roadworthy carriages, 545.
- acceptance of goods or passengers by, to be carried beyond the limits of its own line, 670, 671, 693.
- conveyance of passengers, animals, or goods by, partly by rail and partly by sea, 670.
- liability of, for negligence in carrying servant, though the servant's fare be paid by the master, 692.
- liability of, for injuries to servants injured by their negligence, but not to master, 1272.
- liable for injuries to infants, though no fare paid, 545.
- responsibility of, for injuries caused to passengers in carrying out rules of, 246.
- obligation of, to carry passengers' luggage, 649. *See* LUGGAGE.
- liability of, for negligence of porters in delivery of luggage, 671.
 - for loss of luggage placed in the same carriage with passenger, 671, 698.
 - for loss of merchandise carried as luggage, 672.
 - in delivering luggage at stations, 669, 671.
 - for loss of luggage in excursion trains, 653, 664, 671,
- delivery of goods by, 668, 674.
 - not liable for injuries caused by defective packing (unless patent), or other negligence of consignor, 653, 655.
- negligence in delivery of cattle by, 244.
- liability of, for escape of dogs, 653.
- not responsible for the malicious or negligent acts of strangers, 546.
- not responsible for delay caused by the negligence of another company running on their line, 546, 652.
- liability of, for negligence of their porters, at station used in common by other companies, 36.
- evidence of negligence of, from the mere occurrence of the accident, 546.
- power to make "reasonable" conditions as to receiving and delivering animals, goods, or luggage, 664, 666.
 - what is a reasonable condition, 664, 666, 670, n.
- special contract with, for carriage, under Railway Traffic Act, must be signed, 665.
 - and the signature fairly obtained, 699.
- liability of, for negligence, though goods carried under a special contract, 666.
- duty of, to afford equal facilities of carriage to all, 652.
 - but not equal facilities for storage, 652.
- duty of, to give equal accommodation to all, 705.
 - but may charge lower rates for large consignments at regular periods, 705.
- charges of, must be equal—packed parcels, 678.
 - where passengers carried partly by rail, and partly by sea, 677.
- duty of, to give account how much is charged for use of railway, and how much for unloading and delivery, &c., 678.
- responsibility of, for luggage left at cloak rooms, 605, 667.
- conversion of goods by, 477.
- liability of, for negligence or detention of property by their servants, 693.
- duty of, to disinfect cattle trucks, 649.
 - to provide animals carried with food and water, 649.
 - to provide means of communication between passengers and guard, 545.
 - to consume their own smoke, 277.
- by-laws of, to be hung up at every station, &c., 986.
 - how proved, 986.

Railway Company—Continued.

- lien of, 676.
 - for food supplied to animals carried, 649.
 - not for disinfecting cattle trucks, 676.
 - nor for goods previously carried, 676.
- arrest or assault by servants of, 832.
- arrest by servants of, 817, 1309.
- are liable for not starting trains at time mentioned in their time tables, 1195
- 1211.
- liability of, for false representations as to time of trains starting, &c., contained in their time tables, 651.
 - production of ticket only is not sufficient to prove contract with, time-bills must be produced, 651.
- duty of, to use all reasonable exertions to forward passengers; secus, cattle or goods, 652.
- can not prevent passenger from getting down at nearer station, if he has paid his fare to a further one, 679.
- liability of, for libel, by publication of false telegram, 1140.
- not liable for malicious prosecution instituted by their servant without their knowledge, 872.
- may distrain engines, &c., encumbering their line, 750.
- where it carries on its business within meaning of County Court Acts, 1327.
- when entitled to notice of action, 1074.
- reports of officials and medical men to, when may be inspected, 1353, n.
- protection of rolling stock and plant of, from execution or distress. *See* AD-DENDA.
- protection of property of, from action or execution (without leave of Court), after filing of a scheme of arrangement with its creditors, 908.
- summary proceedings against, for contravening the Railway Traffic Act, 691.
- injunction from paying dividends out of capital, &c., 1443.
- to enforce compliance with Railway and Canal Traffic Act, 705.
- mandamus to, to make compensation for lands taken, or statutory injuries, 1499.
- to restore highway, 1499.
- indictment against, 299.

Rain. *See* WATER.

Ratification. *See* FALSE IMPRISONMENT.

Rats,

- damage caused by, in causing cisterns to burst or leak, 95.
- injuries caused by, to goods on board a barge, 653.

Recaption. *See* CONVERSION.

Receiver,

- may distrain, if appointed by Court of Chancery, but not otherwise, 711.

Recreation. *See* EASEMENT.

- right of by custom, 133.
- right to go on land for, not claimable under Prescription Act, 753.

Rector. *See* ECCLESIASTICAL DILAPIDATIONS—INCUMBENT.

- is entitled to freehold of church, chancel, and churchyard, 405.
- is entitled to keep keys of church, 405.
- right of, to compensation for churchyard taken under Act of Parliament, 405, n
- conversion of communion plate by, 405
- mandamus to institute, 1495.
- mandamus to, to swear in churchwarden, parish clerk, or sexton, 1495.

Reference. *See* ARBITRATOR—COSTS.

Refusal. *See* CONVERSION.

Register,

- orders for rectification of, 1524.

Registrar,

of County Court. *See* BAILIFF.

of births, liable for refusing to register a birth, 30. ⁴

Registration. *See* COPYRIGHT.

of title, 387, n.

Remainderman. *See* REVERSIONER.**Rent.** *See* DISTRESS—LANDLORD.

when payable with or without agreement, 709.

not due till end of day appointed for payment, 716.

payment of, establishes the fact of a tenancy between payer and payee, 781.

unless made under a mistake or under false representation, 781.

what payments of, are valid against landlord, 769.

payment of, in advance, not valid against mortgagees unless tenant is bound to do it, 711.

receipt of, is *prima facie* evidence of title, 290, 386, 443, 1378.

wrongful receipt of, for twenty years, against person rightfully entitled,

tender of, makes distress wrongful, 715.

tender of, and expenses, makes sale of distress unlawful, 738, 740.

tender of, may be made to bailiff who makes the distress, 739.

Repairs. *See* TENANT.

doing, is evidence of occupation or ownership, 290.

Replevin. *See* AVOWRY.

at common law, 754.

distinction between, and trespass or trover, 754.

not available against bailee claiming a lien, 754.

must be made in county court, but action may be in county or superior court, 755.

and if commenced in county court may be removed into superior court by certiorari, 755.

for goods distrained damage feasant, 757.

for goods improperly taken by distress or otherwise, except under process of superior court, 1018.

can not be joined with another cause of action, 1337.

plaintiffs in action of, 760.

bailees, agisters of cattle, husband and wife,

declarations in, 762.

pleas in, 765.

avowries in, 766, 771.

for double rent, 767.

by joint-tenants, co-parceners, &c., 768.

payment into court in actions of, 770.

Repository. *See* HORSES.**Reputed Ownership.** *See* BANKRUPT—TITLE.**Return.** *See* MANDAMUS.**Returning Officer.** *See* MAYOR—SHERIFF.

duties of, partly judicial, partly ministerial, 40.

liability of for refusing to receive a vote, 40.

Revenue Officers. *See* CONSTABLE.

how far liable for detention of luggage, merchandise, &c., 1054.

when entitled to notice of action, 1075.

Reversioner. *See* LANDLORD—PLAINTIFFS.

when entitled to sue for injuries to land, 98, 101, 108.

when may sue for nuisance to land demised, 282.

right of, to sue for waste by fire or otherwise, 362.

for obstructions of easements, *e.g.*, a right of way or light, or profits à prendre when injury permanent or the obstruction is to a right, 195, 197, 212

Reversioner—*Continued.*

- for obstruction of way by locking a gate, 197.
- for injury to right of support or light, 198, 208, 212.
- for the pollution of water, 284.
- for injury from eaves-dropping, 291.
- for diversion of water from mill, 195.
- for timber unlawfully cut, 461.
- for alterations by lessee of premises, or cultivation, although premises increased in value thereby, 323, 325, 368.
- and he has alternative remedy on a covenant, 324.
- to contest easements obtained over land on lease or in the hands of a tenant for life, 175.
- to resist claim to easement, &c., after determination of term, 153.
- right of entry of, to inspect waste, 352.
- right of, if house or buildings destroyed by fire, 353, 357.
- may sue for damage to his reversion, 421.
- can not sue for a mere trespass, 195, 421.
- joint tenants, co-parceners, &c., to join in action, 421.
- when liable for creation or continuance of a nuisance on land demised, 196, 222.
- although he has parted with the land, 222.
- evidence of, by receipt of rent. *See RENT.*
- damages recoverable by, in actions for nuisances to demised premises, 292.

Riding. *See HORSES.*

- injuries occurring from negligence in, 36.

Right,

- procuring the violation of, is a tort, 18.

Riot,

- liability of hundred for damage caused by, 418.

Riparian Proprietor. *See INJUNCTION—RIVER—WATER.*

- right, to the use of water, 160.
- to fish, 147.
- to take water from canal, 96.
- to remove obstructions to flow of water made by another proprietor, *e.g.*, by enlarging a dam or weir, 269.
- with consent of adjoining riparian proprietor, to alter channel of stream, 93.
- whether he can assign his right to water to a person not a riparian proprietor, 93.

River. *See BATHING—CONSERVATORS—FISHERY—WATER—WATERCOURSE.*

- soil of tidal, between high and low water mark is *prima facie* in Crown, 406.
- soil of navigable, is vested in Crown, 235.
- navigable, title to soil of, towing paths, and banks of, 122, n. 412, 442.
- public right of navigation in, 406.
- right of public anchorage in, 406.
- right to tow on banks of, 122.
- obstruction to navigation of, when actionable at suit of private individual, 279.
- obstructions in navigable, by oyster beds, sunken vessels, telegraph wires, wharfs piles, &c., remedy by action or indictment, 235.
- obstructions in, by wharfs, sunken vessels, &c., when indictable, 314.
- removal of obstructions by weirs, nets, &c., in navigable, 272.
- penalty on persons throwing rubbish into navigable, from passing vessels, 272.
- non-navigable, title to soil of, 407.
- encroachments on, by embankment, 4.
- encroachments on, by erecting jetty, &c., unlawful, 407.
- enlargement of prescriptive dam on, right to remove, 269.
- right of stepping stones across, does not include right to have bridge, 269.
- pollution of, may be restrained by injunction, 1085.

Roof. *See WATER.*

Rooks,

- driving away, from a rookery, not actionable, 20.

Sailor,

may sue shipowner for not keeping medicines on board, 59.

Sale. *See* BILL OF SALE—CONVERSION—TITLE.

effect of, on title to goods, 494.

in market overt changes the property, 493.

pretended, does not pass the property, 537.

colorable or fraudulent, 496.

obtained by fraud is a nullity, 467.

goods taken by pirates, 493, n.

right of, where goods deposited as security for loan to be repaid at a certain time, 482.

distinction between, and bailment, 595, n.

Salmon,

statutes relating to, 266.

inspectors and commissioners of fisheries, 266, n.

Salvage,

recovery of, where both ships in fault, 592.

lien for, 609.

Sand. *See* SEA-SHORE.

claim to take in alieno solo, when valid, 133.

School,

interference with, when actionable, 22.

keeping, not necessarily a nuisance, 225.

Schoolmaster,

has not a freehold office, 1490.

may lawfully chastise his pupils, 840.

Sculpture,

remedy for infringement of property in, by copying, &c., 64.

Sea. *See* BATHING—FISHERY—SEA-SHORE—SEA-WALLS.

soil of, is vested in Crown, 235.

title to land gained from, 408, n.

Seaman. *See* SAILOR.

smuggling by, on board ship, is a tort, 14.

Sea-Shore,

right to soil of, 147.

title to, between high and low water mark is *primâ facie* in Crown, 406.

may belong to manor by grant from Crown, 406.

is *primâ facie* extra-parochial, 406.

title to waste land adjoining, 408.

or land gained from sea, 408, n.

custom to take sand and gravel from, 133.

to dry nets on, 147,

right to pass over, to bathe, &c., 148.

shingle on, powers of Board of Trade over, 133, & 406, n.

Sea-Walls,

right to erect, 238.

erection of, not actionable, 4.

duty of person benefitted by, to repair, 146.

liability for non-repair of, by corporation, 1324.

repair of, by Commissioners of Sewers at expense of owner, 312

non-repair of, by lessee, is waste, 361

destruction of, by tempest, &c., is not, 321.

dedication of highway along, 302.

injuries to, from ships running against, 563.

Securities. See TITLE-DEEDS.

right to possession of, belongs to person beneficially interested, 642.

Security for Costs, 1439.

Seduction. See COSTS—PARENT.

when actionable or not, 51.

action for, can not be brought in, but may be remitted for trial to, county court, 1328.

who may sue for, 1280.

declarations in actions for, 1281.

pleas in actions for not guilty, and evidence thereunder, 1281.

evidence in actions for, proof of service, 1282.

damages in actions for, 1283, 1286.

Self Defense.

acts done in, not actionable, 2.

Servant. See MASTER—SLANDER—WORKMAN.

is responsible for wrong in carrying out his master's orders, 526.

is responsible for injuries to land committed by order of his master, 99.

is liable for his wrongful acts done by command of master, though master may also be, 693, 1312.

liability of, for negligence, though master also liable, 551.

when master liable or not for acts of, 36.

master liable for negligence of, 550, 551.

master not liable for injuries caused by negligence of, to fellow-servant, 257.

though engaged by him, 579.

must indemnify the master from the consequences of his negligence, 37.

the proper person to sue for injuries from negligence of bailor in not disclosing the dangerous nature of goods bailed to the servant's master, 631.

may sue for a wrongful act, *e.g.*, assault, though master may sue also, 1293.

i.e., if he is thereby deprived of his servant's services, 830.

may sue carrier for negligence in carrying him, though his fare is paid by his master, 692.

injuries to, from dangerous premises or employment, 254.

can not recover for injuries received in a dangerous employment, if rules made for his safety be habitually violated, 567.

inducing to leave service, or harboring after he has left, is actionable, 41, 1272.

unless master has recovered damages from the servant for breach of his contract of service, 1355.

damages recoverable, 1286.

possession of cottage, &c., by, is the possession of the master, 391.

possession of goods by, is the possession of the master, 524.

conversion of goods by, 475.

not entitled to take away their livery, 489.

penalty on, for carelessly or negligently causing fires, 357.

giving character of, is a privileged communication, 1103.

Service. See SEDUCTION.

Servitude. See EASEMENT—PROFIT A PRENDRE—SUPPORT.

prædial or urban, 81.

natural or conventional, 81.

instances of, given by Bracton, and how created, 114.

of receiving water from higher, and transmitting it to land lower down the stream, 82.

of support from adjoining land, 84, 86.

torts arising from the disturbance of rights of, 78.

transfer of, passes by sale to vendee, 87.

Settlement. See MARRIAGE SETTLEMENT—WIFE.

property under, does not pass to trustee on bankruptcy of husband, 518.

effect of bankruptcy on, 507.

Severance. *See* STATUTORY COMPENSATION.

right of landowner to compensation for, 124.

Sewage,

acts for utilization of, 266.

Sewer. *See* COMMISSIONERS OF SEWERS—DRAIN—TENANT—WATER.

public, repair of, 318.

grant of right of, 129.

obligation of occupier to keep repaired, 218.

power of making, through private property, 266.

expense of construction of, how recoverable, 266.

Sexton,

rights of, in burial ground substituted for old churchyard, 405.

mandamus to elect, 1494.

Shaft,

obligation to fence, 228.

illegality of, adjoining turnpike road or highway, 230, n. 232.

Shareholder. *See* COMPANY—REGISTER—SHARES.

duty of, to execute transfer of shares, 28.

remedy of, by mandamus against company. *See* MANDAMUS.

Shares,

in reputed ownership of bankrupt, 510, 512, 514.

mandamus to register transfers of, 1496.

Sheep. *See* CATTLE.

negligent management of, if diseased, 35.

sale of diseased, when unlawful, 6, 7.

injuries to, from dogs. *See* DOG. 35, 263.

importation of, from abroad, 7, n.

Sheriff. *See* INTERPLEADER.

how far a judicial officer, 891.

is liable for refusing a poll at elections, 40.

duties of, at elections, 40.

may order person disturbing county election to be taken into custody, 942.

duties of, with regard to replevin, now transferred to registrar of County Court, 754.

duties of, in compensation cases, 1061, 1064.

disqualification of, in a railway compensation case on account of interest, 885.

certificate of, on inquisition for costs, 1409, 1411, 1415.

liability of, for escape of judgment debtor, 918, 931, 938.

action against, for money paid under threat of execution, which the sheriff had no right to levy, 955.

sale by, only conveys such title as the sheriff possesses, 1190.

sale by, conveys no better title than the execution debtor possessed, 911, 937.

conversion of goods by, 533.

duties and liabilities of, in the execution of writs, 897, 908, 938.

must make due inquiry before executing writ of *fi. fa.*, &c., 1187.

but may sue persons officiously interfering, and giving false information and directions, 1187.

execution levied by wrong officer, 897.

must execute the writ that is first delivered to him, unless countermanded, 898.

liability for the acts of the under-sheriff and his officers—special bailiffs, 899.

entering the house of third persons, 901, 902, 909.

power to break open a house or outbuildings in the execution of process, 902, 904, 905.

illegality of seizure, if entry illegal, 905.

remaining in the house an unreasonable time, 906.

Sheriff—Continued.

- seizure of goods of wrong person, though of same name as defendant, 907, 910, 935.
 - or of wrong person, 912, 935.
 - seizure of goods of testator for debt due from executor, 907.
 - method of levying, some overt act must be done, a man left in possession, &c. 907.
 - must execute subsequent valid writ against goods, though he has previously seized under a void one, 907.
 - seizure of protected or privileged goods, in Royal Palace, &c., 908.
 - rolling stock or plant of railway company, 908.
 - seizure of goods *bonâ fide* sold before the levy without notice, 908.
 - seizure by, under writ of goods which have been given to another, 488.
 - can not sell property on which execution-debtor has a lien only, 626.
 - seizure and sale by, of goods which the execution-debtor has hired, is only actionable against, if damage ensues, but the real owner may sue the purchaser, 937.
 - seizure of goods of companies after a winding-up order, 908.
 - seizure of property of railway company after filing of a scheme of arrangement with its creditors, 908.
 - seizure of goods and receipt of notice of adjudication of bankruptcy before sale, 909.
 - duty of, to pay rent to landlord before removal of goods seized under an execution, 723.
 - where rent (not ground-rent) is in arrear from execution-debtor, 910, 939, 953.
 - sale of goods seized, 911.
 - may sell goods seized by auction or otherwise, 499.
 - liability of, for selling more goods than necessary, 467.
 - sale of goods by, in possession of bailee or pawnee, 467.
 - duty of, when execution levied for more than £50, 506.
 - method of arrest, 917.
 - arrest of wrong person, or of right person, under wrong name, 912, 935.
 - where the injury, arrest, &c., has been caused by the misrepresentation of judgment-debtor, 922.
 - arrest or seizure on Sunday, or of clergymen while performing divine service, 914.
 - arrest under void writ does not authorize detainer under valid one; *secus* in the case of goods, 907, 915.
 - liability of, for seizure or arrest under forged writ, but not under one void for irregularity, 918.
 - arrest of privileged persons, 916.
 - not liable for arrest of person privileged from arrest as a witness, 870.
 - countermand of writs, 917.
 - power to receive the judgment debt, 917.
 - may discharge judgment debtor on payment of debt with consent of judgment-creditor,
 - or on written order of attorney in the cause, 918.
 - return to writ—false return, 923, 949.
 - fees payable to, extortion, 924, 940, 959.
 - payment of proceeds to execution-creditor, 930.
 - power of, to protect himself from actions, and to compel rival claimants to property seized under an execution, to interplead, 909.
 - except in cases of claims for rent, 909.
 - or where sheriff has illegally broken open an outer door, or otherwise misconducted himself, or has delayed in claiming the protection of the Court, 909.
 - plaintiffs in actions against, 936.
- Declaration against :**
- for not levying, or for an escape, 938.
 - for removing goods without paying the rent due to the landlord, 939.

Sheriff—Continued.

for extortion, 940.

Pleas in actions against :

not guilty, 941.

justification in execution of legal process, 943.

replications, 944.

evidence in actions against, for the plaintiff, 948.

for the defendant, 953.

damage in actions against, 955, 958.

injunction to restrain from selling landlord's fixtures, 911.

prohibition to, when it lies, 1455.

Shingle. See SEA SHORE.**Shipmaster.** See MASTER OF SHIP.

power of to preserve order, &c., in his steamer, 814.

may lawfully chastise seaman or imprison passengers if necessary for the preservation of discipline or the safety of the ship, 840.

duty of, to give notice to consignee of arrival of goods, 668.

Shipowner. See MASTER OF SHIP.

is a common carrier, 650.

liability of, for negligence of master, 556, 563.

unless the charter-party amounts to a demise of the ship, 558.

how far exempt from liability for negligence of master where the employment of a pilot is compulsory, 556.

liability of, for loss of life or damage to goods, limited by Merchant Shipping Act, 556, 559, 592.

liability of, for acts of crew appointed by master, 36.

landing of goods by, where consignee fails to take them away, 675.

liability of, for not keeping medicines on board, 590.

liability of, for loss of gold, silver, &c., or for loss by fire, or robbery, unless value is declared, is limited by statute, 607, 673.

may sue master of ship for the consequences produced by the latter having been guilty of smuggling, 37.

may recover from person guilty of smuggling on board his ship the loss he thereby incurs, 14.

lien of, 609, 620.

Shipper. See BAILOR.**Ships.** See COURT OF ADMIRALTY—MASTER OF SHIP—SHIPMASTER.

negligence in the management of, 556, 563.

negligent navigation of, 592.

mooring of, across navigable river, when actionable, 279.

duty of, to show a light 558.

jurisdiction of Court of Admiralty and County Court in cases of collision between, or torts in carriage of goods by, 1334.

what are ships, 1334.

collisions between, remedy in Court of Admiralty where both in fault, 576.

collisions between, causing death or personal injury, inquiry by Board of Trade a condition precedent to action, 576.

collisions between, damage, how apportioned in Court of Admiralty, 567.

collisions between foreign, out of English jurisdiction, 557.

title to, 483, n.

damages in action for conversion of, 539.

remedy for, if wrongfully seized for being engaged in slave trade,

seizure of, under Foreign Enlistment Act, 526, n.

damage for seizure of, under Customs Act, 543.

sale of, if formally engaged in acts of piracy, 493, n.

injuries to persons going to, on business, 252, 258.

master of, liable for throwing rubbish into navigable river, 272.

injuries to, while under convoy of man-of-war, 43.

obstructions in navigable river from sunken, 236.

Ships—*Continued.*

sunk in navigable river, whether owner liable to indictment for obstructions caused by,
in reputed ownership of bankrupt,
lien on, 611, 611, n.
joint owners of, should join in actions for injuries to, caused by negligence, 578.
smuggling by master of *See* SHIPOWNER.

Shipwright,

lien of, 611.

Shop,

injuries to persons entering on business, 258.

Shopkeeper,

right of, to erect stalls in front of their shops, 26, n.

Singer. *See* LIBEL.

Slander. *See* COSTS—LIBEL.

distinction between, and libel, 1087, 1088.
not actionable, may become so, if printed, 1088.
and printer or publisher, not utterer, is liable, 1088.
when actionable, 8.
each utterance of, is actionable, 1355.
repetition of, who liable for, 11.
repeater of, can not discharge himself by giving up name of original utterer, 1140, 1146.
of a wife, when actionable or not, 51.
malice is implied in, 1090.
but may be rebutted, 1119, 1130, 1137.
mere abuse is not, unless spoken of a man in his profession, business, or employment, 1116, 1121, 1122, 1123.
or special damage ensues, 1118, 1121.
by imputation of an indictable offense, 1119.
or that a man has a contagious disorder, 1120.
puffs of rival tradesmen, 1121.
by clergymen, 1125.
causing dismissal of servant, when actionable, 1127.
special damage caused by, must be the natural result of the words spoken, and not the wrongful or capricious act of a third person ;—the repetition, therefore, by A. of slanderous words used by B. may be actionable, though the original utterance by B. be not so, 1127, 1129, 1153, 1159.
privileged statements—
respecting servants, or in course of public duty, 1131.
charges of felony, &c., 1132.
by advocates, defendants, or prisoners, in course of judicial proceedings, 863, 1133.
by judges or magistrates in the course of their duty, 883, 1135.
interpretation of words used, 1136.
of title, 1137.
special damage must be proved, and malice and falsehood, 1137.
to a patent, 1137.
action for, can not be brought in, but may be remitted for trial to, County Court, 1328.
plaintiffs in actions for, 1139.
partners, 1139.
on partners is joint, and they may sue jointly, 1302.
defendants in actions for, joint or separate, 1140.
declarations for, 1141, 1143.
statement of special damage, 1143.
plea of not guilty in actions for, and evidence thereunder, 1145.

Slander—Continued.

- where words are not actionable without special damage, 1343.
- of the truth of the slander, 1146.
- evidence in actions for, for the plaintiff, 1147, 1150, 1153, 1154.
- of malice, 1157.
- of special damage, 1159.
- of the trade, profession, &c., of the plaintiff, and that the words were spoken of him as such, 1161.
- evidence in actions for, for the defendant, 1163, 1165.
- truth of the charge or accusation, 1163.
- judges direction to jury in actions of, 1169.
- damages recoverable in actions for, 1164, 1167, 1392, 1393.
- evidence of apology in mitigation of, 1168.
- damages in actions for, must be stated in declaration, or evidence of can not be given, 1339.
- costs in actions of, 1408, 1412.
- arrest of judgment or setting aside verdict in actions of, 1170.
- indictment for, 1171, 1173.
- costs on, 1431.

Sluices. See SEA-WALLS.**Smell.** See INJUNCTION—PRESCRIPTION.

- when amounting to a nuisance, 219.

Smoke,

- nuisance arising from, not actionable by reversioner,
- statute for prevention of, 266.
- penalties for non-consumption of, 277.
- consumption of, in Birmingham, 218.
- injunction against injuries arising from, 293.

Smuggling. See SHIPOWNER.

- torts caused by, to the master of the vessel on which it occurs, 14.

Soldier,

- can not sue his commanding officer for maliciously discharging him from the regiment, 861.

Solicitor. See ATTORNEY.**Specification.** See PATENT.**Sporting.** See GAME.

- right of, when an incorporeal right in gross, 130, n.

Spring Guns,

- setting, a misdemeanor, except in a dwelling house, 226.

Stage Coach. See COACH.**Stage Play.** See COPYRIGHT—NOVEL.**Stalls.** See SHOPKEEPER.**Stands.** See RACE-STANDS.**Stannaries,**

- customs of, to dig for tin, 133.

Station. See RAILWAY.**Statue.** See SCULPTURE.**Statute.** See BY-LAWS—COMPENSATION—PENALTY—STATUTORY—COMPENSATION.

- injuries caused in the necessary execution, with due care, of powers given by are not actionable, 1040.
- for injury resulting from the execution of, without negligence, the remedy is on the statute, but if the injury is the result of negligence or wrongful act an action lies, 1079.

Statute—Continued

- providing a specific method of obtaining compensation for injury, no other remedy available, 59, 1058.
- injuries from negligence in performance of work under, are actionable, 1041, 1044.
- action for breach of duty or obligation created by, 58, 59.
- benefits given by, and burdens imposed by, are co-relative, 77.
- right of support to land taken under, 123, n.
- duties on public officers imposed by, 77.
- duty imposed by, of fencing machinery, 256.
 - on railways of maintaining fences, 244.
 - for purpose of making river navigable, 237.
 - can not be avoided by showing that some other person ought to have performed it,
- powers given by, for drainage of land, 83.
 - for abatement of nuisances, 266.
 - over rivers and canals, 96.
 - for the regulation of salmon fisheries, burials, public health, and metropolitan buildings, for the prevention of smoke, and the utilisation of sewage, 266.
- no action lies for doing a thing prohibited by, unless damage suffered by plaintiff beyond what he suffers in common with everyone else, 1368.
- limitation of time for bringing actions for injuries committed under, 1071.
 - commencement of period of limitation, 1072.
- actions for injuries committed under, must generally be preceded by notice, 1074. *See NOTICE OF ACTION.*
- directing actions to be brought against a clerk of a board or commissioners is generally compulsory, 1079.
- provisions protecting persons intending to act in pursuance of, 822, 823.
- pleas of justification under, 1082.
- costs in actions against person intending to act under, 1421.
- powers given by, if exceeded may be restrained by injunction. *See INJUNCTION,* 295.
- injunction to prevent unnecessary injury in the execution of, 1084, 1086.
 - against nuisances created under, 296.

Statute of Limitations,

- provisions of, as to actions of tort, 1360.
- commencement of the period of limitation, 1361.
 - in cases of excavation of land, &c., 1361.
 - in cases of slander or false imprisonment, 1361.
 - in cases of negligence or detention of goods, 1361.
 - in case of conversion of timber by tenant for life, 330.
 - in case of boundary walls, 415.
- with regard to the recovery of land, 387, 403.
 - in case of unopened mines, 390.
 - in case of occupation of cottage, &c., by poor relations, servants, or agents, 391.
- accrual of right of entry on death, alienation, or forfeiture, 392.
- possession by tenants at will, mortgagors, cestui que trusts, persons let into possession under an agreement for purchase, &c., 393.
- possession by tenants from year to year, 395.
- purchasers of trust estates, 394.
- effect of wrongful receipt of rent, 396.
- entry, or continued claim, 397, 403.
- possession of coparceners, joint-tenants, or tenants in common, 398.
- possession of younger brothers, or relations, 399.
- acknowledgments of title, 400.
- in case of ecclesiastical, or eleemosynary corporations, 401.
- in case of disabilities, 402.
- in case of concealed fraud, 402.

Statute, &c.—Continued.

- in case of entry only, or entry and expulsion, or a fresh agreement made, 402, 403.
- in case of mortgagees, 404.
- extension of the period in certain cases, 1362.
- effect of, on lien, 609.

Statutory Compensation. *See* COMPENSATION—INJUNCTION.

- does not apply to injuries caused by negligence, 1058.
- or to negligent or wrongful acts, 1068, 1079.
- what claimable by landowner whose land has been taken under statutory powers, and what by landowner whose land has not, but who has been injured by the works executed by the company, commissioners, &c., 1055.
- amount of, ascertainable by arbitration, 1056.
- but not the legal liability to pay, 1056.
- where amount is ascertained in one particular way, *e.g.*, by arbitration, or before justices, no other method of obtaining is available, 1058, 1059, 1077.
- under Lands Clauses, or Railway Clauses Act, how obtainable, by arbitration, by verdict of jury, or before justices, 1059.
- if case not within statute, the Court of Chancery has jurisdiction to decide on the claim to, 1059.
- for dust and dirt from railway works, 1059.
- for obstruction to light and air, 1059.
- for depreciation of property, if but for the statute, the act of the railway, or other company, commissioners, &c., would have been actionable, 1059.
- for diversion, or narrowing a highway, or turnpike road, 1059.
- for substitution of roadway for waterway, 1059, n.
- for obstruction of private way, or access to house, 1059.
- for vibration, and the noise and smoke of railways, 1059.
- for nuisance arising from railway platform overlooking dwelling house, 1064.
- for subsequent damage, 1068.
- for the whole building, if part taken, 1052.
- or severance, 1060.
- value of land and damage to it, how assessed, 1063.
- prospective damage, 1063, 1068.
- to lessees and tenants from year to year,
- notice by person whose land is taken of the amount, &c., claimed, 1061.
- action for, if company makes default, 1061, 1066.
- declarations in actions for, 1066.
- judgment on sheriff's inquisition not conclusive, 1067.
- mandamus to obtain, 1499.
- costs on, 1435.

Steam-Boat Company,

- power to make "reasonable" conditions as to receiving and forwarding animals or goods, 664, 666.
- duty of, to disinfect cattle pens, 649.
- lien of, for food supplied to animals carried, 649.

Steam-Boats. *See* SHIPMASTER—STEAM-BOAT COMPANY.

- duty of, to consume their own smoke, 277.

Steam Engines. *See* STEAM PLOUGHING MACHINE.

- use of, on highways legalised by statute, 231.
- unless they amount to a public nuisance, 298.
- illegality of, adjoining highway, unless screened from view, 230.
- illegality of, adjoining turnpike road, 230, n.

Steam Ploughing Machine,

- legality of, adjoining highway, or turnpike road. 230, n.

Steam Vessel. *See* SHIPMASTER—STEAM-BOATS.**Stepping Stones.** *See* RIVER.

Steward. *See* COURT BARON.
lien of, 618.

Stock,
in reputed ownership of bankrupt, 511.

Stolen Goods,
may be retaken, 523.
action for, when it will lie, 46.

Stone. *See* MINERALS—QUARRY.

Stoppage in Transitu,
right of, in unpaid vendor of chattels, 611.
bill in equity to enforce, 1446.

Storm,
non-liability for accidents arising from effects of, 228.

Stream. *See* WATER.

Street. *See* TENANT.

Subsoil. *See* SUPPORT.

Summary Convictions. *See* JUSTICES.
under by-laws, 54.

Sunday,
execution or arrest on illegal, 914.

Superfluous Land. *See* COMPANY.

Superintendent of Customs. *See* CUSTOMS.

Support,
right of lateral or subjacent, from adjoining or superjacent land, 84, 86.
right of, from adjoining land, 79, 241.
right of, from one house to another, 125.
prescriptive right to, how gained, 165.
between adjoining houses, 165.
right of, between owner of surface and owner of mines, under an English Act, 215.
between owners of upper and lower doors of house or warehouse, for railway or canal bridges, viaducts, &c., 124.
when it passes as incidental to a conveyance of land, 123.
when land taken under the provisions of an Act of Parliament, 123, n.
when land weighted with buildings, railways, or canals, 124.
when separate storeys of house belong to different people, 126.
when owner alienates the surface, reserving the mines, abridgment of right of, by contract, 86.
no right of action for injuries to, till actual damage sustained, 107.
declarations for injuries to the right of, 101.
by reversioner, 197.
in actions for injury to against adjoining proprietor, 197.
or a stranger, 197.
injunction to prevent disturbance of right of, 111, 215.

Surface. *See* SUPPORT—WATER.

Surgeon,
negligence of, 569, 1288.

Surveyor,
negligence or fraud of, in refusing certificate of work done, 572.

Surveyor of Highway,
not liable for non-repair of highway, 30.
not liable for injuries caused by non-repair of highway, 1044.

Surveyor of Highway—Continued.

but is for leaving heaps of stones, &c., unlighted, 1044.
is entitled to notice of action, 1077.

Swearing. See CURSE.

Tallow,

manufactory, is a nuisance, 217, 219.

Tan-Yard,

is a nuisance, 217, 219.

Tax-Collectors. See REVENUE OFFICERS.

Telegram. See TELEGRAPH COMPANIES.

is a post-letter, within 7 Will. IV. & 1 Vict. c. 54, 607, n.
production of, in court of law, 607, n.

Telegraph Company. See ELECTRIC TELEGRAPH COMPANY.

negligence of, in delivery of messages, 607.
injuries to submarine cables of, 236.
posts of, on highway are indictable, 313.

Tempest. See STORM.

Tenancy. See OCCUPATION.

Tenant. See DAMAGES—FIXTURES—JOINT-TENANTS—LESSEE—TENANTS IN COMMON—TENANT-RIGHT—WASTE.

for years, rights of, in respect of brick-earth, gravel, and minerals generally, 325, 334.

in respect of woods, timber, underwood, streams or ponds, fish, pigeons, game, &c., 325, 328.

has the property in bushes, but not in trees, 413.

is entitled to cuttings of fences, 413.

for life, rights of, with respect to timber, underwood, mines, &c., 332.

without impeachment of waste, rights of, 351.

for years or at will, liability of, for waste, 321.

for life or years now liable for waste, commissive or permissive, 319.

at will, not liable for permissive waste, 319.

from year to year or at will, waste by, 326, 327.

for life, waste by, 328, 332.

liability of, for waste committed by stranger on demised premises but remedy over against trespasser, 350.

from year to year, liability of, for repairs, 326.

for life, liability of, for repairs or to rebuild, 328.

liability of, for alteration of premises or cultivation, though value thereby increased, 16, 368.

for years, must not convert arable land into pasture, or vice versa, or destroy fences, 325.

liability of, for obstruction of entry to inspect waste, 353.

for a term, not bound to rebuild, 321.

liability of, for repairs, 321.

liability of, for non-repair of house, 240.

liability of, for stone, timber, or rubbish being placed on highway while repairs going on to his house, 234.

right of, to cut timber for repairs, 329.

for years, waste by, by non-repair of sea-wall, 321.

by alteration of premises, 323, 325.

bound of common right to keep pipes, sewers, drains, privies, &c., repaired, if used by him, 218, 284, 290.

when liable for expenses of paving, 58.

is liable for non-repair of fence, 196, 422.

liability of, to repair highway in certain cases, 316.

Tenant—Continued.

- duty of, to keep all accessories to his premises in a proper and safe state, 233.
- e.g.* to secure shutters, swing doors, cellar doors, &c., 228.
- is liable for injuries to third persons from unfenced holes or dangerous areas, &c.,
 - on his premises, if the person injured was rightfully there, 228, 230, 232.
 - or for the dangerous state of pathway to his house, 229.
- when liable or not for nuisances from fall of ruinous buildings, 290.
- when liable for injuries to passengers from things falling from his house into the street, 228.
- liability of, for using premises demised so as to create a nuisance, 222, 283.
 - for explosion of gas, 358.
 - for fires, negligently or otherwise caused. *See* FIRE, 353, 357.
 - for acts of persons appointed by his bailiff, 36.
- holding over, is liable for all consequential damage, 463.
 - except for the holding over of his sub-tenant in an action for mesne profits, 464.
- can not dispute his landlord's title, 983.
 - but may show it has expired, 1332.
- statements by, in derogation of his landlord's title, are not admissible, 211.
- encroachments made by, enure to benefit of landlord, 388.
- if driven from his holding by the menaces of a third person, 20.
- user by, of land opposite his house between carriage and footway, 308.
- can not dedicate highway, except with consent, express or implied, of landlord, 306.
- laches of, in permitting easements to be acquired, 151, 156.
- from year to year, who underlets from year to year, may nevertheless distrain, 706.
- statutory provision as to emblements, 707.
- right of, to away-going crop operates as extension of tenancy pro tanto, 710.
- may sue bailiff for refusing to receive rent and expenses after a distress, 738.
- may show, in defense to distress, that he has paid rent to mortgagee or ground landlord, &c., 769.
- may resist illegal distress by force, or rescue goods till they are impounded, 709, 747.
- or resist abuse of distress, 735.
- when to be plaintiff in actions for injuries to land, 97.
- at will only, or by mere possession, may maintain action against wrongdoer, 442.
- may sue for nuisance to lands demised, 282.
- may sue for injuries caused by fire to demised premises, 362, 369.
- not landlord, is the person to sue for trespass to land, 421.
- may sue landlord for damage done to crops by cutting timber, &c., 455.
- may sue for injury to trees, causing loss of shade, fruit, &c., 461.
- may sue for obstructions to easements or profits à prendre, 194.
- may sue, or be sued, for the obstruction of light, 195.
- for life, injunction against waste by, 371.
- injunction against, to prevent waste by digging minerals, altering premises, injurious cultivation, &c., 371.
- for life. *See* PRESCRIPTION ACT—REVERSIONER.

Tenant in Common. *See* PARTNER.

- when liable to co-tenant for injuries to, or ouster from, property held in common, 1303.
- liability of, to his co-tenant for destruction of the property held in common 480.
 - or for destruction or alteration of boundary wall held in common, 415.
 - or for misuse of property held in common, 339.
- when may maintain trespass against his co-tenant or his licensee, 420.
- can not license stranger to commit trespass against co-tenant, 447.
- of deeds or chattels, who entitled to possession of, 629.
- can not sue co-tenant for detention of goods, 642.

Tenant in Common—Continued.

- rights of survivor of one of two, 1290.
- possession of, effect of, under Statute of Limitations, 397.
- may distrain for their own share of rent, 711.
- avowry by, 768.
- should join in actions for injuries to land held in common, 98, 1302.
 - e.g.* for trespass, 421.
 - or for a nuisance, 283.
- devisee of deceased, should join co-tenant in action for injuries to land held in common, 1302.
- should join in actions for conversion of property, 525.
- injunction against, by co-tenant, to prevent waste, 371.

Tenant-Right,

- effect of assignment of, 130.

Tender. *See* AMENDS.

- of amends by constables and others acting in pursuance of statute, 829.
- of debt or charges extinguishes lien, 628.

Thames. *See* CONSERVATORS.**Theatre,**

- liability of lessee of, for the unlawful representation of dramatic pieces, 63.
- action of libel by manager of, 10.

Theft. *See* FELONY.**Threats.** *See* MENACES.**Threshing Machine,**

- nuisances arising from, 230, n.

Tiger. *See* ANIMALS—FERÆ NATURÆ.**Timber.** *See* CUSTOM—ESTOVERS—PROFIT A PRENDRE—WASTE.

- title to, when severed from the freehold, 484, 524, 533.
 - by tenant for life, &c., 362.
- proceeds of, when severed by the owner of a limited estate, to be invested for the benefit of the inheritance, 484.
- cutting and sale of, by tenant for life, when lawful or not, 332, 336.
- decaying, may be cut by order of Court of Chancery, unless ornamental or useful for shelter of dwelling house, 330.
- and proceeds invested for benefit of inheritance, 330.
- cutting of, by one tenant in common, 339.
- right of rector to cut for repairs, &c., 337.
- cutting of, by trustees "without impeachment of waste," or otherwise, when lawful or not.
- license to cut down, 116.
- grant of, implies license to go on land to cut, 119.
- injunction against cutting, although title in dispute, 371.

Tin. *See* STANNARIES.

- right to search for in Cornwall, 143.

Tin-Bounders. *See* TIN.**Title.** *See* TITLE DEEDS.

- to realty, from twenty years' possession, 388, 403.
- registration of, 387, n.
- by custom. *See* CUSTOM.
- by prescription. *See* PRESCRIPTION, 149.
- to trust property, 521.
- to soil carried away, 528.
- to timber severed from the land, 484, 524.
- evidence of, by proof of receipt of rent, &c., 1378.
- to chattels evidence of—in actions of trespass or conversion, 532, 535.

Title—*Continued.*

- to personal securities, in whom vested, 642.
- to chattels, by joint tenants, or tenants in common, 629.
- to goods stolen, 523.
- to stolen goods by purchase, 494.
- to chattels by finding, 485, 500.
- to property for the conversion of which damages have been recovered, 522.
- by purchase from sheriff under an execution, 499.
- not affected by reversal of judgment on which execution issued, 921.
- to goods in possession of children, 524.
- by bill of sale, 483, n, 499, 513.
- to ships, 483, n.
- to goods altered by wrongdoer, 483.
- to birds and animals *feræ naturæ*, 486.
- to fish, when struck with harpoon, or caught in nets, 487.
- to chattels by gift, 488.
- to servant's liveries, 489.
- to grants of arms, title deeds, leases, bonds, and other securities, 490, 500, 642.
- to bills and notes, 478, 479, 490, 500.
- to letters, 492.
- to chattels by purchase in market overt or by private contract, 493, 494.
- of innocent purchasers from fraudulent vendors, 496.
- by delivery order, dock warrant, bill of lading, &c., 497.
- to property of bankrupts, 501, 502, 507.
- under an execution, 506.
- to property of which bankrupt was reputed owner, 508, 516.
- warranty of on sale of chattels, 1205.
- may be tried in an action of trespass, 445.
- question of, before county court judge, how far inquirable into, 886.
- jurisdiction of county court in questions of, to land, &c., 1331, 1332.
- false representation of, on sale of real property or personal chattels, 11, 191.
- false assumption or representation of, is actionable, 1211, 1213.
- slander of, 1137.

Title Deeds,

- belong to the person in whom the legal title is vested, 642.
- right to possession of, where two persons equally entitled, 629.
- heir at law may sue for detention of, 631.
- right of owner, mortgagee, or tenant for life to, 490.
- right of cestui que trust to, 490, n.
- action of detinue for, 634.
- by devisee 644.
- damages in actions for detention of, 645.

Tolls. See MARKET.

Tombstones,

- property in, 405, n.
- taking up or defacing, is a tort, 15.
- in a private cemetery, 15, n.

Tort. See TORTS.

- what necessary to constitute, 1, 12.
- any unauthorized interference with the property or right of another is 16, 18.
- writing on the certificate or license of another constitutes, 15.
- sale of goods without authority is, 52.
- interference by force or fraud with another's trade, occupation. or means of livelihood is, 22.
- arising from breach of duty imposed by law, 28, 32.
- by refusing to obey decree of court of justice, 39.
- malice not a necessary ingredient, 40.

Tort—Continued.

- founded on negligence, 33.
- arising from the disturbance of rights of servitude, *et seq.* 78.
- founded on contract, 27.
 - is actionable either on the contract or the tort, 1288.
 - arising out of contract, who can sue for, 32.
- committed abroad may be sued for here, 44.
- if amounting to a felony, is postponed to criminal proceedings, 46.
- waiver of, 52.

Torts,

- are in their nature several, 1321.
- one defendant, therefore, may be acquitted; and judgment given against the other, 1325.

Towing-Path. *See* CANAL—RIVER.

- right of adjoining landowner to cross, for loading and unloading vessels, 412.

Town Clerk,

- lien of, 618.

Trade. *See* FIXTURES.

- interference with, when a tort, 17, 22, 23.
- by-laws made in restraint of, 57.
- offensive and noisome, when a nuisance, 219.
- prescriptive right to exercise, 221.
- penalties for establishing noxious, 71, 71, n.

Trade Mark. *See* INJUNCTION.

- counterfeiting is actionable by purchaser, as well as by person whose mark is imitated, 1199, 1224.
- imitation of, is actionable, though no damage suffered, 17.
 - but on application for injunction, evidence of damage is necessary, 17.
- no property, strictly speaking, exists in, but right of user may be obtained, and that right protected from invasion by injunction, 1232.
- may exist in the title of a periodical publication, 132, n.
- or words and devices, 1232.
- the property of partners, to whom it descends on death of one partner, 1232.
- on wines, &c., produced in a particular place only, will pass, on sale of the place, to the purchaser, 123.
- sale of, how far lawful, 1232.
- penalties for the use of counterfeit, 70.

Trade Union. *See* INTIMIDATION.**Trainer.** *See* HORSES.**Tramway,**

- on highway is indictable, 313.
- grant of, by parol, irrevocable if expense incurred, 213.

Transfers. *See* SHARES.**Transports.** *See* SHIPS.**Treasury.** *See* COMMISSIONERS OF TREASURY—PUBLIC OFFICERS.**Trees.** *See* ESTOVERS—TIMBER.

- title to, is in landlord, 413.
 - if standing in boundary fence, 415.
 - if on waste land adjoining highway, set out under Enclosure Act, 452.
 - if growing on banks or towing-paths of navigable river, title to, 442.
- lessee can not cut, except for repairs, 325, 329.
- effect of grant of, by tenant in fee, 130.
- right to cut and carry away can not be claimed under Prescription Act, 159
- overhanging branches of, may be cut by adjoining proprietor, 414.
- overhanging railways, 414, n.

Trees—Continued.

- overhanging highway or private property, may be cut, 266.
- overhanging highway, are a public nuisance, 297.
- tenant and landlord may both sue for injuries to, 421.
- and so may lord and copyholder, 421.
- injunction against injury to, from offensive trades, 293.

Trespass. See ARREST—ASSAULT—DEFENDANT—PLAINTIFF—TRESPASSER.

- malice not a necessary ingredient of, 40.
- by agent in name of principal, and subsequently ratified by him, 1310.
- to person or personality :
 - by letting loose a dangerous animal, 2.
 - by keeping a person in confinement, though not the original confiner, 1312.
 - by throwing a squib into a crowd, which is tossed from one to another, 582.
 - by carrying away goods, driving away, or striking cattle, &c., 466.
- by dogs in pursuit of cattle, game, &c., 466.
- by abusing or destroying a chattel found, 466, 474.
- by conversion of chattels, 467.
- for distraining cattle contrary to agreement, 713.
- in seizing estrays or wrecks, 533.
- under void or irregular process, 937.
- by sheriff. *See SHERIFF.*
- merger of, in felony, 46.
- declaration for, 528.
- plea of not guilty, 529.
- justification of, on ground that goods were on defendant's land, 531.
- in defense of oneself, one's property, or one's rights, *e.g.*, a right of access to one's own house, 466.

to realty :

- what constitutes, 375, 376.
- after notice, 375.
- if committed to escape danger, or to retake animals or chattels on land of another, 375.
- by throwing rubbish, or water, building wall, &c., 376, 385.
- by cattle, or other domestic animals, or birds, 377.
- in charge of servants, or wife, 377.
- straying from common, or highway, 379.
- from want of, or defective fences, 379.
- by rabbits, pigeons, or dogs, 381.
- if surface and subsoil belong to separate persons, 382.
- when may be repelled by force, or house erected pulled down, 383.
- none, if person entering be the lawful owner, 383.
- if a highway, 384.
- if continuing, right of action accrues *de die in diem*, 385.
- by locking door of plaintiff's room, and keeping him out, 441.
- by lessee of herbage, or purchaser of crops, 442.
- on towing-paths of navigable river, 442.
- antecedent to plaintiff's possession of land, 444.
- by person lawfully entitled, after entry, 445.
- by landlord, after expiration of tenancy, 445.
- leave and license, 447.
- by entering house under a license, otherwise than by the door, 447, 453.
- by tenant in common against stranger, licensee of co-tenant, 447.
- to remove or retake goods, papers, &c., 447, 453.
- to replace goods on plaintiff's land or to remove therefrom goods, papers, &c., of defendant, 453.
- by riding over another's land, 15.
- by picking up game which falls on the land of another, 15.
- from fall of chimney, or flow of filth from land or house of the defendant to or on land of the plaintiff, 284.

Trespass—Continued.

- against wrongdoer, constructive, or mere possession, is sufficient, 442.
- title may be tried in action for, 387, 445. *See* TITLE.
- action of, may be brought, either against person trespassing, or person by whose authority the trespass was committed, 421.
- and against all or any one of persons trespassing, 422.
- parties to actions for, 419, 422.
- reversioner, 195.
- declaration and venue in actions for, 423.
- pleas in, 424, 434.
- pleas of justification in actions of, 838.
- by right of way, &c., 449, 455.
- if trespass continuing, 838.
- replications, 435, 439.
- new assignment, 1366.
- evidence for plaintiff, 441, 446.
- for defendant, 446, 453.
- damages recoverable in actions of, 454, 463.
- where trespass is by several, 846.
- costs for, if wilful and malicious, 1418, 1420.
- costs in actions of, after notice, 1419.
- for mesne profits, 464.
- injunction against, 465.

Trespasser,

- injuries to, not generally actionable, 228, 229, 260, 292.
- when may sue for injuries sustained while trespassing, 232.

Trial. *See* EVIDENCE.

- proceedings at, plaintiff to begin, &c., 1367.

Trover. *See* CONVERSION.**Trustee.** *See* CONVERSION—CESTUI QUE TRUST—PARTIES TO ACTIONS—TRUSTEE IN BANKRUPTCY.

- liabilities of, 521.
- for fraud of solicitor employed by him, 1197.
- cutting of timber by, 334.
- duty of, to prevent commissive but not permissive waste, 336.
- must sue for injuries to land, 98.
- is entitled to his expenses out of the trust fund, 1046.
- new appointment of, if the trustee becomes bankrupt, 519, 2.

Trustee in Bankruptcy. *See* BANKRUPT—LIQUIDATION.

- liability of, as assignee of lease.
- may bring or defend actions for injuries to the property of bankrupt, 1300.
- but not to his person, 1300.
- if more than one, should all join in actions for injuries to property of bankrupts.
- evidence of appointment of, 1299.
- character need not be proved unless it is specially denied, 534.
- security for costs from, 1439.

Trustees. *See* COMMISSIONERS.**Turbary.** *See* BILL OF PEACE—TURF.

- common of, 139.

Turf. *See* TURBARY.

- right to cut, or wood, is a profit à prendre, 114.
- claim to dig and carry away, from another's land, when valid, 114.

Turnpike Road. *See* HIGHWAY—STATUTORY COMPENSATION.

- title to soil of, 409.

Turnpike Road—*Continued.*

repair of ditches or watercourses by the side of, 218, 318.
cattle straying on 313, n.

Underwood. *See* TREES.

Unity of Ownership. *See* COMMON—LIGHT—WATER—WAY.

What sort of, is essential to the extinguishment of easements, 186.

Unsoundness. *See* HORSES.

Vagrant. *See* ARREST.

Valuer. *See* SURVEYOR.

Variance. *See* AMENDMENT.

none, if right claimed includes the right proved, 205

Vendor. *See* FALSE REPRESENTATION.

of goods, warrants that he has right to sell them, and is liable if he has not, 1190.

Venue. *See* DECLARATION.

in actions for injuries to land, 100.

for trespass to land, 423.

for obstructions to easements or profits à prendre, 197.

against justices, constables, churchwardens, overseers, &c., 832.

Verdict. *See* WATER.

Vessel. *See* SHIP.

Vestry Clerk,

has not a freehold office, 1487, 1490.

mandamus to admit, 1495.

Vicar. *See* INCUMBENT—RECTOR.

right to name of, 405, n.

has no right to fees for vaults or tablets in chancel, 405.

Vice-Chancellor,

of University not liable for a wrongful imprisonment, 883.

is a judge of Court of Record, 890.

View,

interference with, not actionable, 4.

Village Green. *See* EASEMENT—RECREATION.

Visitor. *See* GUEST.

Vote. *See* PARLIAMENT.

Voter. *See* POLL.

Waiver. *See* NOTICE TO QUIT.

of tort, 34.

Wall. *See* BOUNDARY WALL—FENCES—PARTY WALL.

pulling down, is waste, 320.

building, across a way, or obstructing light, is actionable by the reversioner 196, 197.

declaration in action for non-repair of, 197.

Warehouse. *See* SUPPORT.

injuries to persons entering on business, 258.

Warehouseman. *See* WHARFINGER.

not bound to receive petroleum, nitro-glycerine, or other "specially dangerous" goods, 649.

is entitled to authority from owner before parting with goods in his keeping to a third person, 631.

lien of, 613, 624.

Warrant,

how proved, 948.

Warranty. *See* FALSE REPRESENTATION—HORSES.

damages in actions for breach of, 1388.

Waste. *See* COMMON—HIGHWAY—INJUNCTION—RECREATION.

what it is, different kinds of, and who liable for, 319, 351.

pulling down houses, or neglect to repair, 319, 326.

commissive or permissive, 320, 324.

fire. *See* FIRE, 353, 357.

alteration of premises, or cultivation, though value thereby increased, 368. *See*

TENANT.

removal of fixtures. *See* FIXTURES, 340, 349.

in trees or woods, what is, 329.

sale of timber by tenant for life, 330.

taming deer, 331.

equitable, by committal of wanton and malicious destruction, 332.

license to commit, 351.

right of entry to inspect by reversioner, 352, 370.

willful, not seemle affected by Ecclesiastical Dilapidations Act, 1871, 337.

by tenant for life, 319, 323, 330, 336.

by tenant in fee, with executory devise over, 332.

by tenant for years, 319, 326.

by non-repair of sea-wall, 321.

by alterations in demised premises, 322, 325.

although covenant to repair exists, 324.

in respect of brick earth and minerals, 325.

in respect of woods, underwood, streams, or ponds, fences, pigeons, game, &c., 325, 329.

by removing glass, wainscot, &c., 325.

by tenant from year to year, or at will, 321, 327.

tenant from year to year, or at will, not liable for permissive, 321, 327.

by copyholders, when a forfeiture, 338.

by tenants in common, 339.

on property held in common, 1289.

by trustees, "without impeachment of waste," 334.

duty of trustees, to prevent commissive, but not permissive, 336.

by rector, dean, &c. *See* ECCLESIASTICAL DILAPIDATIONS.

by executors, 1318.

by feme covert, executrix, or administratrix, 1313.

committed by strangers on land demised, 350.

action for, 360.

how affected by insurance, 361.

parties to, 362.

declarations, 364.

pleas, 365.

evidence, 366.

damages, 367, 370.

judgment, 358.

injunction to prevent, 360, 371, 373.

damages in equity for, if already committed, 371.

acquiescence in, effect of, or of delay in coming to the Court of Chancery, 372, 373.

parties to suits in equity to prevent,

prohibition against, 359.

Water. *See* CANAL COMPANY—MILL—MINE—RIPARIAN PROPRIETOR—RIVER—WATERCOURSE—WELL.

natural right to the use of flowing, 81, 82, 88, 89.

right to use of, as against wrong doer, by a person who is not a riparian proprietor, 93.

Water—Continued.

- right to use, claimable by custom, 133.
- under Prescription Act, 152, 153.
- right to surface, 82, 89.
- right to underground, and springs of, beneath surface, 95, 1055.
- right to artificial, 88.
- right of navigation and canal companies to, 96.
- right to, flowing through drain, conduit, or watercourse, on land of another 116, 118.
- claim to diversion of,
 - for purposes of irrigation or drainage, 89.
- diversion or abstraction of running, whether actionable, if the plaintiff does not use it, or is not himself injured, 16, 107.
- diversion of, from mill, is actionable by reversioner,
- diversion of, from mill, is a nuisance,
- effect of acquiescence in the unlawful diversion of, 90.
- effect of fine on, or verdict against, the unlawful diverter of, 90.
- right to vary the channel of, 89.
- right to pen back, 91.
- by prescription, 161.
- right to discharge of, from eaves of house, 113.
- discharge of, from eaves of adjoining house, is actionable by reversioner, 282.
- grant of right, 128.
- reservation of, on demise, 117.
- enjoyment of right of, over lands vested in tenant for life, or for a long term, 175.
- right to, may be destroyed by permission given to divert it, if expense has been incurred in such diversion, 177.
- right of, extinguished by unity of possession, 186.
- right to, when not extinguished by unity of ownership, 186.
- interruption in the enjoyment of, 171.
- forfeiture of limited right to, if right attempted to be extended, 182.
- abandonment of right to, by acts indicative of inattention, but not by mere non-user, 181, 186.
- right to, not destroyed by the destruction of house or mill to which the right belongs, if house or mill rebuilt, 187.
- collection of surface, &c., when actionable,
- injuries arising from the artificial collection of, 95.
- injuries to lower story of house from bursting or leakage of cisterns on upper floor, 95.
- discharge of, on another's land, is a trespass, 376.
- injuries from the escape of, 33.
- fouling of, may be an injury to the reversion, 284.
- contamination of, by refuse from gas works, 275.
- right to use or pollute by grant or prescription, 92.
- right to foul, in derogation of a grant, 129.
- obstruction of, by throwing in cinders, &c., whether legal, 287.
- fouling of, is a nuisance, 218, 223.
- and actionable without special damage, 107.
- passage of dirty, may be stopped, if right to passage of clean water only exists, 269.
- declaration for obstructing flow of water through a drain, &c., 197.
- for injury from wrongful diversion, obstruction, or pollution of, 100, 107.
- for pollution of, 284.
- by reversioner, 284.
- effect of plea of not guilty in actions for fouling, 286.
- plea of prescriptive right to foul, 287.
- plea of prescriptive right to divert, 102, 104.
- injunction against disturbance of right of, though granted by parol, 213.
- to prevent the diversion of, 110.
- to prevent pollution of, 293.

Water Company,

- duty of, to keep pipes duly charged with water, 59.
- to keep fire-plugs, &c., in proper order, 1079.
- not liable for bursting of pipes through frost, 586.
- power to take water under Waterworks Clauses Act, 1052.

Watercourse. *See* DRAIN—WATER.

- natural right to use of, 160.
- rights acquired by prescription to use of, 152, 160.
- artificial, right to, *e.g.*, mine-adits, drains, &c., 163.
- grant of right of, 129.
- right to stop up, if used for other purposes than those granted, 218.
- prescriptive right to pollute, 162.
- repair of, in alieno solo, 121, 160, 188, 218.
- injunction to prevent obstructions to repair of, on another man's land, 112.
- along turnpike road, repair of, 318.
- obstruction of, is a nuisance, 223.
- right to obstruct, if doing damage, .
- removal of obstructions to, on another's land, 271.
- stoppage of, on another's land to prevent injury by flood, &c., to one's own, 271.
- when a nuisance, new sewer to be provided, 266.

Way. *See* HIGHWAY—TURNPIKE ROAD—STATUTORY COMPENSATION.

- private or accommodation, title to soil of, 410.
- right of, arising from long user, 151.
- right of, under Prescription Act, 149, 152.
- what enjoyment of, sufficient to give right under Prescription Act, 157.
- proof of right of, by user, express grant, &c., 205.
- reasonable exercise of right of, is a question for the jury, 205.
- user of, by stealth, or by license, or without knowledge of landlord over land let on lease, does not confer right,
- right of, over lands vested in tenant for life or for a long term, 175.
- dedication of, by tenant for a long term, 158.
- right of, must be appurtenant to land, 130.
- right of, by permission, 130.
- assignment of right of, 130.
- transfer of right of, 130.
- for carriages includes a footpath,
- right of, if appurtenant to premises is available for landlord as well as tenant,
- right of, to go in one direction, or one place, is not available for another,
- deviations from, are a trespass, unless the way is public,
- right of, by license, when revocable, 116.
- of necessity, will pass on sale or demise of house, 118.
- of necessity, pass, or are reserved by law, without any express words of conveyance, 120.
- of necessity, ceases when necessity for it ceases, and revives when necessity revives, 181.
- of necessity is not destroyed by unity of ownership,
- right of, not lost by mere non-user, 176.
- abandonment of, 180.
- abandonment of right of, not to be inferred from mere non-user, 180.
- user of new, substituted, is an exercise of the right over the old, 179.
- right of private, not extinguished by dedication to public, 180.
- forfeiture of right of, by non-performance of conditions, *e.g.*, repairs annexed to the grant, 182.
- right of, when extinguished by unity of ownership, and how re-created, or revived, 186.
- repair of, in alieno solo, 121, 188.
- obligation to repair *ratione tenuræ*, 188.

Way—*Continued.*

- grantor of private, may be bound to repair, 284.
- repair of, by Highway Board, in return for its public use, 317.
- injuries from the dangerous state of, 229.
- obstruction of private, by gates, when actionable, 207.
- obstruction to, whether public or private, is actionable whether enjoyed as a right or by permission, 195.
- obstruction of, is actionable, both against tenant and stranger who caused the obstruction, 195.
- obstruction of, is actionable without special damage, 212.
- obstruction of, is actionable by reversioner, 212.
- obstruction to right of, may be abated, 189.
- obstruction of, is indictable by any one, including reversioner, 195.
- declaration for obstructing, 197.
- for non-repair of, 197.
- injunction against disturbance of right of, though granted by parol, 213.
- right of public, not ascertainable by a bill of peace, 216.

Weir. See FISHERY—RIVER.

Well. See PUMP—WATER.

- right to take water from, belonging to another, 113.
- right to use, by permission, will not pass on sale of house, 118.
- abstraction of water from, by an adjoining owner digging a deeper one, is not actionable, 1055.
- right of support to, from owner of adjoining land, 84.
- obligation to fence, 228.
- penalty for fouling water in, 276.

Wharf. See DOCK—SEA-WALLS.

- liability for existence of, if an obstruction to a navigable river, 235.
- whether an indictable obstruction to navigable river, 314.

Wharfinger,

- negligence of, in care of article warehoused, 600, 603.
- lien of, 614, 624.
- may sell goods to satisfy his charges upon them, 627.

Wife. See CHILDREN—COVERTURE—MARRIED WOMAN—SETTLEMENT.

- liability of, for torts after death, or transportation of husband, or in case of divorce, judicial separation, or protecting order, 1313.
- communications to, may be evidence of husband's knowledge, 290.
- conversion of property by, 526.
- not liable for false representation that she was single, 51.
- not liable for false representation that signature of bill of exchange was her husband's, 51.
- can not authorize distress, 1313.
- can not sue for deprivation of her husband's society by slander, 51.
- when to be joined with her husband in actions of tort, and when not, 1294, 1295.
- when chooses in action of, vest in trustees in bankruptcy of husband, 1302.
- persuading of, to live apart from her husband, is actionable, 18.
- inducing, to separate from her husband, or harboring her after she has separated, is actionable, 1271.
- damages recoverable, 1286.
- seduction of, while living with her parents is actionable, 1277.
- right of access to children, and to custody of, up to seven in certain cases, 1259.
- right of, to protection order, when deserted by her husband, and its effect on her property, her right to sue, and liability to be sued, 1233, 1234.
- desertion, what amounts to, 1235.
- right of, to restitution of conjugal rights, 1236.
- to alimony, pendente lite, 1237.
- to judicial separation on ground of adultery, cruelty, or desertion, 1238.

Wife—Continued.

- cruelty, what amounts to, 1238, 1239.
- desertion, what amounts to, 1240
- status of, after a judicial separation, 1241.
- right of, to alimony after a judicial separation, 1242.
- when entitled to dissolution of marriage, 1243.
- connivance or condonation of adultery, 1248.
- competency of, to give evidence in cases of adultery, 1262.
- right of, to alimony after divorce, 1249.
- settled property of, may be ordered by Divorce Court to be paid to husband or children, 1251.

Wild Fowl. See DECOY-POND.**Wind.** See AIR—MILL.**Windmill,**

- right to wind coming to, 153.
- illegality of, adjoining highway, 230.
- illegality of, adjoining turnpike road, 230, n.

Window. See AIR—LIGHT—WASTE.

- right to enlarge, 169.
- effect of alteration in, upon right to light, 179.

Wine,

- mixing of, with water is a conversion, 468.

Witness,

- not liable for false statements in the course of a judicial proceeding, 51.
- depositions of, disabled by permanent illness, are admissible, 1381.
- privileged from arrest, 916.

Workman. See MASTER—SERVANT.

- liability of, for negligence in performance of work, 569.
- injuries to, from dangerous or defective machinery, ladders, &c., 256.
- if duty of fencing machinery &c., be imposed by statute, 256.
- lien, of, 610, 614.

Workshop. See NOISE.**Wood.** See ESTOVERS—TURF.**Wreck.** See SHIP.**Writ,**

- how proved, 946.

INDEX TO AMERICAN NOTES.

[References are to volume and page.]

Animals.

- affected with contagious disease, nuisances, i. 10.
- horse affected with glanders, i. 11.
- sheep affected with foot rot, i. 11.
- vicious dogs, liability for injuries inflicted by, i. 43, 283.
- scienter* must be proved, i. 43.
- injuries from horses and other domestic animals, i. 43.
- rule as to, i. 43, 44.
- Van Leuven v. Lyke, i. 43.
- Earl v. Van Alstyne, i. 43.
- Michael v. Alestree, i. 43.
- Cox v. Burridge, i. 43.
- Goodman v. Gay, i. 44.
- Dickson v. McCoy, i. 44.

Arrest,

- who are exempt from, on civil process, ii. 139.

Assault and Battery,

- what constitutes an assault, ii. 4.
- distinction between an assault and a battery, ii. 4.
- to constitute an assault must be an *intent* to injure, and *means* to do so, ii. 4.
- instances in illustration, ii. 4, 5.
- what will justify a battery, ii. 6, 7.
- instances of, ii. 6, 7.
- who may be held chargeable for, ii. 7.
- a battery may be justified in turning man out of one's house, when necessary, ii. 10.
- damages in actions for assault and battery, ii. 51.

Attorneys,

- liable for neglect, i. 616, 617.
- not liable for taking judgment when suit has been settled by his client without notice to him, i. 12.
- party liable when action is directed to be brought against the wrong party, i. 12.
- instances in which attorneys have been held chargeable for negligence, i. 617, 618.
- lien of, for what it exists and to what it extends, i. 681, 682.

Bailment,

- what is, i. 642.
- who are bailees, i. 642.
- degree of care required from, i. 647, 648, 659, 660, 667.

Boiling Flesh and Carrion,
nuisance, when, i. 234.

Boiling Whale Blubber,
nuisance, when, i. 234.

Bone Mill,
nuisance, when, i. 234.

Brewery,
nuisance, when, i. 234.

Cattle Yards,
nuisance, when, i. 234.

Certiorari,
writ of, when it lies, ii. 107, 108, 109.
when not, ii. 107, 108, 109.
when it lies to correct discretionary act, ii. 108
granting of writ, discretionary, ii. 108.
duty of court in correction of errors, ii. 108.
when it will consider extrinsic matters, ii. 108.
special instances, ii. 108, 109.

Chemical Works,
nuisance when, i. 234.

Circulars.
issuing of, actionable when, i. 20.
posting near one's place of business, i. 20.

Common Carriers,
who are, i. 709, 747.
liability attaching to, i. 643-656.
bill of lading, *prima facie* evidence of the condition of the goods, i. 644 645,
646, 716, 717.
may be rebutted, i. 644-646.
instances, i. 644-646.
degree of care required of, i. 711, 713, 714, 715.
not liable for injury resulting from inherent defect of the property itself, i. 713
727.
liability of shipper of dangerous articles, i. 713, 727.
carrier not liable for the fault of the party himself, i. 713.
not liable for injuries resulting from viciousness of cattle, i. 713.
what is regarded as the act of God, i. 714, 715.
liability of carriers of passengers for baggage lost, i. 718.
notice limiting liability does not excuse, 719, 720, 733, 734.
may restrict its liability, but notice must be brought home to the shipper, i.
734.
can not contract against loss from its gross negligence, i. 734, 735.
when the carrier's liability begins, i. 735, 736.
what constitutes delivery to, i. 735, 736.
contracts limiting liability to the carriers own line does not relieve it from de-
livering with reasonable dispatch, i. 739.
carriers lien for freight, i. 744.

Conspiracy,
damage the *gist* of the action, ii. 61.
no damage no action, ii. 61.
must be legal injury from unlawful act, ii. 61.
illustrations, ii. 61, 62.

Copyright,
in what a copyright can be had, i. 21, 71.
engravings, maps, charts, &c., protected by, when, i. 21, 69.
photographs, i. 21.

Copyright—Continued.

- pictures, &c., of natural objects, how far protected, i. 21.
- what constitutes an infringement, i. 70.
- piracy, a question of fact, i. 70.
- labels not protected, i. 70.
- names of newspapers not protected, i. 70.
- decisions of courts not protected by, i. 71.
- analysis of, and notes to, are, i. 71.
- who may take out copyright, i. 72.
- the title of books, &c., not covered by, i. 73.
- musical compositions, when protected, i. 73.
- infringements of plays, i. 71, 72, 73.

Damages,

- what damages are special, ii. 3005.
- and must be specially alleged, ii. 3005.
- instances of, ii. 3005.
- exemplary damages not permitted when the wrong was committed by servant, except, ii. 3005.
- what damages may be recovered for a wrong, ii. 3006, 3007.
- probable profits not recoverable, ii. 3012.
- matters in aggravation, ii. 3013, 3014.
- exemplary damages, rule as to, ii. 3013, 3016.
- matters in mitigation in actions for mesne profits, ii. 3017.
- jury to exercise discretion, ii. 3022, 3023.

Dangerous things,

- liability for setting in motion, i. 8, 9.
- carrying fire, i. 9.
- suffering vicious animals to go at large, i. 9.
- placing objects near highway calculated to frighten horse, i. 9, 571.
- cases in which special matters were held actionable, i. 14.
- leaving dangerous machinery in public places, i. 37.
- special instances, i. 37.

Decayed Vegetables, &c.,

- nuisance, when, i. 234.

Deceit. See FALSE REPRESENTATIONS.

Distillery,

- nuisance, when, i. 234.

Divorce,

- rules relative to, in special cases, ii. 477, 478, 481, 482, 483, 486, 487, 490.

Dwelling-House,

- is the occupant's castle, i. 464, ii. 121.
- entry into, without consent, express or implied, is actionable, i. 464, ii. 123.
- sheriff can not break in, to serve a capias against the occupant, i. 465, 466, 467 468.
- may break in, to serve a criminal warrant, i. 465, 466, 467, 468.
- mere raising the latch, is a breaking, i. 465, ii. 123, 124.
- what is an outer door, i. 465, ii. 124, 125.
- after entry through an outer door, inner doors may be broken, i. 465.
- who are protected by, i. 465, 466, 467, 468.
- admission must be demanded in all instances, i. 465, 466, 467, 468.
- Lee v. Gansell*, 466, 467, 468.
- entry after an escape, i. 465, 466, ii. 121.
- when entry is wrongful, an arrest or attachment made in pursuance of it is void, ii. 121, 122, 123, 126.

Easements,

- what are, i. 126.
- how created, i. 126.

Easements—Continued.

- distinction between and profits *a prendre*, i. 127.
- easements reserved, i. 126.
- implied easements, i. 136, 138.
- when right will not be implied, i. 137.
- way of necessity, i. 138.
- when implied—and when it ends, i. 138.
- easements by grant, express, or implied, i. 139.
- right to repair, i. 139.
- no implied easement of light, i. 148.
- how an easement may be lost, i. 197, 198.
- instances of, i. 197, 198.

Eminent Domain,

- power of in the state, ii. 241–266.
- instances of exercise of, ii. 241–266.
- limitation upon the power of the state, 241, 242.
- what is a public use; ii. 242, 243, 244, 245, 246, 247.

Escape,

- what is, ii. 142, 143.
- liability of sheriff for, ii. 142, 143.

Ex damno sine injuria, &c., as a legal maxim, i. 3.

- may be a recovery where there is legal injury, i. 3.
- may be recovery when no damage ensues, i. 3.
- Lord HOLT's views in *Ashly v. White*, i. 3.
- Judge STORY's views in *Webb v. Portland Mfg. Co.*, i. 3.
- damage not the test of liability, i. 3.
- injury may result from acts of omission as well as commission, i. 3.
- allowing buildings on a public street to fall into decay, i. 3, 4.
- using defective railway carriages, i. 4.
- when legal right is injured, may be recovery even if there is no damage, i. 16.
- Orphan Asylum v. Schwartz*, i. 16.
- other cases similar in principle, i. 17.

False Imprisonment,

- what is, ii. 14, 54.
- person detained forcibly against his will, ii. 14, 54.
- committing to prison without written complaint, ii. 15.
- on erroneous warrant, ii. 15.
- or insufficient, ii. 15.
- or on an execution based on a void judgment, ii. 15.
- or without a warrant, ii. 16, 17.
- when an arrest without a warrant is justifiable, ii. 17, 18, 19, 52.
- who are liable for false imprisonment, ii. 40, 41.
- damages in actions for false imprisonment, ii. 59.

False Representations,

- actionable, when, ii. 398–426.
- who may maintain an action for, ii. 398–403.
- scienter must be proved, ii. 400–426.
- exceptions, ii. 400–403.
- must be actual damage, ii. 400–426.
- representations must be as to substantive matters, and must have been relied on, 400–426.
- must relate to matters not obvious to the senses, ii. 400, 426.
- must not be mere puffing, ii. 407, 408.
- must be fraudulent intent, ii. 404–406.
- party need not be benefitted by them, ii. 404, 405.

Fat Boiling,

nuisance, when, i. 234.

Ferry,

right to establish, a franchise, i. 24.

right not incident to ownership of banks, i. 24.

when riparian owners may establish ferries, i. 24.

rule in Arkansas, i. 24.

interference with ferries and ferry, rights and actionable nuisance, i. 24

state may license, i. 25.

may authorize bridges to be built, i. 25.

ferries may exist by prescription, i. 24.

Fishery,

right of may be acquired by grant or prescription, i. 411.

not against public, i. 411.

relative rights of navigation and fishery, ii. 411.

right of fishery in unnavigable stream, 411, 412.

power of legislature to regulate, i. 411, 412.

how prescriptive right may be gained, i. 411.

Fixtures,

what are, i. 356, 357, 358.

test for determining what are, 357, 358.

when may be removed, i. 356, 357, 358

special instances, i. 356, 357, 358.

lunch counter, i. 357.

iron stone set in mortar, i. 356.

iron safe set in brick wall i. 357.

materials of a building blown down, i. 357.

heavy stone sink, i. 357.

windlass in a slaughterhouse, i. 357.

machinery set in a wall, i. 357.

a portable grist mill, i. 357.

counters and drawers in a store, i. 357.

a water pipe, i. 357.

a stream saw mill, i. 357

pans or vats attached to a mill, i. 357.

gin stands, i. 357.

factory bell, i. 357.

blower pipe, i. 357.

trees, growing fruit, shrubbery, &c., i. 357.

cotton gins, i. 357.

boiler engine, &c., i. 357.

an organ in a church, i. 357.

platform scales, i. 357.

a furnace, i. 356.

smoke-pipes, i. 356, 357.

a cistern, i. 356.

fences, i. 356.

fence rails, i. 356.

house, i. 356, 359.

stone used as a door step, i. 356.

materials to be used in a building, i. 359.

planing machines, i. 359.

saw benches, saws, &c., i. 359.

bridge piers, erected by a R. R. Co., i. 359.

glass cases, i. 359.

a stand of drawers, i. 359.

mirrors screwed or nailed to a building, i. 359.

bowling alleys, i. 359.

marble slabs, i. 359.

Fixtures—Continued.

- saw mill built on block, i. 359.
- ice house, i. 359.
- blinds, i. 359.
- double windows, i. 359.
- kettles, set in brick and mortar, i. 359.
- machinery in a woolen mill, i. 359.

Frauds

- liability for, ii. 398-426.
- corporation liable for, ii. 410.
- See* FALSE REPRESENTATIONS.

Gas Works,

- nuisance, when, i. 234.

Glue Works,

- nuisance, when, i. 234.

Hearsay Evidence,

- when admissible, ii. 613-616.

Highways,

- rights in, of owners of land adjacent to, i. 415.
- may maintain trespass, when, i. 396.

Hog-pens,

- nuisance, when, i. 234.

Innkeepers,

- liability to guests for loss of goods, i. 752, 753-758.
- who are innkeepers, i. 752, 753.
- what is an inn, i. 753.
- degree of care required of, i. 752-758.
- may limit his liability in certain cases, i. 753.
- who are guests, i. 753, 754, 755.
- negligence of guest excuses landlord, i. 755.
- what is baggage, i. 756.
- innkeeper's lien, i. 756, 757.
- goods left at the inn by a guest to be kept for him after his departure, i. 756.

Judges,

- not liable for strictly judicial acts, i. 32, 33, 34 ; ii. 102, 103.
- not even if corrupt or malicious, i. 32, 33, 34 ; ii. 102, 103.
- liability of judges of courts of limited jurisdiction, i. 32-34 ; ii. 102, 103.
- for ministerial acts, i. 33, 100.

Justices of the Peace,

- powers and duties of, ii. 175, 176.
- liability of, for acts not within their jurisdiction, ii. 176, 197, 201, 202.
- for acts corruptly, maliciously, or willfully done, ii. 176.
- power to issue search-warrants, ii. 177.
- arrests by, ii. 178.
- issuing warrants without authority, ii. 178, 183.
- must conform strictly to statute, ii. 178.
- jurisdiction when title to land is concerned, ii. 194, 195, 196.
- power to commit for contempt, ii. 215.

Literal Support,

- right of, lost, how, i. 98.

Libel,

what is, ii. 305, 307, 308.
 what is libelous, ii. 306, 311-317.
 special instances, ii. 208, 309.
 how malice may be established, ii. 311-317.
 reasonable and probable causes, ii. 314.
 privileged communications, what are, ii. 317-321, 328, 329.
 proceedings of courts of justice, publication of, when actionable, ii. 321.
 newspapers, rights of, ii. 341.

License,

must be specially plead, i. 433.
 revocable when, i. 129, 130, 131.
 distinction between, and easement, i. 129, 130.
 when not revocable, i. 130, 131, 433, 434.
 how far a defense, i. 433.
 exceeding license actionable, i. 433.
 bringing an action revokes the license, i. 434.
 a license may be implied, i. 452.
 instances, i. 452.

Lien,

when it arises, i. 671, 672, 673.
 how enforced, i. 672.
 how lost, i. 672, 674.
 by wrongful conduct, i. 674.
 attorney's lien, for what it exists and to what it extends, i. 681 682
 carrier's lien, i. 744.

Lights, Ancient,

English doctrine not recognized, i. 148.

Lime Kiln,

nuisance, when, i. 234.

Livery Stable,

nuisance, when, i. 234.

Malicious Prosecution,

to sustain action for, malice and want of probable cause must be shown ii. 65
 71, 72.
 how established, ii. 65, 66, 67.
 malice may be inferred, when, ii. 67.
 want of probable cause must be proved, ii. 67, 68, 71.
 how probable cause may be shown, ii. 67, 68, 71.
 advice of counsel, when a protection, ii. 74.
 what the declaration should allege, ii. 79.
 a person who instigates or promotes proceedings liable for, ii. 85.
 corporation can not be made liable for, ii. 86.

Mandamus,

when it lies, ii. 3088-3103.

Master and Servant,

liability of master to servant for injuries resulting from use of dangerous machinery or materials, i. 276, 277, 278.
 degree of precaution required from the employer, i. 276, 693.
 instances, i. 276, 277.
 what risks the servant assumes, i. 278, 279, 604, 605, 606.
 master liable for acts of servant in the course of his employment, i. 586, 587, 588, 589, 590.
 instances of, i. 586, 587, 588, 589, 590, 591.
 distinction between servant and contractor, i. 591.
 no liability for injuries inflicted by co-laborer, ii. 606, 607.

Motives,

- the motive with which an act is done, not material when a legal right is injured i. 4.
- motive may be bad, and yet no liability result, i. 4.
- Paynton v. Gill, i. 4.
- an act must be legally wrongful to be actionable, i. 5.
- the motive with which a lawful act is done does not affect the question of liability, i. 5.
- Wilde v. Minstroly, i. 5.
- Thurston v. Hancock, i. 5.
- unlawful act, actionable with whatever motive done, i. 6.
- presumption that a person intends all the consequences of his acts, i. 6
- Hay v. Cohoes Co., i. 6.
- Phinzey v. Augustar, i. 6.
- Fletcher v. Ryland, i. 6.
- Michael v. Alestree, i. 6, 7.
- instances where *motive* is material, i. 7, 8.
- intentional personal injury without legal excuse, i. 7
- Read v. Cokes, i. 7.

Municipal Corporations,

- can not make by-laws unless authorized by law, i. 60, 61.
- and when it seeks to enforce them, it must establish its power to make them i. 60.
- they must be reasonable, i. 60, 61.
- must not contravene statute or common law, i. 60, 61.
- can not be retrospective, i. 60.
- has no implied power, i. 61.
- power over nuisances, i. 61, 62.
- can not license a nuisance, i. 62.
- nor maintain one, i. 62.
- special instances in reference to which a city may legislate, i. 62.
- instances when it may not, i. 62.

Municipal Officers,

- municipal officers, judicial officers, when, ii. 100.
- when ministerial, ii. 100, 106.

Natural Servitudes,

- instances of, i. 95.
- rights in running streams i. 95, 103.
- does not exist in streams that arise from fugitive or spasmodic causes, i. 95.
- course or volume must not be changed, i. 95, 96, 97.
- what interferences with are actionable, i. 97.

Neat's Foot Oil Works,

- nuisance when, i. 234.

Negligence,

- what is, is a mixed question of law and fact, i. 42.
- when a question of law, i. 42.
- when mixed, i. 42.
- must be proved, i. 42.
- no liability when act is lawful and lawfully performed, i. 568.
- discharging gun near highway actionable, when, i. 569.
- beating a drum in highway so as to frighten horse, i. 569.
- careless driving, i. 569.
- act unlawful, liability attached for all the consequences, and negligence is no an element, i. 569.
- musket discharged at vessel liability for, i. 569.

Negligence—Continued.

- attracting a crowd upon a man's premises, i. 569.
- accidental injuries not excused unless inevitable, i. 569.
- what is inevitable accident, i. 569, 570, 571.
- Weaver v. Ward, i. 569, 570.
- accidental shooting, actionable, i. 570.
- shipping dangerous compounds, i. 570.
- no liability for injuries resulting from lawful act, unless negligently done, i. 571.
- no liability for injuries from horse, escaping while being driven carefully on highway, i. 571.
- otherwise where the vehicle or harness is defective and the injury results therefrom, i. 571.
- or where the driver is careless, i. 571.
- leaving things near highway calculated to frighten horses, i. 571.
- carriers of passengers, rule as to care to be exercised by, i. 572, 573.
- fires occasioned by negligence of railroad company, i. 574, 575.
- contributory negligence, what is, i. 42, 576, 611.
- rule as to contributory negligence as applied to children, i. 576, 577.
- measure of caution, to be measured by capacity, i. 576.
- special instances, i. 576.
- distinction when the action is brought by the child, and when by the parent or guardian, i. 576.
- senselessness of the rule, i. 576.
- when a passenger may jump from a car when in motion, i. 577.
- when he may not, i. 577.
- traveler crossing a railroad track, degree of care to be observed, i. 580, 581, 582.
- instances, i. 580, 581, 582, 583.
- when contributory negligence excuses, i. 611.

Nuisances,

- what are, i. 232.
- how they arise, i. 232.
- instances of, i. 233.
- flooding lands, i. 233.
- cutting off drainage, i. 233.
- polluting water of a stream, i. 233.
- turning surface water from its natural course, i. 233.
- noxious trades, i. 233.
- nuisance results from invasion of legal rights, i. 233.
- instances of noxious trades, i. 234.
- fat boiling, i. 234.
- lime burning, i. 234.
- tannery, i. 234.
- privies, i. 234.
- hog pens, i. 234.
- slaughter houses, i. 234.
- soap and bone boileries, i. 234.
- livery stables, i. 234.
- cattle yards, i. 234.
- chemical works, i. 234.
- private stable, i. 234.
- bone mill, i. 234.
- tobacco mill, i. 234.
- poudrette works, i. 204.
- tallow factory, i. 234.
- gas works, i. 234.
- distillery, i. 234.
- interference with natural flow of streams, 235, 236.
- injury must result from act of man, i. 235.
- purely natural causes can not produce an actionable nuisance, i. 235, 236.

Nuisances—Continued.

- neglect to drain a swamp not actionable, i. 235.
- clearing up of land creating miasma, not actionable, i. 236.
- Mohr v. Gault, i. 236.
- Knoll v. Light, i. 236.
- when the act of man is the promoting cause, an actionable nuisance may arise, i. 236, 237.
- instances, i. 236, 237.
- Margate Pier Co. v. Board, i. 237.
- Wilson v. New Bedford, i. 237.
- Smith v. Fletcher, i. 237.
- can be no nuisance except where natural causes combine with artificial, i. 238.
- pouring slops on land, i. 238.
- drains, i. 238, 239.
- convenience of place no defense, i. 240, 241.
- what is a convenient place, i. 240.
- impregnation of air with smoke or noxious smells, nuisance, when, i. 241.
- must be legal injury, i. 241.
- test of nuisance, i. 241.
- benefit no defense, i. 242.
- brick burning, nuisance, when, i. 243.
- coming to a nuisance no defense, i. 244.
- coal-holes nuisance, when, i. 245.
- who is liable for injuries from, i. 245, 246.
- rule in England, i. 245.
- rule in Massachusetts, i. 246, 247.
- rule in Michigan, i. 245, 246.
- general rule of liability, i. 245, 246.
- liability of landlord for nuisance, i. 247.
- pollution of water of streams, wells, springs, &c., i. 248.
- noise as a nuisance, i. 249, 250, 251.
- placing poisoned food on one's own land, nuisance, when, i. 252.
- setting spring guns, &c., i. 252.
- nuisances on highways, i. 259.
- what are, i. 259, 260, 261.
- obstruction of navigable streams, i. 262, 263.
- excavations in or near highway, i. 282, 283.
- ferocious animals, i. 283, 284.
- private actions for injuries from public nuisances, i. 296, 297, 298, 299.
- indictable nuisances. i. 319, 320.

Obstructions,

- placing so as to cut off access i. 21

Patents,

- when letters patent operate as a protection, i. 78, 82.
- injury must be alleged as occurring *after* the date of application for patent. i. 78.
- patent may be invalidated, how, i. 78.
- by showing the invention to have been in public use before the application for a patent, i. 78.
- that the patentee is not the original inventor, i. 78.
- specifications must be full and complete, i. 83.
- requisites of, i. 83, 84.
- effect of defects in, i. 83.
- new combinations patentable, when, i. 82.
- must have novelty and utility, i. 82, 85.
- must be inventive skill displayed, i. 82.
- mere mechanical dexterity not enough, i. 82.
- degree of inventive skill required, i. 83, 84.

Patents—Continued.

- the result, as well as the means, important, i. 84.
- patents for *improvements*, i. 84, 85.
- what is covered by a patent, i. 86.
- what constitutes an infringement, i. 86.
- how rights under a patent may be lost, i. 86, 87.
- what use before application for patent will invalidate it, i. 89, 90.
- who is entitled to patent, i. 89, 90.

Postmaster,

- liable for loss of letters, when, i. 35.
- not liable for acts of employees, unless he is guilty of gross-negligence, i. 35.

Poudrette Works,

- nuisance, when, i. 234.

Prescription,

- right by, can not be acquired for support of buildings by adjoining soil, i. 98
- 99, 173, 174, 186.
- nor to maintain a well so that adjoining owner may not make excavations.
- i. 99, 110.
- does not exist as to percolating waters, i. 99, 110.
- how prescriptive right may be acquired, i. 128, 172, 173, 174, 175, 438.

Privy,

- nuisance when, i. 234.

Profits a Prendre,

- what is, i. 127.
- distinction between and an easement, i. 127.

Prohibition,

- writ of, when it lies, ii. 3066, 3069.

Public Nuisance,

- may be private nuisance also, i. 296, 297, 298, 299.

Public Officers.

- how far protected in the discharge of their duties, i. 31.
- liable for abuse of his office, i. 31.
- for negligent or unlawful acts, i. 31.
- distinction between ministerial and judicial officers, i. 31.
- ministerial officers liable, when, i. 31.
- judicial officers liable for willful, malicious, or corrupt conduct, i. 31.
- Wilson v. Mayor, &c., criticised, i. 31.
- Judges of courts of general jurisdiction not liable to action for corrupt or malicious action, i. 32, 33, 34.
- liable to impeachment, i. 32, 33.
- Judges of courts of special jurisdiction, are liable for corrupt or willful action, i. 32, 33.
- so far acting where they have no jurisdiction, i. 32, 33, 34.
- or where ministerial duty is attached to the office, i. 33, 34.
- not liable for errors of judgment, i. 31, 32, 33, 100, 102, 103, 104, 105, 106.
- not liable unless there is total want of jurisdiction, i. 34.
- nor when the jurisdiction depends upon special facts, which were not stated, i. 34.
- but when the question of jurisdiction is one of law, they act at their peril, i. 34.
- for matters within their jurisdiction they can only be made liable when they act maliciously, corruptly, or oppressively, i. 35.

Res Gestæ,

- what is, ii. 619-631.

Restraint of Trade.

- contracts in, void, when, i. 26.

Restraint of Trade—Continued.

- to be operative must be reasonable, i. 26.
- must be founded on good consideration, i. 26.
- must not be oppressive, i. 26.
- must not be an entire restraint, i. 26.
- may be good for a term, or a district, i. 26.
- but not when they perpetually bind a party, or cover the entire state, i. 26.
- nature of the business important when i. 26.
- exception as to patent rights, i. 26.

Riparian Owners,

- who are, and rights of, i. 411, 412, 413.
- rule in this country, i. 413.
- right of fishery, i. 411, 412.
- ferry, i. 24.
- lands bounded on ponds, &c., i. 413.

Seduction,

- actions of, when sustained, ii. 514, 515.
- loss of service must be shown, ii. 514.
- who may bring, ii. 514, 517, 518.
- what may be shown in defense, ii. 518, 522.
- what must be shown by plaintiff, ii. 514-521.
- what may be shown in aggravation, ii. 521.
- effect of previous unchaste character of the daughter, ii. 523.

Slaughter Houses,

- nuisance when, i. 234.

Soap and Bone Boileries,

- nuisance, when, i. 234.

Special Privileges,

- instances of, i. 24, 25.
- infringement of, actionable, when, i. 24, 25.

Stable,

- nuisance, when, i. 234.

Statute of Limitations,

- must be specially plead, ii. 599, 600.
- when it begins to run, ii. 599, 600.
- how waived, ii. 599, 600.

Surface Owners and Mine Owners,

- relative rights of, i. 100.
- injuries to mine by owner of surface, i. 100.
- Smith v. Fletcher, i. 100.
- injuries to surface, by owners of mine, i. 102, 103.
- no implied right to let down the land, i. 102, 103.

Surface Water,

- rights as to disposal of, i. 105, 106.

Sheriff,

- duties of, ii. 112, 113, 114, 115, 116.
- may require indemnity, when, ii. 112.
- must discharge his duty, or liable for neglect, ii. 112.
- liable for neglect, when, ii. 112.
- must keep property attached, ii. 112.
- duties in case of attachment or property in process of manufacture, ii. 112.
- must use reasonable diligence in serving capias, ii. 112, 113.
- duties in levying execution, ii. 113, 114, 136.
- party not bound to give instructions, ii. 114.
- effect if he does, ii. 114.
- when execution must be returned, ii. 114.
- burden of proof, when execution is returned nulla bona, ii. 114.
- priority of executions, how determined, ii. 115, 116.

Sheriff—Continued.

- effect of withdrawal of prior writ, ii. 116.
- liability for acts of deputy, ii. 117, 118.
- not liable for acts of special deputy appointed at request of creditor, ii. 119.
- duty when property of debtor is so intermingled with property of others that the sheriff can not determine which is debtor's, ii. 130.
- liability for arrest of wrong party, ii. 137.
- liability of, for an escape, ii. 142, 143.

Slander,

- when words are actionable, per se, ii. 344, 345.
- instances of, ii. 344, 345, 348.
- when special, damage must be alleged, ii. 344, 345.
- instances of, ii. 344, 345.
- words to be actionable, must have been spoken or written in a slanderous sense, ii. 346, 347.
- and not qualified so as to deprive them of such sense, ii. 346.
- rule when words are susceptible of two meanings, ii. 347.
- the import of the words, and not the understanding of those to whom they were spoken, is the test, ii. 347.
- who must be plaintiffs in an action for libel or slander, ii. 363, 364.
- corporation liable for, ii. 364, 365.
- how the slander must be alleged, ii. 366.
- office of an innuendo, ii. 367, 368.
- truth can not generally be given in evidence under general issue, ii. 371, 372.
- matters in mitigation may be, ii. 371, 372.
- what justification must cover, ii. 374.
- truth of the words is a full defense, ii. 386, 387, 394.
- repetition of the slander may be proved to establish malice, ii. 388.

Tallow Factory,

- nuisance, when, i. 234.

Tannery.

- nuisance, when, i. 234.

Tenants in Common,

- when one tenant in common of lands may maintain trespass against his co-tenant, i. 423.
- what amounts to an ouster, i. 423, 424, 425.
- what is not, i. 423, 424, 425.
- when case lies for an injury to the estate by one co-tenant, i. 424, 425.
- special instances of, i. 424, 425.
- when one co-tenant may bring action of trespass against a stranger, i. 427.
- when trover lies for conversion of chattel owned jointly, i. 488, 489.

Threats,

- actionable, when, i. 20.
- preventing persons from trading with another by posting placards, i. 20.
- issuing circulars, i. 20.
- obstructing access to dwelling or place of business, i. 21.

Tobacco Mill,

- nuisance, when, i. 234.

Torts,

- arising from breach of implied duties imposed by contract, i. 27.
- instances of, i. 27.
- implied contract, that person is competent to do an act which he contracts to do, i. 27, 28.
- no degrees of guilt in, ii. 3020.

Trade Fixtures,

- what are, i. 352, 353.
- when may be removed, i. 352, 353.
- rule in *Van Ness v. Packard*, i. 352.

Trade Fixtures—Continued.

- steam boiler, i. 352.
- gas fixtures of all kinds, including gasometers, generators, &c., i. 352.
- chandeliers, i. 352.
- brackets, i. 352.
- must be removed before the term is ended, i. 352, 353.
- instances of trade fixtures, &c., i. 356, 357.

Trade-marks,

- liability for infringement of, i. 18.
- how trade-mark may be acquired, i. 18.
- fraud on the part of person claiming it may vitiate it, i. 18.
- equitable ground of interference, i. 18.
- what elements are essential to constitute a valid trade-mark, i. 18.
- true name of the article not protected, i. 18.
- must be a fancy name, and have been originated by the party claiming it, i. 18
- what is regarded as an infringement of, i. 18.

Trespass,

- when stranger may enter on lands of another, i. 387.
- where entry is lawful, may be rendered unlawful by wrongful act, i. 387.
- distinction between trespass and use, i. 388, 389.
- trespass by cattle, i. 389.
- rule of damage where there are different owners, i. 389.
- what constitutes forcible entry and detainer, i. 394, 395.
- trespass lies for unlawful use of highway, i. 396.
- trespass to try title lies, when, i. 397.
- plaintiff must be in possession *in fact* in order to maintain trespass *quare clausum*, i. 422.
- possession is enough except against real owner, i. 422.
- must be no adverse possession, i. 422.
- plaintiff must have title or possession, i. 422.
- trespass may be committed without actual entry, i. 422.
- when the real owner may maintain trql. when not in possession, i. 422.
- action is local, i. 423.
- what amounts to possession, i. 423.
- delivery of key of building not enough, i. 423.
- when one co-tenant can maintain trespass against his co-tenant, i. 423, 424.
- who are liable as trespassers, i. 428, 429.
- aiding and abetting in, i. 428, 429.
- when a person not actually participating in, is liable as trespasser, i. 428, 429.
- effect of pleading general issue in trql. i. 431.
- when *liberum tenementum* may be plead, i. 431.
- effect of, with entry, i. 431.
- reply of parol purchase to *liberum tenementum*, i. 431.
- what the plea puts in issue, i. 431.
- matters in estopped, i. 431.
- plea setting up new matter must confess and avoid, i. 434.
- pleas in justification, i. 434, 435, 440.
- sufficiency of, i. 434, 435.
- when not sufficient, i. 434, 435.
- wrongful entry is the *gist* of the action, i. 436.
- lawful entry may be converted into a trespass by abuse of, i. 436.
- plea justifying entry under legislative grant, i. 437.
- what the legislature may authorize, i. 437, 438.
- matters in mitigation, i. 438.
- when possession need not be proved, i. 447.
- when possession is alleged, title need not be proved in first instance. i. 448.
- when an entry upon the land of another is justified, i. 456, 457, 458, 459, 460, 461
- when an entry into a house is justifiable, i. 464, 465, 466, 467, 468, 469.
- nominal damages may be recovered when no actual damage is shown, i. 461, 462
- rule as to damages in, i. 461, 462, 463.

Trespass—Continued.

- instances of, i. 461, 462, 463.
- exemplary damages may be given, when, i. 463, 469.
- who may maintain action, i. 473.
- when landlord may sue, i. 473.
- trespass ab initio, what constitutes, ii. 127.
- instances of, ii. 127.

Tripe Works,

- nuisance, when, i. 234.

Trover,

- what action of, is, i. 481.
- when a proper remedy, i. 481.
- what property plaintiff must have in the goods, i. 481, 482.
- naked possession is enough except against one having a better title, i. 482.
- but must have right of possession as against the defendant, i. 482.
- even the owner must show a right to immediate possession, i. 481, 482.
- a bailee may maintain the action, i. 492, 483.
- common carrier, i. 482, 483.
- finder of goods, i. 482, 486.
- an heir, i. 482.
- an agister, i. 482.
- in order to maintain trover the possession must be wrongful, i. 483.
- or there must have been a wrongful conversion, i. 483.
- will not lie against a bailee of goods who has lost them, i. 483.
- defendant may share property in himself, i. 483.
- will lie against a carrier for delivery of goods to a wrong person, i. 483.
- but not for loss of, i. 483.
- defendant may set up a lien, i. 483.
- but if he sets up title in himself he can not rely on a lien, i. 483.
- may set up that he holds under legal process, i. 484.
- plaintiff in such case may show that the process is void, i. 484.
- trover lies for previous damage, even though the property has been returned, i. 484.
- trover lies for animals *feræ naturæ*, when, i. 484, 513.
- for timber wrongfully cut and sold, i. 484.
- does not lie for a fixture until it is severed, i. 484.
- lies for a house which the plaintiff has a right to remove, i. 484.
- does not lie for standing trees or any thing annexed to, and a part of, the free hold, i. 484.
- does not lie for machinery obtained by fraud and annexed to the freehold, i. 484.
- it lies for manure lying on the surface of the land, i. 484, 485.
- for choses in action, as a note even after it is paid, i. 485.
- or by payee even when the note has never actually been delivered to him i. 485.
- as where the possession of the note was obtained by fraud i. 485.
- for bonds, deeds, &c., i. 485.
- for a certificate of stock, i. 485.
- but not for a *share* of stock, i. 485.
- when trover lies against a vendee who has only a conditional title, i. 485.
- for property obtained by fraud, i. 485.
- against agent for property of principal converted by him, i. 485.
- where property of several becomes intermingled without the fault of either they may jointly sue for wrongful conversion, i. 486.
- otherwise if the intermingling was intentional, i. 486.
- trover lies for money paid by mistake to the wrong person i. 486.
- or for money paid by mistake, as a ten dollar gold piece for one cent, i. 486.
- but the amount due must first be tendered, i. 486.
- who may maintain the action, i. 486.
- when goods are lost, so as to give title to the finder, i. 486, 487, 512, 513.
- when demand is necessary, i. 489, 490, 491, 492, 493, 501.
- when refusal to deliver to the real owner on demand is justifiable, i. 487.
- when trover will not lie, i. 488.

Trove—*Continued.*

- where one joint owner is liable for conversion of the joint property, i. 488, 489
- where several persons have gained in conversion one or all may be sued, i. 489.
- aiding or abetting a conversion, i. 489.
- wrongful conversion is the gist of the action, i. 489, 490.
- what amounts to a conversion, i. 487, 490, 491, 492, 498.
- instances of, 490, 491, 492.
- misapplying funds, 491.
- refusal to deliver on demand in certain cases, i. 490.
- when defendant who has a lien on the goods, waives it by misconduct, i. 490.
- misapplying property, i. 491, 492.
- property bailed for one purpose and used for another, i. 493, 494, 498.
- honesty of purpose no defense, i. 494.
- the real tort of liability, i. 494, 495.
- measure of damage is the value of the goods when converted, i. 495.
- measure when property has been returned, i. 495.
- when the tort may be waived, i. 494.
- when demand fixes liability, i. 502.

Urban Servitudes,

- distinction between and sub-urban, i. 96.

Warranty,

- when implied, ii. 442, 447.
- in sale of merchandise, ii. 442, 447.
- in sale of food for man or beast, ii. 442, 447.
- to what it extends, ii. 442, 447.

Waste,

- what is, i. 338, 339, 340.
- instances of, i. 338, 339, 340.
- making essential change in buildings, i. 338.
- rule in this country, where the act is justified by good husbandry, i. 338.
- cutting of timber permitted, when, i. 338, 343.
- when not, i. 338.
- when waste may be predicated of natural causes, i. 338.
- when tenant may clear the land, i. 338, 339.
- not when it is bad husbandry to do so, i. 339.
- must be prejudicial to the estate, i. 339.
- changes in levelling, waste, when, i. 338.
- waste per se, i. 340.
- when waste must be willful, ii. 340.
- when the custom of the country excuses, i. 344.
- tenant may work mines, when, i. 345.
- action for waste, but not of his, against tenant by dower, i. 347.
- so against tenant for years, i. 347.
- tenant by courtesy liable for, i. 347.
- but assignee of tenant, not liable, i. 347.
- rule as to liability of tenants, i. 347.
- trade fixtures, what are, and when may be removed, i. 352.
- when equity will enjoin commission of waste, i. 379.
- rule of damages in action for, i. 377.
- who may maintain action, i. 372.
- trover lies for property severed from freehold, when, i. 372.
- what will justify waste, i. 382.

Water Course.

- what constitutes, i. 104.
- rights in, i. 95, 103, 104.
- actionable injuries to, i. 107.
- pollution of water of, i. 107.

Way,

- right of, may be proved, how, i. 430.

